INTERIOR BOARD OF LAND APPEALS

White Oak Mining & Construction Co., Inc.
v.
Office of Surface Mining Reclamation and Enforcement

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WHITE OAK MINING & CONSTRUCTION CO., INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 94-87 Decided February 4, 1997

Appeal from a decision by Administrative Law Judge John R. Rampton, Jr., vacating cessation order No. 93-020-244-1.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders–Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Imminence–Surface Mining Control and Reclamation Act of 1977: Permits: Transfer, Assignment or Sale of Rights–Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

   A cessation order alleging failure to obtain a permit was not properly issued to an operator engaged in mining at a permitted coal mine while an application for transfer of an existing permit to the operator was pending before a state permitting authority.

APPEARANCES: Denise A. Dragoo, Esq., Salt Lake City, Utah, for appellant; Jennifer Rigg, Esq., Assistant Regional Solicitor for Surface Mining, U.S. Department of the Interior, Salt Lake City, Utah, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from an October 18, 1993, oral order issued by Administrative Law Judge John R. Rampton, Jr. at the conclusion of a hearing on an application for review and temporary relief. Judge Rampton's order vacated cessation order (CO) No. 93-020-244-1 (Respondent's Exh. 6 to the hearing transcript) issued pursuant to section 521 of the Surface Mining Reclamation and Enforcement Act of 1977 (SMCRA), 30 U.S.C. § 1271 (1994). On November 9, 1993, Judge Rampton issued a written order to restate and clarify his oral order; therein he explained that the CO was issued to White Oak Mining and Construction Company, Inc. (White Oak)

> as designated operator of Valley Camp of Utah's (Valley Camps) Belina Mine Permit No. ACT/007/001, Carbon County, Utah. The CO was issued by [OSM] for White Oak's alleged "failure to obtain

> a permit issued by the regulatory authority prior to engaging in coal mining operations." Cessation of mining operations was required immediately upon issuance of the CO. On Friday, October 15, 1993, White Oak obtained a temporary restraining order * * * [that] prevented [OSM] from enforcing, implementing or acting upon in any way the CO. The TRO was set to expire on Monday, October 18, 1993, at 5:00 p.m.

(Order dated Nov. 9, 1993, at 1).

Judge Rampton then terminated the CO; he first found that:

> White Oak is operating pursuant to Valley Camp's Mine Permit No. ACT/007/001 and has submitted an application to transfer the mine permit. Valley Camp was found to be the permittee of the mine permit. White Oak's activities were found not to adversely affect the health or safety of the public or cause significant, immanent environmental harm to land, air or water resources.

(Order dated Nov. 9, 1993, at 2).

Proceeding from this finding, Judge Rampton then concluded that OSM

> should have provided a written notice to the State of Utah, giving its reasons for believing that the State's action was not appropriate and culminating in a Ten-Day-Notice (TDN) to the State and the permittee before proceeding with enforcement action. [Because OSM] failed to provide the State and the permittee with a TDN before taking enforcement action * * * the CO was vacated.

Id.

OSM filed a timely appeal. Arguing that Judge Rampton's ruling allows White Oak to conduct mining operations without a validly issued permit, OSM contends that he committed reversible error when he vacated the CO. White Oak replies that White Oak is mining under permit ACT/007/001, a valid permit issued to Valley Camp, the company that has transferred the mine operation at issue to White Oak. White Oak concludes from this circumstance that no legal foundation exists for issuance of a CO by OSM in this case. The operative facts are not disputed.

Mine permit ACT/007/001 for the underground Belina Mine was issued to Valley Camp on July 20, 1990, for a 5-year term. On September 16, 1993, Valley Camp agreed to sell the Belina operation to White Oak. On September 27, 1993, White Oak submitted an application for approval of transfer, assignment or sale of permit to the State of Utah; provision was made by the parties for bond coverage of the mine operation while approval of the transfer application was pending before the State authority. Meanwhile, operations at the Belina mine continued with White Oak as the operator. On October 14, 1993, OSM issued a CO to White Oak for

"failure to obtain a permit issued by the regulatory authority prior to engaging in coal mining operations." Cited by the CO as authority for this violation is "State of Utah R645 Coal Mining Rules. Section R645 300-112.400." The corrective action required to abate the CO is "obtain a permit to mine." The CO states that the operation cited is on State permit ACT/007/001, but that White Oak has "No Permit."

Recognizing that Judge Rampton's order rests upon his finding that White Oak caused no environmental harm by continuing the same operation permitted to Valley Camp (and that the existence of such harm is an essential condition for issuance of the CO under regulations implementing SMCRA section 521), OSM charges that his order vacating the CO is in error. While a number of allegations of error are made by OSM and debated by the parties hereto, the basic premise underlying this appeal is that White Oak was mining without a permit under the circumstances described above in this opinion. Citing 30 CFR 843.11(a)(2), OSM contends that the surface mining regulations make such action environmentally harmful in and of itself, and that conducting mining operations before written approval of White Oak's application for permit transfer was granted amounts to mining without a permit, despite the existence of permit ACT/007/001.

We conclude that continuation of operations under the circumstances of this case does not constitute mining without a permit. Because it does not, OSM may not invoke 30 CFR 843.11(a)(2) in support of issuance of the CO. We therefore conclude that the CO was not properly issued, and affirm the order issued by Judge Rampton.

[1] In Spurlock Mining Co. v. OSM, 135 IBLA 396, 401 (1996), also a mining permit transfer case, we found that continuation of operations under a valid permit, albeit by an operator other than the permittee, could not be equated to cases where mining operations were conducted in the total absence of a permit. In Spurlock we reversed a decision sustaining issuance of a CO because the operator was not yet approved to mine, concluding that changing operators during permit transfer "did not itself cause significant imminent environmental harm." Id.

Nor does the transcript of the hearing held in this case before Judge Rampton indicate that immanent environmental harm was threatened by the part played by White Oak in the transfer of permit ACT/007/001. The testimony of reclamation specialist Gary Fritz establishes that, in the course of a random oversight inspection of the Belina mine (Tr. 40), OSM discovered that while White Oak was advertised as the mine operator (Tr. 46), the company was not the permit holder (Tr. 50); he learned there was an application for permit transfer pending that would transfer the Belina permit from Valley Camp to White Oak, but it had not yet been approved (Tr. 53). Fritz then issued the CO to White Oak on October 14, 1993, acting in the belief that, under the circumstances described, White Oak was mining without a permit (Tr. 61, 63).

Defending the notion that the pending transfer of permit ACT/007/001 does not shield White Oak from a charge of mining without a permit, OSM

has raised numerous arguments concerning policies concerning permit transfers, including arguments that White Oak's transfer application was both incomplete and untimely filed. The CO, however, did not cite White Oak for such defects in the transfer application; instead, the CO charges that White Oak was violating "Section R645 300-112.400." No other provision of State or Federal law is cited. Under section 521 of SMCRA, 30 U.S.C. § 1271(a)(5) (1994), an operator issued an order based upon a violation of SMCRA is entitled to have the "nature of the violation" identified with "reasonable specificity." In this case, the only violation charged, and therefore the violation upon which the CO must depend if it is to be sustained (see OSM v. Spradlin, 93 IBLA 389, 390 (1986)), is mining without a permit.

The regulation cited by the CO is found in the Utah regulations at R645-300, Coal Mine Permitting: Administrative Procedures. In its entirety, section 112-400 states that: "All persons who engage in and carry out any coal mining and reclamation operation will first obtain a permit from the Division. The applicant will provide all information in an administratively complete application for review by the Division in accordance in accordance with R645-300 and the State Program."

On appeal to this Board, OSM assumes this rule provides a foundation for a variety of arguments directed to perceived deficiencies in the manner in which White Oak has handled the permit application submitted to the State authority in September 1993. Except for the stated conclusion that White Oak was guilty of "failure to obtain a permit," however, there is no statement in the CO directed to anything that White Oak did or did not do in presenting its permit application to the State to explain how White Oak had violated SMCRA or State regulations implementing SMCRA. Assuming that, as OSM now argues, the White Oak application was not "administratively complete," there is no indication how this fact might result in significant imminent environmental harm, unless White Oak was mining without a permit in violation of section 506 of SMCRA and implementing regulations.

Departmental regulation 30 CFR 843.11(a)(1)(ii) provides authority for issuance of a CO upon detection of conditions that "cause significant imminent environmental harm." This regulation provides, at subparagraph (a)(2), that "[s]urface mining operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm." An exception to this rule is provided at subparagraph (a)(2)(i), which excepts operations that are "an integral, uninterrupted extension of previously permitted operations [provided that] the person conducting such operations has filed a timely and complete application for a permit." On the day the CO was issued to White Oak, there was a permit, ACT/007/001, in effect for the Belina Mine operation, a fact recognized by the CO, an application for transfer of which was then pending.

OSM nonetheless concludes that White Oak was mining without a permit at the Belina Mine because the permit transfer application was not yet approved by State authority when White Oak took over operations at the

mine. There is no question, however, that permit ACT/007/001 remained in effect at the mine. Had Valley Camp continued to operate the Belina mine, it would not have been cited for operating without a permit. This anomaly is apparent in the CO, which recites that there is no permit, but names permit ACT/007/001 as the place where the alleged violation is occurring. The CO does not charge that there was no permit in effect at the mine. It alleges instead that White Oak failed to obtain a permit. While the language in the CO is opaque, the parties have now made the situation clear: There was a permit in effect that had been issued to Valley Camp. Valley Camp agreed to sell the Belina Mine to White Oak, and an application for permit transfer was made. The transfer was not yet approved when White Oak, which had not been previously issued a permit to mine in Utah, took over mine operations on the permit.

Departmental regulation 30 CFR 774.17, governing permit transfer, provides that permit transfer applications must identify the parties to the transfer and the terms of the agreement between them, and must advertise the change in operators and arrange for a sufficient bond. White Oak argues that the transfer application for the Belina Mine met these standards and those set by the State as well. While the application is pending, operations conducted in conformity to the existing permit may continue. 30 CFR 774.17(f). This regulation implements section 506(b) of SMCRA, 30 U.S.C. § 1256(b) (1994), which provides that a

> successor in interest to a permittee who applies for a new permit within thirty days of succeeding to such interest and who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until such successor's application is granted or denied.

OSM denies that White Oak can rely upon this provision of SMCRA, arguing that White Oak has not applied for a "new permit," but seeks instead to obtain a transfer of the existing permit, a circumstance not sanctioned by the statute; under this reading of SMCRA, White Oak should not have started operations until after approval of the transfer application by the State, regardless of the sufficiency of the application for transfer it had submitted (OSM Brief at 19, OSM Reply Brief at 4).

Such a construction of the statutory language ignores the plain meaning of the words quoted above, however; it overlooks the fact that Congress authorized existing permitted operations to "continue" so long as they were conducted "according to the approved mining and reclamation plan of the original permittee." If, as OSM would have it, this proviso was intended by Congress only to apply to changed or expanded (and therefore "new") permits, then the quoted authorization allowing existing operations to continue under a new operator makes no sense.

A glance at the legislative history of SMCRA lends circumstantial support to this view. Section 208(b) of the Surface Mining Control and Reclamation Act of 1974 (SMCRA 1974), a precursor of SMCRA section 506(b), provided that:

> All permits issued pursuant to the requirements of this Act shall be issued for a term not to exceed five years and shall be nontransferable: Provided, That a successor in interest to a permittee who applies for a new permit within 30 days of succeeding to such interest and who is able to obtain bond coverage of the original permit may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until such successor's application is granted or denied.

H.R. Rep. No. 1072, 93rd Cong. 2d Sess. 11, 132 (1974). Compare this section with SMCRA section 506(b), which provides:

> All permits issued pursuant to the requirements of this chapter shall be issued for a term not to exceed five years: Provided, That if the applicant demonstrates that a specified longer term is reasonably needed to allow the applicant to obtain necessary financing for equipment and the opening of the operation and if the application is full and complete for such specified longer term, the regulatory authority may grant a permit for such longer term. A successor in interest to a permittee who applies for a new permit within thirty days of succeeding to such interest and who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee and until such successor's application is granted or denied.

30 U.S.C. § 1256(b) (1994).

A principal difference between section 204(b) of SMCRA 1974 and section 506(b) of SMCRA is that SMCRA permits may be transferred between operators, while SMCRA 1974 permits could not. Nonetheless, SMCRA 1974 would have allowed continued operations under an original permit while a successor's permit application was under review. It was not then contemplated, therefore, that mining operations were to cease because a transfer of mine ownership was in progress, although any permit obtained by the new operator would have been newly issued to him. To read section 506(b) as narrowly as OSM wishes, would require that we ignore the statutory proviso allowing operations under an existing permit to continue unchanged during such a transitional period, even though there is no indication that such a result was ever intended. We are certainly not free to ignore statutory language when a need arises to construe an Act of Congress. See Paul D. Lieb, 116 IBLA 279, 286 (1990) and authority cited therein. We may not do so in this case.

The conclusion, stated in the CO, that White Oak had failed to obtain a permit to mine, is based on an assumption that continuation of operations under an existing permit can be equated to mining without a permit if a new owner takes over mining operations before the State permitting authority gives written approval to permit transfer. This conclusion, which rests on a mistake of law, fails to provide a foundation for issuance of the CO issued to White Oak. As a consequence, Judge Rampton's order vacating the CO must be affirmed. Moreover, as Judge Rampton found, in the absence of a prospect of significant, imminent environmental harm, OSM was required to give the State a TDN stating the exact nature of violations believed to have been committed by White Oak before enforcement action could proceed. See 30 U.S.C. § 1271 (1994).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur with the results:

R.W. Mullen
Administrative Judge