



INTERIOR BOARD OF INDIAN APPEALS

American Land Development Corp. v. Acting Phoenix Area Director,
Bureau of Indian Affairs

25 IBIA 120 (01/12/1994)

Reconsideration denied:

25 IBIA 197

Judicial review of this case:

Appeal dismissed, *American Land Development Corp. v. Babbitt*,

No. CV-S-94-00616-LDG (D. Nev.)

Dismissal affirmed, 133 F.3d 925 (Table) (9th Cir. 1998)

Related Board case:

26 IBIA 197



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

AMERICAN LAND DEVELOPMENT CORP.

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-2-A

Decided January 12, 1994

Appeal from the cancellation of a lease.

Dismissed.

1. Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

2. Administrative Procedure: Burden of Proof--Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

Where the Board of Indian Appeals has not received a notice of appeal alleged to have been timely filed, the burden is on the appellant to show that the notice was timely mailed or delivered to the Board at its correct address.

APPEARANCES: George P. Vlassis, Esq., Phoenix, Arizona, for appellant; Kathleen A. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant American Land Development Corporation seeks review of a June 28, 1993, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the cancellation of a lease between appellant and the Fort Mojave Indian Tribe. For the reasons discussed below, the Board dismisses this appeal.

Background

On September 15, 1993, appellant's counsel, George P. Vlassis, Esq. (counsel), sent the Board a copy of appellant's notice of appeal from the Area Director's June 28, 1993, decision. The copy was received by the Board

on September 16, 1993. Although the notice of appeal was dated July 27, 1993, neither the original notice nor a copy thereof was received by the Board prior to September 16, 1993.

At the Board's request, the Phoenix Area Office furnished the Board with a copy of the Area Director's decision and a copy of the receipt for certified mail for appellant's copy of that decision. The decision correctly informed appellant that any appeal must be filed with the Board within 30 days of appellant's receipt of the decision. It also provided appellant with the Board's correct address. The receipt for certified mail showed that another of appellant's attorneys, Robert M. Kramer, Esq., to whom the decision was addressed, received it on July 6, 1993. ^{1/}

Because it appeared that the notice of appeal was untimely, the Board ordered appellant to show cause why its appeal should not be dismissed. Appellant's response was received on October 21, 1993, after which the Board issued an order allowing the filing of answer briefs by the Area Director and other interested parties and the filing of a reply brief by appellant. Pursuant to the Board's order, the Area Director filed an answer brief and appellant filed a reply brief.

Discussion and Conclusions

[1] The Board's regulations provide that a notice of appeal from a decision of a BIA official shall be "filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203, within 30 days after receipt by the appellant of the decision from which the appeal is taken" and that "[a] notice of appeal not timely filed shall be dismissed for lack of jurisdiction." 43 CFR 4.332(a). The regulations also provide that "[t]he effective date for filing a notice of appeal or other document with the Board during the course of an appeal is the date of mailing or the date of personal delivery." 43 CFR 4.310(a). When an appellant has been given the correct appeal information by the BIA deciding official but fails to file a timely notice of appeal with the Board, the Board must dismiss the appeal. E.g., Kozak v. Acting Aberdeen Area Director, 24 IBIA 207 (1993); Netterville v. Aberdeen Area Director, 24 IBIA 52 (1993).

Appellant contends that it mailed its original notice of appeal to the Board on July 27, 1993; that the fact the Board did not receive the notice is not conclusive evidence that the notice was not mailed; and that appellant's evidence is convincing proof that the notice of appeal was mailed. Appellant's evidence consists primarily of affidavits from counsel, counsel's secretary, and others.

^{1/} The decision was apparently also mailed to present counsel, although not by certified mail. Under both BIA and Board regulations, when a party is represented by more than one attorney, service on one of the attorneys is sufficient. 25 CFR 2.12(e); 43 CFR 4.310(b). Accordingly, appellant is deemed to have received the Area Director's decision on July 6, 1993.

Appellant states:

The original Notice of Appeal was mailed prepaid first class postage rate under the custom and practice of Appellant's attorney's office, to the Board's address at 4015 Wilson Boulevard, Arlington, Virginia 22203 as advised by the Phoenix Area Director in his opinion and pursuant to 43 CFR § 4.332(a). * * * The Assistant Secretary and each interested party received a copy of the Notice of Appeal by certified mail.

(Appellant's Response to Order to Show Cause at 3). Appellant furnishes copies of the certified mail return receipts for all but one of the copies it sent to interested parties and others. 2/

Appellant submits two affidavits from counsel's secretary. In the first affidavit, dated September 15, 1993, the secretary states: "On July 27, 1993, I mailed a Notice of Appeal in [this appeal] to the United States Department of the Interior, Office of Hearing [sic] and Appeals, Board of Indian Appeals located at 4015 Wilson Boulevard, Arlington, Virginia 22203, by United States mail."

In the second affidavit, dated October 19, 1993, she states:

3. The unvarying mailing custom and practice in our office, is to place outgoing mail in preprinted envelopes bearing the correct name and address, of the recipient and stamp all outgoing mail with proper postage from our postage meter. The correctly addressed and stamped mail is then placed in a receptacle next to the postage meter. The mail is taken directly to the U.S. Post Office at the end of each day by Elizabeth D. Vlassis before the last pickup at 6:15 p.m.

4. I prepared the Notice of Appeal in [this appeal] on July 27, 1993 at the direction of George P. Vlassis.

5. After printing the final draft of the Notice of Appeal, I sent copies to all the interested parties by certified mail and

2/ The receipts are for copies addressed to (1) the Area Director; (2) the Director of Trust Responsibilities/Chief, Division of Real Estate Services, Phoenix Area Office; (3) the Chief, Branch of Environmental Quality Services, Phoenix Area Office; (4) the Superintendent, Colorado River Agency, BIA; (5) the Assistant Secretary - Indian Affairs; (6) the Chairman of the Fort Mojave Tribe; (7) counsel for the Fort Mohave Tribe; and (8) appellant's co-counsel, Robert M. Kramer, Esq.

Appellant's service list for its notice of appeal, also included Kathleen A. Miller, Esq., Office of the Field Solicitor, Phoenix. There is no receipt for her copy of the notice of appeal, and Ms. Miller has submitted an affidavit stating that she did not receive a copy.

the original to the Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, by first class mail on July 27, 1993. In addressing the mailing to the Board of Appeals [sic], I referred directly to the address printed in the opinion of the Area Director.

6. Almost all pleadings generated in our office are filed locally and in state and federal courts and, therefore, the policy is to hand-deliver them to the court in question either personally or by a messenger service. We normally do not use certified mail to file any pleadings or documents. However, we often use certified mail to ensure service on the parties in an action.

7. I prepared the Notice of Appeal in this action on the personal computer and saved the document in the applicable directory * * *. I also placed a copy in the client's file in the pleading binder.

8. I specifically recall that the Notice of Appeal and the nine copies were placed by me in a bundle into the outgoing mail receptacle for delivery to the post office after I had processed each through the postage meter.

9. The original Notice of Appeal addressed and mailed to the Board was never returned to our office.

In addition to the two affidavits from the secretary, appellant furnishes:

(1) an affidavit from Elizabeth D. Vlassis, Esq., counsel's partner, which describes the mailing practice of the office but does not specifically state that she mailed the notice of appeal at issue here;

(2) an affidavit from co-counsel Kramer, which discusses his conversations with counsel during preparation of the notice of appeal;

(3) an affidavit from appellant's President which discusses conversations with counsel and co-counsel concerning the preparation and filing of the notice of appeal. This affidavit states that, on July 28, 1993, "Mr. Vlassis confirmed that he filed the Notice of Appeal on July 27, 1993",

(4) an affidavit from counsel, dated October 20, 1993, concerning preparation of the notice of appeal. This affidavit states that the notice of appeal was originally to have been prepared by co-counsel Kramer but that, because of co-counsel's scheduling conflicts, it was determined that counsel would do it. The affidavit continues:

8. Because there was an abrupt change in the responsibility for effecting service, I was compelled to alter my work schedule and concentrate solely on effecting a proper Notice of Appeal and

timely mailing thereof. * * * I remain [sic] focused on this work product until it was placed in the mailing receptacle and confirmed its mailing by telephone with the Appellant's President Mr. Flatley on the 28th of July. The scrutiny of the transaction was too constant to reasonably suggest that the Notice of Appeal went away [sic] while still in this firm's control. In fact, out of an excess of caution I directed that the Notice of Appeal be mailed to a number of persons who were probably not "interested parties."

(5) a second affidavit from counsel, dated December 91 1993, stating that he may have signed more than one notice of appeal in this case.

Appellant cites a number of cases from various courts and administrative tribunals, concerning the kinds of evidence those forums have found persuasive to establish an office mailing custom and/or to corroborate a claim of actual mailing. Appellant contends that the statements made in the affidavits it submits here are sufficient under those cases to establish that it "at the minimum, has made a 'prima facie' case supporting the presumption of proper mailing of the Notice of Appeal" (Appellant's Response at 12).

Next, appellant contends that the evidence of non-receipt by the Board is insufficient to overcome the presumption that the Board received it. Appellant continues: "Although the Board could augment its proof with testimony of its custom and practice, such proof could not specifically show that the document was not received, thus * * * leaving the trier of fact in the position of deciding between the merits of both presentations" (Appellant's Response at 16).

Finally, appellant states: "Should the Board entertain any substantial doubt that the affidavits submitted do not carry the burden of persuasion, Appellant would request a full evidentiary hearing which would allow for testimony." Id.

The Board is the trier of fact here, as appellant undoubtedly realizes. The Board is well aware of its own procedures concerning receipt of mail and does not find it necessary to take testimony on this point. 2/ It finds, as a matter of fact, that it did not receive appellant's notice of appeal prior to September 16, 1993.

2/ Board procedures are, however, briefly described. Incoming mail is opened upon receipt by the Board's legal assistant or, in her absence, one of the two Judges. New notices of appeal are entered immediately on a list of new appeals. Documents in pending cases are entered immediately on the docket cards for those appeals. The documents are then given to the appropriate Judge. Even if appellant's notice of appeal had been received and then somehow lost by the Board, as appellant implies, it would still appear on the list of new appeals. Appellant's notice of appeal does not appear on the list until Sept. 16, 1993.

[2] The Board's non-receipt of the notice of appeal, while it is some evidence that the notice was not properly mailed, is not dispositive of the question. The Board is well aware that mailed documents, even if properly addressed, do not always reach their destination. However, where the Board has not received a notice of appeal, the burden is on the appellant to show that the notice was timely mailed or delivered to the Board at its correct address.

The Board has carefully considered the evidence presented by appellant to show that it timely mailed the notice of appeal to the Board. For the reasons discussed below, however, it finds that evidence unpersuasive.

First, although appellant contends that its handling of the notice of appeal on July 27, 1993, was in "strict compliance" with office custom and practice concerning mailing (Appellant's Response at 9), and that such compliance is significant to prove actual mailing, it is apparent from the secretary's October 19, 1993, affidavit that more than one office "custom and practice" is relevant here. In paragraph 3 of the affidavit, the secretary describes office custom and practice with respect to mailing in general. In paragraph 6, she describes office custom and practice with respect to the filing of court pleadings. Paragraph 6 was evidently included to explain why the notice of appeal in this case was not sent to the Board by certified mail. The paragraph also demonstrates, however, that counsel's staff considered the filing and service of this notice of appeal to be analogous in some respects to the filing and service of court documents, *i.e.*, at least to the extent of sending copies to the parties by certified mail. Counsel's custom and practice of filing court documents includes the custom of hand delivery of the original document to the court, presumably to ensure delivery and to obtain proof thereof. From this practice, it is fair to assume that counsel's custom is to file original court documents by a means which will generate proof of delivery. This assumption is confirmed, and made relevant to filings in this administrative appeal, by counsel's actual practice during the course of this appeal: He filed the belated notice of appeal by Federal Express; he filed two copies of his response to the Board's order to show cause, one by Federal Express, and one by personal delivery; and he filed his reply brief by Federal Express. Counsel also used Federal Express to file a notice of appeal in an appeal related to this one, now docketed as IBIA 94-31-A.

Significantly, none of appellant's affiants state that it is the custom of counsel's office to file court or administrative appeal documents by ordinary mail while using certified mail to serve the interested parties. ^{4/} Further, it seems apparent, from the secretary's October 19,

^{4/} Assuming it was counsel's practice to file such documents by ordinary mail, one would expect that it would also be his practice, as a prudent attorney, to call the court or administrative tribunal to confirm receipt. Appellant does not contend that counsel made any calls to the Board prior to being notified by BIA, on Sept. 15, 1993, that the Board had not received the notice of appeal.

1993, affidavit and from counsel's practice in this case, that the handling of the Board's copy of the notice of appeal on July 27, 1993, was not in accord with the most relevant office custom, i.e., the custom concerning filing of court documents, a custom which, in all other respects, counsel and his staff have deemed applicable to this administrative appeal. The Board therefore rejects appellant's contention that the actions of July 27, 1993, were in strict compliance with office custom.

Second, as to actual mailing of the notice of appeal to the Board, appellant has made inconsistent statements. The secretary states in her September 15, 1993, affidavit that she herself mailed the notice of appeal: "I mailed a Notice of Appeal [to the Board] by United States mail." In paragraph 5 of her October 19, 1993, affidavit, she also states that she "sent the original [notice of appeal to the Board] by first Class Mail." However, in paragraph 3 of her October 19, 1993, affidavit, she states that, under the "unvarying mailing custom and practice" of counsel's office, she did not mail items herself but instead placed them in a receptacle from which they were taken to the Post Office by counsel's law partner. These two sworn statements are clearly at odds with each other, and appellant makes no attempt to explain the conflict between them. 5/ Another conflict is posed by counsel's telephonic statement to the Board's legal assistant that he had personally delivered the notice of appeal to the post office. This statement is inconsistent both with the secretary's statement that she mailed the notice and with her statement, and that of Elizabeth D. Vlassis, concerning office mailing custom. Counsel does not repeat his oral statement in either of his affidavits. Even disregarding counsel's unsworn statement, however, there are enough unexplained conflicts in the secretary's affidavits to raise questions about their credibility.

Third, appellant sent a notice of appeal with original signatures to the Phoenix Area Office. The Area Director submits two copies of the notice of appeal received at the Area Office, together with their original envelopes. 6/ One of the notices is clearly a photocopy. The other, however, bears the original signature of counsel and, on the certificate of service, the original signature of counsel's secretary. The Area Director contends that, because the Area Office received the original notice of appeal, the original could not have been sent to the Board as appellant contends.

5/ It is possible that appellant would contend that the secretary did not actually mean to say, in her Sept. 15, 1993, affidavit, that she mailed the notice but only that she prepared it for mailing. If appellant were to make such a contention, the Board could only observe that such inaccuracies are particularly unfortunate here, where the very fact of mailing is at issue.

6/ The copy with original signatures was addressed to the Area Director. The other copy was addressed to "Director, Phoenix Area Director, Trust Responsibilities, Bureau of Indian Affairs, Chief, Division of Real Estate Services."

Appellant responds by (1) contending that there is no requirement in the Board's regulations that the original notice of appeal be filed with the Board and (2) submitting an affidavit from counsel, stating:

On July 27, 1993, after the final Notice of Appeal was prepared I may well have signed at [sic] two or more notices of appeal in the matter of [this appeal]. Although I have no specific memory of this, similar occurrences are quite common when the office is processing an original document to be filed with the court with copies to other parties at the same time. Priority, of course, is given to the document going to the court and often we have prepared and mailed an original to the court prior to printing and copying documents for other parties. [7/] The reason for so doing is the interaction between the computers, the laser printer and the copying machine. Many times its [sic] more expedient to produce additional or duplicate originals form [sic] the laser printer to reduce fragmentation of the task-oriented workflow process. [8/]

7/ This suggestion that documents are commonly mailed to courts appears to be in conflict with counsel's secretary's statement that such documents are normally hand-delivered.

8/ Appellant also contends that, if the original notice of appeal was filed in the Area Office, it was the Area Director's responsibility, under 25 CFR 2.13(b), to forward it to the Board. Appellant contends that the Area Director's failure to do so "dictates that the Board may simply proceed to docket the underlying Appeal without further consideration" (Appellant's Reply Brief at 10).

Contrary to appellant's characterization of the import of 25 C.F.R. 2.13(b), that section provides:

"Bureau of Indian Affairs offices receiving a misdirected appeal document shall forward the document to the proper office promptly. If a person delivers an appeal document to the wrong office or mails an appeal document to an incorrect address, no extension of time should be allowed because of the time necessary for a Bureau office to redirect the document to the correct address."

Similarly, the Board has held that an appellant who files his notice of appeal in the wrong office, after being given correct appeal instructions, bears the risk of delays in transmission of the notice to the Board. E.g., Davenport v. Acting Portland Area Director, 22 IBIA 60, 61 n.1 (1992).

The Board makes two further observations with respect to the situation in this case. First, identification of the Area Director's copy of the notice of appeal as an original would have required close inspection and comparison of the signatures on different copies. This is not an obligation of BIA staff. Second, it was a BIA employee who first raised a question as to whether the Board had received the notice of appeal. The BIA employee contacted the Board and then appellant's counsel. Appellant cannot complain of BIA dereliction of duty in this case.

Appellant is correct that the Board's regulations do not specifically require that an original notice of appeal be filed with the Board. The issue here, however, is not whether appellant might properly have filed a copy, rather than the original, with the Board. Rather, the issue is the credibility of appellant's contention and counsel's secretary's sworn statement that "the original" notice of appeal was sent to the Board.

In light of counsel's second affidavit, the Board considers it significant that neither appellant in its response nor counsel's secretary in her October 19, 1993, affidavit state that "an" original notice of appeal was sent to the Board. Instead, both state that "the" original was sent, clearly implying that only one original existed. No mention was made, in appellant's initial description of office custom and practice, of the practice of preparing duplicate originals. It was not until the Area Director produced a copy of the notice of appeal with original signatures that counsel recalled the practice. Under these circumstances, the Board finds that there is some evidence the copy sent to the Area Director was the copy intended for the Board. 9/

The Area Director notes that a number of errors appear in the titles and addresses of parties listed on appellant's service list. None of these errors, except the error in the address of Kathleen Miller, resulted in the failure of the addressee to receive the mailing, and appellant argues that the errors are "de minimis." The Board agrees that most of the errors appear minor. However, the Board must also take note of the fact that a substantial number of typographical errors appear in the affidavits filed by appellant in this matter. 10/ These are documents which one would expect

9/ On Sept. 29, 1993, counsel wrote to the Assistant Secretary - Indian Affairs asking whether she had received her copy of the notice of appeal. This inquiry and the Dec. 20, 1993, response from the Director, Office of Trust Responsibilities, BIA, were sent to the Board by BIA in the normal course of business because they related to a matter before the Board.

The Sept. 29 letter states: "In addition to the original notice sent to the BIA, we also served copies on the Assistant Secretary as required by the Regulations." (Emphasis added.) This sentence can be read in three ways: (1) it is an admission by counsel that the original notice of appeal was sent to BIA; probably to the Area Director, who received an original notice of appeal; (2) it is an error, and counsel meant to say that the original notice of appeal was sent to the "IBIA," an acronym frequently used for the Board; or (3) counsel intended "BIA" as an acronym for the "Board of Indian Appeals" even though this is the usual and widely known acronym for the "Bureau of Indian Affairs." The Board tends to doubt that either the second or third possible reading is correct because counsel nowhere else used an acronym for the Board.

10/ One particularly glaring error appears in counsel's Oct. 20, 1993, affidavit. Counsel states in paragraph 9 that he received a call from BIA on or about Aug. 15, 1993, in which the caller stated that the Board had not received the notice of appeal. In paragraph 10, he states that the call was received on Sept. 15, 1993.

to have been scrutinized with particular care and which, presumably, were prepared under less pressing conditions than those described by counsel as surrounding the preparation of the notice of appeal. The Board cannot help but conclude that the work of counsel's office is sometimes subject to a certain inattention to detail.

The Area Director also notes that the Board is not listed on appellant's service list and that the Board's address is not included in the caption of the notice of appeal. Appellant responds that neither inclusion of the Board on the service list, nor inclusion of the Board's address in the caption, is required by the Board's regulations or customary under the practice of counsel's office. The Board agrees that inclusion of the Board on the service list is not proof, in itself, that appellant did not mail the notice of appeal to the Board. ^{11/} The Board also agrees that there is no requirement to include the Board's address in the caption of a filing. However, one consequence of these omissions in this case is that there is no corroboration for the secretary's statement that she properly addressed the Board's copy of the notice of appeal. Given the number of typographical errors in the materials before the Board, this lack of corroboration is significant. Assuming arguendo that the secretary accurately remembered mailing, or preparing for mailing, the Board's copy of the notice of appeal, the Board still could not give total credence to her recollection of the address she typed on the envelope. The requirement for filing a notice of appeal with the Board includes the requirement that it be mailed or delivered to the Board's correct address. 43 CFR 4.332(a), quoted supra.

Perhaps most damaging to appellant's case here, especially in light of counsel's usual practice concerning court filings, is appellant's failure to provide a credible explanation for the decision to use ordinary mail, without even a follow-up telephone call, to send the Board's copy of the notice of appeal, when the copies sent to interested parties and others were sent by certified mail. The Board's copy was the one which was absolutely critical to perfection of the appeal, as an experienced attorney, such as counsel, would have realized. Thus, the choice of this unusual filing method is particularly puzzling, and the failure to explain it must be considered extremely detrimental to appellant's position. Further, as discussed above, the credibility of the affidavits filed by counsel and counsel's secretary is compromised by unexplained conflicts and inconsistencies, and, in the case of counsel's second affidavit, the appearance of a convenient recollection. None of the other affidavits filed by appellant discuss the mailing of this particular notice of appeal and are therefore of

^{11/} Although it is not required, many appellants before the Board include the Board on their service lists, perhaps to protect against an inadvertent failure to mail the document to the Board.

Except for the notice of appeal, appellant has included the Board on its service list for its filings in this matter. It also included the Board on its service list for its notice of appeal in Docket No. IBIA 94-31-A.

