

SECRETARY OF LABOR,
Complainant,

v.

INTERSTATE BRANDS, INC.,

Respondent.

OSHRC DOCKET
NO. 00-1643

DECISION AND ORDER

By motion dated October 20, 2000, the Secretary of Labor seeks an order dismissing a notice of contest filed by Respondent on the ground that an informal agreement signed by the parties resolves all issues arising from a citation issued to Respondent on July 24, 2000. Moreover, by signing the agreement, according to the Secretary, Respondent waived its right to file a notice of contest. Respondent opposed Complainant's motion and seeks a hearing on the merits of the case.

Background

On July 20, 2000, a representative of Complainant, Compliance Officer Trina Mailloux, entered Respondent's worksite located in Billings, Montana, for the purpose of conducting a safety and health inspection. Respondent is engaged in the bakery business at that location. Ms. Mailloux was directed to Ms. Debra Weisgarber who was identified as the Human Resources Manager for the facility. Ms. Weisgarber informed the compliance officer that she was not authorized to consent to an OSHA inspection; however, upon conferring with corporate headquarters, Ms. Weisgarber was granted authority to allow the inspection. The compliance officer was accompanied on the inspection by Ms. Weisgarber, Mitch Holmberg, Production Manager, Dan Bader, Assistant Engineer, and Mark Heide, Controller; all of whom were management representatives. Mr. Lee Miller, an employee and union steward, also participated in the inspection as the employee representative.

During the inspection, the compliance officer requested to expand the scope of the inspection to include an on-site warehouse. Ms. Weisgarber stated that she was not authorized to consent to the inclusion of the warehouse as part of the inspection. However, upon consultation with corporate headquarters, Ms. Weisgarber agreed to allow the compliance officer to inspect the warehouse. The

inspection was completed within approximately 45 minutes.

At the conclusion of the inspection the compliance officer conducted a closing conference. According to the compliance officer's affidavit, Ms. Weisgarber "and the others" were present and informed by the compliance officer that they could request an informal settlement conference to discuss, and possibly settle, any citations that issued as a result of the inspection. Thereafter, on August 1, 2000, an informal conference requested by Respondent was conducted and Ms. Weisgarber, Mr. Holmberg and Mr. Bader were Respondent's representatives. Compliance officer Mailloux and Assistant Area Director Charles Peaton represented the Secretary. Mr. Eusebio Diaz, Business Agent for Local 466 and Mr. Russ Murray, shop steward, represented the employees. The citation issued to Respondent on July 24, 2000 listed one serious citation with two subparts and four instances of violation with a proposed penalty in the amount of \$5,000.00. At the conclusion of the discussion between the attendees, a written "informal settlement agreement" was signed by Mr. Peaten on behalf of the Secretary and Ms. Weisgarber on behalf of Respondent wherein Respondent agreed, *inter alia*, (1) to correct the violations and (2) to pay a reduced penalty in the amount of \$3,000.00. Respondent also waived its right to contest the citation and penalty as amended by the agreement. The conference was concluded upon the signing of the agreement.

On August 8, 2000, Respondent, by counsel, filed a written notice of contest with the Billings Area Office contesting the citation and proposed penalty. The notice of contest was returned to Respondent's legal representative on August 11, 2000 with an explanation that the notice was not being forwarded to the Review Commission on the ground that Respondent had waived its right to contest the citation by signing the settlement agreement. Thereafter, Respondent filed its notice of contest directly with the Review Commission. By letter dated October 20, 2000, the Secretary filed a notice to vacate Respondent's notice of contest. Respondent filed an opposition to Complainant's motion on December 20, 2000. By letter dated December 29, 2000, Complainant now seeks an extension of time to engage in discovery to establish a basis for replying to Respondent's opposition.

Discussion

The Secretary does not dispute that Respondent filed a notice of contest to the citation within the time period required by section 10© of the Act. However, according to the Secretary, Respondent waived its right to contest the citation when its representative, Ms. Weisgarber, signed

the informal settlement agreement on August 1, 2000. Respondent argues that the agreement, admittedly signed by its employee, is not a valid waiver of its right to contest the citation because that employee did not have authority, either actual, apparent or inherent, to sign the agreement on behalf of Respondent. Respondent insists that it be granted its right to contest the citation.

Respondent asserts that it has been a long standing policy that OSHA citations be forwarded to the Corporate Safety Department located in Kansas City, Missouri, to be reviewed by the Director of Safety or the Director of Loss Services. Respondent argues that only the Director of Safety and his supervisor have authority to settle OSHA citations. This policy is contained in a corporate document entitle *Interstate Brands Corporate Occupational Safety and Health Administration Inspection Policy*. This written policy is “widely disseminated throughout” Interstate Brands, Inc. (Respondent’s brief pg. 5). Although Ms. Weisgarber does not state in her affidavit that she has seen or read the aforesaid corporate document, she acknowledges that OSHA compliance issues at the Billings location are the responsibility of Jerry Valentine, Chief Engineer and Mitch Holmberg, Product Manager. Moreover, she “was not authorized to enter into the informal settlement agreement” (Weisgarber affidavit pg. 4). Thus, according to Respondent, Ms. Weisgarber did not possess actual authority to enter into a settlement agreement on behalf of Respondent.

Nor, argues Respondent, did Ms. Weisgarber display apparent authority to act on behalf of the Company. Respondent points to the fact that Ms. Weisgarber refused to allow the OSHA inspection to commence without permission from “corporate.” Moreover, Ms. Weisgarber declined to expand the scope of the inspection as requested by the compliance officer without first contacting her superiors at the Kansas City location. Thus, argues Respondent, the Secretary knew that Ms. Weisgarber did not have authority to act as Respondent’s representative regarding OSHA matters without permission. Therefor, according to Respondent, the Secretary’s representative should have determined whether Ms. Weisgarber had obtained permission from her superiors to sign the settlement agreement.

Respondent relies upon the First Circuit Court of Appeals’ articulation of the basis for establishing apparent authority as follows:

To establish the apparent authority of an agent to do a certain act, facts must be shown that the principal has manifestly consented to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; that a

third person knew of the fact and, acting in good faith had reason to believe and did actually believe that the agent possessed such authority; and that the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

Bates v. Shearson Lehman Bros. 42 F.3d 79, 82 (1st Cir. 1994) (*American Title Ins. Co. v. East West Fin. Corp.* 16 F.3d 449, 454 Cir. 1994)).

Ms. Weisgarber, on two separate occasions during the OSHA inspection, informed the compliance officer that she could not grant permission to engage in certain activities without permission from her superiors. On each occasion permission was granted and Ms. Weisgarber authorized the inspection and its expansion. Moreover, the employer initiated the request for an informal settlement conference and, as previously stated, Ms. Weisgarber accompanied by two management and two union officials attended the meeting. According to Ms. Weisgarber's affidavit, she discussed her attendance at the settlement conference with the Corporate Safety Director prior to the meeting. It is reasonable to infer, based upon her prior conduct, that Ms. Weisgarber discussed the parameters of her authorization at the settlement conference at that time. Moreover, it is reasonable to conclude that Respondent "manifested" its consent to allow Ms. Weisgarber to Act as its representative at the meeting with OSHA personnel by the fact that she appeared on behalf of Respondent. Furthermore, since no objections were raised, it is apparent that Ms. Weisgarber and the other management representatives at the meeting as well as the union representatives, believed that Ms. Weisgarber had authority to sign the agreement on Respondent's behalf.

Based upon prior experiences with Ms. Weisgarber, the OSHA representatives had reason to believe that Ms. Weisgarber would only act on behalf of the Company after receiving permission to do so from her superiors. Thus, it was reasonable for the OSHA representatives to assume that Ms. Weisgarber had obtained permission to attend the settlement conference and participate in the discussion. It was also reasonable for the agency representatives to assume, based upon prior experiences, that Ms. Weisgarber obtained prior permission to sign the settlement agreement on Respondent's behalf. These assumptions are supported by the failure of the other management attendees to raise an objection particularly since their duties included OSHA related matters.

Respondent's reliance upon the fact that the written corporate policy regarding OSHA citations, mentioned above, was widely disseminated, fails to support its position. To the contrary,

the fact that the policy was known by the management participants at the conference and, with that knowledge, none of the management representatives objected to the signing of the agreement supports the conclusion that all three individuals believed and, by their actions, caused the Secretary's representatives to believe that Ms. Weisgarber had authority to sign the agreement on behalf of Respondent.

Finally, it is clear that Complainant, by relying upon the apparent authority exercised by Ms. Wiesgarber, changed her initial position by amending the original citation to achieve a settlement of the case and avoid further litigation. Furthermore, as noted by the Secretary, the vast majority of OSHA citations are settled informally, thus relieving the Administration of lengthy and costly litigation. An inability to rely upon management representations regarding authority to act on behalf of a corporate entity, as in this case, would adversely affect the Secretary's ability to resolve cases without litigation.

ORDER

Thus, it is concluded that the settlement agreement is valid and binding upon Respondent. Since Respondent, by entering into the settlement agreement, waived its right to file a notice of contest in this matter, the notice of contest dated August 8, 2000 is VACATED. Complainant's motion for discovery is DENIED.

/s/

Robert A. Yetman
Judge, OSHRC

Dated: February 20, 2001

