COALEX STATE INQUIRY REPORT - 234

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TOPIC: PROPER SERVICE

INQUIRY: A Cessation Order (CO) was sent to an operator by certified mail. The letter was returned as "unclaimed". The operator claims there was "no service" of the CO. Please locate any case law that addresses the question of what constitutes "service" for COs and similar documents.

SEARCH RESULTS: Using COALEX and LEXIS, a number of relevant decisions addressing the issue of "proper service" were identified. These are listed below. Copies are attached.

OSM DIRECTIVE

Subject No. INE-8, Transmittal No. 173, "Service of Notices of Violation and Cessation Orders" (Issued May 19, 1983).

"3. Policy/Procedure
. . .
"c. Certified Mail 'Unclaimed'. When the NOV or CO has been sent by certified mail and has been returned marked 'unclaimed' or 'addressee unknown' or 'left not forwarding address,' the inspector must make every reasonable effort to determine whether or not the mail was truly undeliverable or was refused. In some cases, mail marked 'unclaimed' may actually have been refused. The inspector or his or her appropriate representative, e.g., secretary, must contact the post office to determine the true circumstances of the undelivered NOV or CO. If indeed, the mail was unclaimed, an attempt must be made to find the correct address of the permittee and to resend the NOV or CO. Sometimes it may be necessary to make repeated efforts to find the correct address of the permittee. A record of each attempt must be made. The inspector or his or her supervisor must make the decision when to cease further attempts."

INTERIOR ALJ DECISIONS

L & J COAL CO. v OSM, Docket No. NX 5-88-R (1986).

The NOV issued for failure to secure the required annual design certification of L & J's sedimentation pond was upheld. Proper service was not at issue, though the hearing notice sent by certified mail was not claimed and was returned. "However, the hearing notice sent by regular mail to applicant's current address was not returned and was presumably delivered to applicant at its current address since it was not also returned as having been undeliverable."

VERNON CUMENS - MACO RESOURCES, INC. v OSM, Docket No. NX 4-41-R (1986).

The Order of Dismissal was issued in response to the applicants' request for a withdrawal of their appeal of the NOVs. The ALJ stated that the two Cos had been properly served: one was personally delivered to Cumens; the second was served on Maco Resources by certified mail.

"The cessation order was returned unclaimed by Maco, but, it was mailed to Maco's address and under the Act this would constitute proper service."

DAVID THORNSBERRY v OSM, Docket No. NX 7-9-R (1987).

Mr. Thornsberry's attorney requested an application for review of the CO by phone. The notice of the hearing was sent by certified mail to the attorney's post box. After the postal service left several notices with the attorney, the envelope, marked "unclaimed", was returned. Neither the applicant nor his attorney appeared at the hearing. The ALJ found that the "applicant was properly served with the notice of hearing."

TURNER BROS. INC. (TBI) v OSM, Docket Nos. TU 6-22-R, TU 6-65-R (1987).

At issue was the question of whether the violation was abated at the time the CO was issued. TBI "argued that it had abated the violation prior to service of the cessation order, so the cessation order was not validly issued and should be vacated." The ALJ ruled that the NOV and the CO were validly issued but that the CO "was served on TBI after it had abated the violation." The record indicated that the CO was mailed five days after it was issued. "The regulation provides that service is complete upon tender of the mail, not upon mailing."

CLARK COAL CO., INC. v OSM, Docket No. NX 6-60-R (1987), aff'd CLARK COAL CO., INC. v OSM, 102 IBLA 93, IBLA 86-627, IBLA 87-348 1988).

Clark Coal refused service of the first NOV sent by certified mail and referred service of the CO to its attorney's office.

"At the hearing, the Applicant also argued that [the CO] must be dismissed, because service upon the Applicant was defective. However, once again the Applicant's argument is mistaken. It is clear the '[service] shall be complete upon tender of the notice [of violation] or [cessation] order and shall not be deemed incomplete because of refusal to accept.' 30 C.F.R. Sec. 722.14(a)(1)(1986); Ben Collins v OSM, 92 IBLA 371, 375 (1986). In the present case, the Applicant's refusal of service does not invalidate its propriety regardless of the Applicant's

reason for refusal. Service was completed upon Inspector Goodin's tender through certified mail to the Applicant's permanent address".

JAMES B. RUNGE/GREGORY CO., INC. v OSM, Docket No. NX 6-61-P (1987).

"[T]he Respondent failed to follow their own regulations about service of enforcement actions and there is no proof that Mr. Runge received the subject CO. In the absence of proper service of the underlying CO, the undersigned concludes that the jurisdictional requirement of proper notice has not been met."

Also see LEROY SEXTON v OSM, Docket No. 88-16-R (1988).

INTERIOR IBLA DECISIONS - OSM

BEN COLLINS v OSM; DARYL G. HALE v OSM, 92 IBLA 371, IBLA 85-466, IBLA 85-467 (1986).

The Board did not accept Collins' and Hale's assertions that service of the proposed assessment was their "first notice of OSM action". According to the record, the inspector had discussed the NOV with Collins who then refused to sign it; the record contained a return receipt for the CO signed by Hale; and service of copies of the documents had been made on their common counsel as part of OSM's request for production of documents.

AMERICAN RESOURCES INSURANCE CO., INC. 99 IBLA 242, IBLA 87-424 (1987).

HEADNOTES: "Where the record is unclear whether the surety of a performance bond was served by certified mail with OSMRE's notice of determination to forfeit the bond and the surety on appeal expresses its intention to reclaim the permit area, OSMRE should properly re-serve its notice of determination in accordance with 30 CFR 800.50."

C & N COAL CO., INC. v OSM, 103 IBLA 48, IBLA 86-166 (1988).

In a footnote to its conclusion that C&N could not raise the issue of service of the NOV at the Board hearing because "there was no indication in the case record that C&N raised lack of service of the NOV at any time prior to the date of the hearing", the Board stated:

"As a practical matter, OSMRE should maintain a case record for each NOV and CO it issues which would show that such documents have, in fact, been served on the operator or that service has been refused. See 30 CFR 843.14. Clearly, the signature of the operator on the NOV or CO or signed and dated certified mail return receipt cards included in such records would constitute the best evidence of service of those documents."

INTERIOR IBLA DECISIONS - NON-OSM

NABESNA NATIVE CORP., INC. (ON RECONSIDERATION), 83 IBLA 82, IBLA 84-258 (1984).

HEADNOTES: "Where the record in a case established that the person authorized by a Native group to act as its agent had actual notice of a certificate of ineligibility for such group, and that the notice of appeal was not transmitted within 30 days of such notice, the notice of appeal must be dismissed."

Also see MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., 90 IBLA 173, IBLA 86-63 (1986).

REBECCA S. KNOTT-GRAY, 112 IBLA 148, IBLA 88-115 (1989).

"Under 43 CFR 1810.2(b), an offer of delivery by mail which cannot be consummated because delivery is refused meets the requirements for communication by mail where the attempt to deliver is substantiated by post office authorities."

HUMANE SOCIETY OF SOUTHERN NEVADA, 119 IBLA 216, IBLA 90-517 (1991).

HEADNOTES: "Refusal to accept personal delivery of a BLM decision does not vitiate service of the decision."

Also see UNION OIL CO. OF CALIFORNIA, 98 IBLA 37, IBLA 84-824 (1987).

STATE DECISIONS

U.S. v PETROSKY, 20 ERC (BNA) 1984 (W.D. Pa 1983).

The court found that the failure to adequately notify the petitioner of the violation before the penalty assessment could be raised as an issue in a civil penalty review proceeding.

STEVE BINGHAM v COMMONWEALTH OF KY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET, 761 SW 2d 627 (Ct App Ky 1988).

Bingham argued that he was denied due process of law because:

"the Cabinet proceeded initially under the alternative service provision of 405 KAR 7:090 [service by certified mail].... [T]he alternative of constructive service provided by the regulation is only to be used when other service methods, including personal service by a sheriff, have failed. We disagree.

"Although the Cabinet never attempted personal service of the hearing notice, the Cabinet is not required to exhaust other service methods before it may use constructive service. Due process of law is afforded in state administrative proceedings by constructive service of notice or process on parties residing within the state."

STEVE BINGHAM v COMMONWEALTH OF KY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET, 766 SW 2d 77 (Ct App Ky 1989).

Bingham claimed that he had no notice of the Cabinet's administrative proceedings. The court concluded that:

"notice by certified mail...does not offend due process. However, the record does not show under what circumstances the certified mail failed to reach Bingham. Bingham alleges that the notice was simply not claimed.
...
"If Bingham can show that the notice and subsequent report were improperly addressed or can articulate some other legitimate reason for not responding to the notice, Bingham should then be allowed a formal hearing to contest the charges. But, if the notice and report were properly addressed and Bingham can show no legitimate reason for not receiving them, Bingham was afforded all rights of due process and the fines should stand."

The judgment was affirmed in part and remanded in part for the trial court to consider the issues above.

COMMONWEALTH OF KY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET v LARRY COOK, 812 SW 2d 507 (Ct App Ky 1991).

The Kentucky court of appeals reversed the lower court's finding that notice of a formal hearing was not perfected.

"A review of the record in this case reveals that the appellee, Cook, was served notice of the formal hearing in accordance with the methods set forth in the regulations. Not only did the cabinet send notice to him via certified mail, return receipt requested at the address he himself provided, it also sent notice to his attorney of record. The regulation provides that service is effective upon failure to claim the document prior to its return to the cabinet by the United States Postal Service. Further the regulation provides that the return receipt shall be proof of the acceptance, refusal, inability to deliver, or failure to claim the document."

SURFACE MINING, INC. v WILLIAM HORVATH, slip op., No. 81-CA-6 (Ct App Ohio 1981).

The court found that Horvath "rather than acting promptly and responsibly, first refused the mail service, and then, upon receipt of the envelope bearing all the characteristic court markings, refused to open it."

FEDERAL DECISIONS

MULLANE v CENTRAL HANOVER BANK & TRUST CO., 339 U.S. 306 (1950).

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

NORTH ALABAMA EXPRESS, INC. v U.S., 585 F 2d 783 (5th Cir 1978).

Failure to provide adequate notice is jurisdictional defect that invalidates administrative action until defect is cured.

U.S. v PRYOR BOLTON AND GLENN MCCULLAH, 781 F 2d 528 (6th Cir 1985).

In affirming the district court's ruling, the circuit court stated:

"Defendants raise several legal challenges to the collection action, specifically challenging the constitutionality of the service of the citations in question by certified mail. In its order of May 24, 1984, the district court found that notice by certified mail, as provided by 30 C.F.R. Secs. 722.14(a) and 723.17(b) (1984), was constitutionally adequate. Determining that 'it is reasonable to assume that if persons refuse to accept delivery or collect their mail, the mail has in fact reached them', the court upheld the provisions of the regulations which find adequate service where there is refusal to accept delivery."

ATTACHMENTS

A. OSM DIRECTIVE, Subject No. INE-8, Transmittal No. 173, "Service of Notices of Violation and Cessation Orders" (Issued May 19, 1983).
B. L & J COAL CO. v OSM, Docket No. NX 5-88-R (1986).
C. VERNON CUMENS - MACO RESOURCES, INC. v OSM, Docket No. NX 4-41-R (1986).
D. DAVID THORNSBERRY v OSM, Docket No. NX 7-9-R (1987).
E. TURNER BROS. INC. (TBI) v OSM, Docket Nos. TU 6-22-R, TU 6-65-R (1987).
F. CLARK COAL CO., INC. v OSM, Docket No. NX 6-60-R (1987).
G. CLARK COAL CO., INC. v OSM, 102 IBLA 93, IBLA 86-627, IBLA 87-348 1988). [Excerpts]
H. JAMES B. RUNGE/GREGORY CO., INC. v OSM, Docket No. NX 6-61-P (1987).
I. LEROY SEXTON v OSM, Docket No. 88-16-R (1988).
J. BEN COLLINS v OSM; Daryl G. Hale v OSM, 92 IBLA 371, IBLA 85-466, IBLA 85-467 (1986).
K. AMERICAN RESOURCES INSURANCE CO., INC. 99 IBLA 242, IBLA 87-424 (1987).
L. C & N COAL CO., INC. v OSM, 103 IBLA 48, IBLA 86-166 (1988).
M. NABESNA NATIVE CORP., INC. (ON RECONSIDERATION), 83 IBLA 82, IBLA 84-258 (1984).
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