

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE PETITION :
OF CASTLE GATE COAL COMPANY FOR : MEMORANDUM IN SUPPORT
REVIEW AND HEARING ON NOTICES : OF MOTION TO DISMISS
OF VIOLATION N89-31-1-2 AND : DOCKET NO. 89-020
N89-31-2-1 AND FOR TEMPORARY : CAUSE NO ACT/007/004
RELIEF FROM NOTICE OF :
VIOLATION N89-31-2-1 :

The Division of Oil, Gas and Mining ("Division"), by
and through its undersigned Assistant Attorney General, submits
this memo:

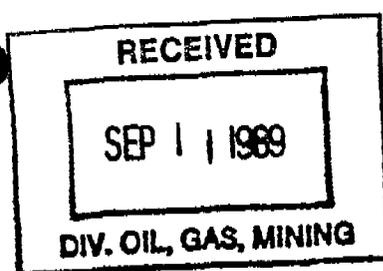
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assessment conference, the violation was upheld and a final
assessment of no civil penalty was issued on June 29, 1989, and
received by Castle Gate on July 5, 1989.

4. A petition appealing the notice of violation was
received by the Board on July 21, 1989, sixteen days after
Petitioner received the final assessment.



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The Division of Oil, Gas and Mining ("Division"), by and through its undersigned Assistant Attorney General, submits this memorandum in support of its Motion to Dismiss.

BACKGROUND

1. On March 30, 1989, Castle Gate Coal Company ("Castle Gate") received a two-part notice of violation, N89-31-1-2, from the Division.
2. Following the issuance of a proposed civil penalty assessment, Castle Gate timely requested an assessment conference which was conducted on June 1, 1989.
3. As a result of the information received at the assessment conference, the violation was upheld and a final assessment of no civil penalty was issued on June 29, 1989, and received by Castle Gate on July 5, 1989.
4. A petition appealing the notice of violation was received by the Board on July 21, 1989, sixteen days after Petitioner received the final assessment.

5. On July 12, 1989, the Division issued notice of violation N89-31-2-1 to Castle Gate.

6. A proposed civil penalty assessment in the amount of \$680.00 issued by the assessment officer was received by Castle Gate on August 10, 1989.

7. Castle Gate has not prepaid the proposed civil penalty assessment pending this appeal.

ARGUMENT

I. PETITIONER'S FAILURE TO APPEAL THE DIVISION'S ACTION IN ISSUING NOTICE OF VIOLATION N89-31-1-2 WITHIN THE TIME PERIOD PROVIDED FOR BY R614-401-800 OPERATES AS A BAR TO THE BOARD'S CONSIDERATION OF THIS MATTER.

The Board lacks jurisdiction to hear this matter as a result of Petitioner's failure to file this appeal within the time period permitted by the Utah Coal Mining Regulatory Program. Rule R614-401-800 provides that:

A permittee charged with a violation may contest the proposed penalty or the fact of the violation by submitting (a) a petition to the Board and (b) an amount equal to the proposed penalty or, if a conference has been held, the reassessed or affirmed penalty to the Division ... within 30 days of the proposed assessment or reassessment, or 15 days from the date of service or the conference officer's action, whichever is later....

Petitioner filed its appeal of the Division's action with the Board on July 21, 1989, sixteen days following

Petitioner's July 5, 1989, receipt of the conference officer's action.

It is a well-accepted tenet that failure to file an appeal within the period prescribed by law operates as a jurisdictional bar against the appellate tribunal. Watson v. Anderson, 504 P.2d 1003 (Utah, 1973); Albretson v. Judd, 709 P.2d 347 (Utah, 1985).

The Interior Board of Land Appeals, when faced with a motion to dismiss for failure to timely file an appeal, has agreed that the appellate body lacks jurisdiction to hear the matter. [McPeek Mining, IBLA 88-110: Interior Board of Land Appeals: 101 IBLA 389-393: Horton; March 31, 1988] In addition, Ohio, when faced with appeals of notices of violation issued under its coal program, has likewise found that its appeal board lacks jurisdiction to decide the matter because the filing was untimely. [See e.g. Penna Mutual Casualty, No.RBR-6-88-082: Reclamation Board of Review; Diebel, June 8, 1988 (Ohio).

In fact, the Utah Administrative Procedures Act, although advisory for Board review of disputes arising pursuant to §40-10-1 et seq., provides that "...the request for agency action seeking review must be filed with the agency within the time prescribed by the agency's rules." [§63-46b-3, Utah Code Annotated (1953, as amended)]

There is no provision whereby the Board can waive this jurisdictional defect and, therefore, this matter should be dismissed.

II. PETITIONER'S FAILURE TO TIMELY ESCROW THE FULL AMOUNT OF THE PROPOSED CIVIL PENALTY RESULTS IN A WAIVER OF ANY RIGHT OF APPEAL OF THE DIVISION'S ACTION IN ISSUING NOTICE OF VIOLATION

N89-31-2-1.

The Board lacks jurisdiction to hear this matter as a result of the failure of Castle Gate to timely escrow the proposed civil penalty. Section 40-10-20(3) provided, in part, that:

The person charged with the penalty shall then have 30 days to pay the proposed penalty in full, or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the board for placement in an escrow account.... Failure to forward the money to the board within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty. [Emphasis added]

As this Board has previously considered this issue of prepayment in Docket No. 85-001, Cause No. ACT/007/004, In the Matter of the Petition of Price River Coal Company for Hearing on Notice of Violation N84-2-2-7. In that matter, the Division filed a motion to dismiss based upon Price River's failure to timely escrow the assessed civil penalty.

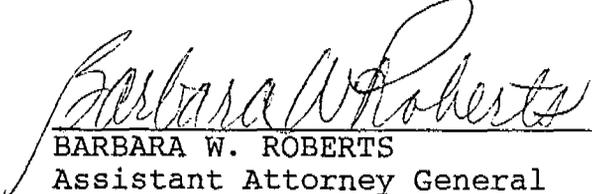
The Board held that "... by its failure to forward the amount of money required to the Board within 30 days, Price River has waived its right to contest the violation, and the motion to dismiss is granted...." [Transcript in Docket No. 85-001, page 13, attached hereto as Exhibit 1]

In the case now before the Board, since Castle Gate received the proposed assessment on August 10, 1989, the total prepayment had to be received by the Board by Monday, August 11, 1989, (the actual deadline, August 9, 1989, falls upon a Saturday, thus making Monday the legal deadline).

Since Castle Gate failed to timely prepay the proposed civil penalty within the 30 days provided by rule, the Board cannot hear the appeal of the Division's action in issuing notice of violation N89-31-2-1 and that portion of the Petition should be dismissed with prejudice.

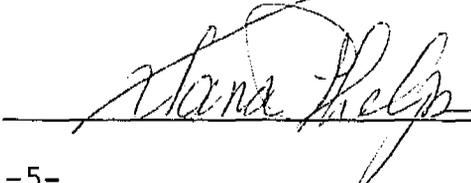
WHEREFORE, since there is no jurisdictional basis for the Board to hear this matter, the Division requests that the Petition be dismissed with prejudice.

RESPECTFULLY submitted this 11th day of September, 1989.


BARBARA W. ROBERTS
Assistant Attorney General

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Memorandum in Support of Motion to Dismiss was mailed first class, postage prepaid, to D. C. Ewigleben, AMAX Coal Industries Inc., Capital Center, 251 North Illinois Street, P.O. box 967, Indianapolis, Indiana, 46206-0967, this 11th day of September, 1989.


DANA KELP

1 BEFORE THE BOARD OF OIL, GAS AND MINING
2 DEPARTMENT OF NATURAL RESOURCES AND ENERGY
3 IN AND FOR THE STATE OF UTAH

4 -oOo-

5 IN THE MATTER OF:)
6 THE PETITION OF PRICE) Docket No. 85-001
7 RIVER COAL COMPANY FOR) Cause No. ACT/007/004
8 HEARING ON NOTICE OF) REPORTER'S TRANSCRIPT
9 VIOLATION NO. N84-2-2-7,)
10 CARBON COUNTY, UTAH)

9 -oOo-

10 On Thursday, March 28, 1985, commencing at the
11 hour of 3:25 p.m., a hearing was held in the above-entitled
12 matter in the Board Room of the Division of Oil, Gas and
13 Mining, 355 West North Temple, 3 Triad Center, Suite 301,
14 Salt Lake City, Utah 84180-1203; and said hearing was
15 reported in shorthand by Ronald F. Hubbard, a notary public
16 and certified shorthand reporter in and for the State of
Utah (License No. 32).

 -oOo-

1 changes and has culminated in one which is fairly clear,
2 I agree.

3 CHAIRMAN WILLIAMS: As I understand it procedurally,
4 if we grant the motion to dismiss, it would be your desire
5 for us to hear the merits of violation 6 of 7.

6 MS. ROBERTS: That's correct.

7 MR. KELLER: Yes.

8 CHAIRMAN WILLIAMS: And if we deny the motion to
9 dismiss, it would be the desire to hear the merits of all
10 the violations next month?

11 MS. ROBERTS: That's correct.

12 MR. KELLER: Also, if you take the motion under
13 advisement, I would request that we go ahead with the 6 or 7
14 to take advantage of time here. I don't think it will take
15 very long.

16 MR. CARTER: Why don't we take a few minutes.

17 (Recess from 3:41 p.m. until 3:46 p.m.)

18 CHAIRMAN WILLIAMS: The Board has considered the
19 motion to dismiss and finds that by its failure to forward
20 the amount of money required to the Board within 30 days,
21 Price River has waived its right to contest the violation,
22 and the motion to dismiss is granted, and we will hear the
23 merits of violation 6 of 7.

24 MR. KELLER: I think in a matter of this nature
25 the burden is on the Division to go forward with a prima facie

prised to hear about the suit through third parties I heard directly from Wyoming. He said the state has good relations with other states, and as for the clause argument, "there are many, many defenses (Oklahoma), but we really haven't put it together

question of a lack of jurisdiction." In addition, the assert lack of jurisdiction at the beginning of a review will not result in a waiver of the right a later time or diminish the obligation of the review forum to dismiss the proceeding."

Surface Mining, IBLA 88-110: Interior Board of Land Appeals (80 IBLA 389-393: Horton; March 31, 1988) 5 pp. Counsel: Michael Warren, Barbourville, Ky. for OSM. Counsel: Anthony Welch, Knoxville, Tenn. for OSM.

board affirmed a violation and cessation order against the company and an individual with one administrative dissenting in part.

"Ter ego" theory: In 1978, Shelbiana Construction Co. obtained a Kentucky construction exemption to mine coal on a tract of land in developing 135 acres for commercial pur-

In September 1980 OSM issued a notice of violation to the company for four violations including failure to eliminate the highwall on two adjacent tracks in Pine County, Ky. Although Administrative Law Judge Frederick Miller ruled that the land was "more useful and less environmentally damaged than before the highwall was created," and that OSM had jurisdiction to issue the notice because Shelbiana had produced 24,192 tons of coal. This far exceeded the 250-ton annual production level for a surface mining operation. Shelbiana argued the highwall restoration was impractical because about 143,000 cubic yards of material would be

The board found "highwall elimination may not be justified by a comparison of its environmental benefits and costs, but by balancing those costs against the degree and kind of damage involved." The board backed Miller's decision on the issuance of the violation.

In January 1985, OSM modified the notice to include the company and Goff, an individual, doing business as Shelbiana Construction. Goff appealed the inclusion and Miller found the "ter ego" theory in *White v. Winchester Land Development Corp.*, 584 S.W.2d 56 (Ky. Ct. App. 1979) applied. The case says shareholders can be held responsible for corporate liabilities when "the corporation is not only controlled by the owners, but also...there is such unity of ownership and interest that their separateness has ceased; the facts are such that an adherence to the normal legal fictions, viz., treatment as a separate entity, of separate

blasting rule were too high and that should his home be damaged he would have difficulty getting reimbursed from the company or his insurance.

The board said it had no authority to change the blasting limits law nor did its jurisdiction extend to private disputes except in that should damage occur the law allows an affected landowner to request the chief's review.

(H. James Brubach, No. RBR-5-87-322: Reclamation Board of Review; Diebel, June 8, 1988) 8 pp.

Counsel: H. James Brubach, 70917 Mt. Pleasant Pike, Martins Ferry, Ohio 43934 for himself; Glen Kizer, 3600 Olentangy River Rd., Suite 505, Columbus, Ohio 43214 for Ohio Coal; and Mark Bonaventura, Fountain Square, Bldg. B-3, Columbus, Ohio 43224 for the state.

The Reclamation Board of Review denied a company's appeal of a civil penalty.

Penalty assessment payment: Jones Contracting and Supply appealed a \$900 fine on May 2, 1988, but did not include payment to the penalty fund.

The board found the company did not follow state law in making the appeal and therefore the board lacks jurisdiction.

(Jones Contracting and Supply, No. RBR-3-88-078: Reclamation Board of Review; Diebel, June 6, 1988) 3 pp.

Counsel: William Reed and Robert D'Anniballe, 611 Ohio Valley Tower, Steubenville, Ohio 43952; and Linda Battisti, Fountain Square, Bldg. B-3, Columbus, Ohio 43224 for the state.

The Reclamation Board of Review denied a company's appeal of a chief's order.

Timely appeal: A chief's order was received by Penna Mutual Casualty on March 21, 1988. On May 10, the company filed an appeal, which the Division of Reclamation moved to dismiss it as untimely.

The board found it lacked jurisdiction to decide the appeal because Penna Mutual did not follow state law on appeals.

(Penna Mutual Casualty, No. RBR-6-88-082: Reclamation Board of Review; Diebel, June 8, 1988) 5 pp.

Counsel: Charles Yeager, P.O. Box 1588, Charleston, W. Va. 25326-1588 for Penna; and Sandy Ramos, Fountain Square, Bldg. B-3, Columbus, Ohio 43224 for the state.

Pennsylvania

The Environmental Hearing Board upheld a violation against a mining company.

Effluent standards, acid mine drainage: The Dept. of Environmental Resources cited Rondell Co. and its partners Wendell Charles and Ronald Lovrich with dis-

charging water from its Correal Strip Mine in Saltlick and Bullsken Townships, in Fayette County, Pa.

The acid mine drainage discharge allegedly degraded three nearby springs.

Rondell did not file a post-hearing brief, so the board said it was unaware of how the company contended the department abused its discretion in issuing the order. Citing *Robert Kwalwasser v. DER and Kerry Coal Co.* (1986), the board ruled it "must deem Rondell to have waived any of the issues it may have raised its notice of appeal, its pre-hearing memorandum, or at hearing because of its failure to submit a post-hearing brief."

The board noted department witness Joseph Schueck testified that the cause of the acid mine drainage was Rondell's mining on the Correal Strip. In addition, a 1973 engineer's report concluded that although there had been prior mining on the Correal Strip, there was no acid mine discharge from the area at that time. "After Rondell completed its mining, however, numerous water samples all showed that the three springs had been affected by acid mine drainage.

"This evidence, which was not refuted by Rondell either through testimony nor in a brief, is sufficient to establish that Rondell's mining caused the degradation of the springs, and that Rondell is responsible for treating the three springs to effluent standards..."

(The Rondell Co., No. 84-156-M: Environmental Hearing Board; Woelfling, June 16, 1988) 14 pp.

Counsel: Allan MacLeod, Coraopolis, Pa. for Rondell; and Joseph Reinhart for the state.

West Virginia

The Reclamation Board of Review affirmed the modification of a company's mining permit.

Permit modification: In 1980, Island Creek Coal Co. applied for a surface mining permit on 600 acres in Mingo County, W. Va.

The state deleted the Riffe Branch from the permitted area saying operations there might "cause stream pollution, landslides, flooding and the destruction of future use of the area and surrounding areas, thereby destroying or impairing the health and property rights of others."

Magnet Coal Inc., which succeeded Island Creek on the permit, requested a permit modification to reinstate the Riffe Branch area which was originally deleted.

In November 1987, the West Virginia Dept. of Energy Commissioner denied the request "because the probable hydrologic consequences data is incomplete..."

The company submitted more information and a second application on Dec. 15, 1987 and in January 1988, the modification was approved. The approval was appealed by three members of the Ooten family.

The board ruled the Riffe Branch area remained a part of the permitted area and the state "was limited to prohibiting