

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

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| SECRETARY OF LABOR, | : | |
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| Complainant, | : | |
| | : | |
| v. | : | DOCKET NO. 96-1656 |
| | : | |
| CF MOTORFREIGHT, INC., | : | |
| | : | |
| Respondent. | : | |

APPEARANCES:

Elizabeth R. Ashley, Esquire
Cleveland, Ohio
For the Complainant.

John T. Billick, Esquire
Cleveland, Ohio
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”), pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), to determine whether Respondent filed a timely notice of contest of the citations issued by the Occupational Safety and Health Administration (“OSHA”) for alleged violations of the Act. A hearing was held in Cleveland, Ohio, on April 21, 1997, on the Secretary’s motion to dismiss Respondent’s notice of contest. Both parties have filed post-hearing briefs.

Background

Pursuant to section 10(a) of the Act, an employer is required to notify OSHA of its intent to contest within 15 working days of receipt of the citation and notification of penalties, and in the absence of a timely contest the citation and penalties are deemed a final judgment of the Commission by operation of law. The citations setting forth the alleged violations and proposed penalties in this case were issued on October 3, 1996, and sent by certified mail to Respondent’s address in Richfield, Ohio. The certified mail return receipt card relating to the citations, which the Secretary attached to

her motion and introduced as Exhibit C-3 at the hearing, bears a postmark reading “RICHFIELD OH 44286, OCT 7 1996, USPS,” and, in block 8, a handwritten date of October 29. Respondent filed its notice of contest on November 18, 1996, and OSHA’s response, on November 21, 1996, was that the notice was untimely. Respondent then filed a motion to extend the notice of contest period, the Secretary moved to dismiss the notice of contest, and Respondent filed an opposition to the motion, after which this matter proceeded to hearing.

The Relevant Evidence

Bonnie Nordquest, an OSHA clerk for over 11 years, testified she put C-1, the subject citations, into proper format, prepared the envelope the citations were mailed in and enclosed C-2, the OSHA 3000 booklet, and also prepared the forms to send the citations by certified mail; specifically, she wrote in block 3 of the return receipt card the inspection number and the company name and wrote in block 4 the certified mail article number appearing on the certified mail receipt slip. Nordquest noted that an individual named Agnes Ash signed for the citations, as shown in blocks 5 and 6 of the return receipt card, that the postmark on the card showed the company received the citations on October 7, 1996, and that she had processed thousands of return receipt cards and it was not unusual for a postmark to serve as the date of delivery to a company. Nordquest further noted that the October 29 date in block 8 was the end of the contest period, that her office always put the 15-day date in that block upon receiving the card and then entered the information into the computer system, and that while she herself had not filled in the October 29 date she knew that a co-worker named Elsie Sanders had because she recognized her handwriting. (Tr. 15-25).

James Lyons, George Sam and Thomas Kenny are the manager, terminal manager and personnel manager, respectively, of Respondent’s Richfield facility; all three are long-time employees of the company, all three participated in the OSHA inspection that resulted in the subject citations, and all three appeared and testified at the hearing. Based on their testimony, the company receives a significant amount of mail every day and regularly receives certified mail. A clerk named Agnes Ash picks up the mail daily at the post office, and, back at the facility, gives it to another clerk named Richard Hoskins; Hoskins distributes the mail to the facility’s various departments, and mail that is not addressed to a specific person or department goes to the personnel department, which determines where the mail should go and directs it there. Kenny first saw the citations on October 30, on top

of the file cabinet where mail is normally dropped off, and he immediately informed Lyons and took the citations to him; Lyons forwarded the citations to the company's counsel, who called back in mid-November, at which point Lyons gave instructions to file a notice of contest. When Lyons learned that OSHA considered the notice untimely he spoke with Sam, Kenny, Ash and Hoskins, and found out no one had been aware of the citations before October 30. In addition, Kenny spoke with the two secretaries in his department, both of whom regularly distribute mail, and neither knew where the citations had come from. Lyons, Sam and Kenny all testified that to their knowledge no certified mail had ever been misdelivered at the facility. (Tr. 29-59).

Discussion

The record in this case plainly shows that Respondent notified OSHA of its intent to contest the citations and penalties but did so after October 29, 1996, the end of the 15-workday period dating from October 7, 1996. Lyons himself testified that he knew of the 15-day filing requirement because of previous OSHA citations, and Respondent does not raise this as an issue. (Tr. 42). Instead, Respondent contends that its November 18, 1996 filing should be deemed timely as there is no reliable evidence establishing its clerk received the citations on October 7 or that OSHA put the October 29 date on the return receipt card. I disagree. The card clearly bears the October 7 postmark of the Richfield post office, and Bonnie Nordquest testified it is not uncommon for a postmark to serve as the date of delivery to a company, that her office always writes in the end-of-contest date in block 8, and that she knew a co-worker had written in the October 29 date because she recognized her handwriting. In addition, the return receipt card specifically states that it will show to whom the article was delivered and the date delivered, and since there is no date in block 7, the date of delivery block, I conclude that October 7 was the date Respondent's clerk received the certified mail containing the citations and that the notice of contest was untimely.

The remaining issue is whether Respondent's untimely filing may be excused under the circumstances. An otherwise untimely notice of contest may be accepted where the delay in filing was caused by the Secretary's deception or failure to follow proper procedures. An employer is also entitled to relief under Fed. R. Civ. P. 60(b)(1) if it shows that the final order was the result of "mistake, inadvertence, surprise, or excusable neglect," or under Fed. R. Civ. P. 60(b)(6) for

mitigating circumstances such as absence, illness, or disability preventing a party from protecting its interests. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981).

Respondent contends the delay in filing was caused by OSHA's failure to address the citations to a particular person, or, alternatively, that the delay was excusable neglect in light of the evidence showing it had established procedures for handling mail. However, the Commission has held the addressing of citations to a company's address, rather than to a particular official, to be sufficient service and not misconduct on the part of the Secretary. *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989). Moreover, despite Respondent's evidence in regard to its mail handling procedures, the only reasonable conclusion is that a company employee failed to promptly bring the citations to the attention of the proper officials at the facility, and the Commission has held such failure to not constitute excusable neglect or any other reason justifying relief. *Id.* Finally, Kenny himself conceded his department did not date stamp the mail delivered to it and that he would consequently not know when a piece of mail was received. (Tr. 57-58). This indicates an additional inadequacy in Respondent's mail handling procedures which may well have contributed to the problem in this case, and it is well settled that deficient business practices that result in a failure to file a timely notice of contest preclude relief under Fed. R. Civ. P. 60(b)(1). *J.F. Shea Co.*, 15 BNA OSHC 1092 (No. 89-976, 1991); *Louisiana -Pacific Corp.*, 13 BNA OSHC 2020 (No. 86-1266, 1989); *Womack Constr. Co.*, 6 BNA OSHC 1125 (No. 76-1445, 1977). While I am sympathetic to Respondent's plight, there is simply no basis for granting relief in this matter. The Secretary's motion to dismiss is therefore GRANTED, and the citations and penalties are AFFIRMED in all respects.

Irving Sommer
Chief Judge

Date: