



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
Complainant,
v.
CATERPILLAR, INC.,
Respondent,
UNITED AUTO WORKERS, LOCAL 974,
Authorized Employee
Representative.

OSHRC DOCKET
NO. 95-0957

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 13, 1996. The decision of the Judge will become a final order of the Commission on June 12, 1996 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before June 3, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
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1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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DOCKET NO. 95-0957

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. / RHD
Ray H. Darling, Jr.
Executive Secretary

Date: May 13, 1996

DOCKET NO. 95-0957

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SECRETARY OF LABOR,

Complainant,

v.

CATERPILLAR, INC.,

Respondent,

UNITED AUTO WORKERS LOCAL 974,

Authorized Employee Representative.

OSHRC DOCKET NO. 95-0957

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Caterpillar, Inc. (Caterpillar), at all times relevant to this action maintained a place of business at its Research and Technical Center, on Old Galena Road, Mossville, Illinois, where it was engaged in manufacture and sale of earth moving machinery. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

Following an inspection by the Occupational Safety and Health Administration (OSHA) of Caterpillar's Mossville work site, Caterpillar was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Caterpillar brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Caterpillar later withdrew its notice of contest to all items¹ with the exception of "willful" citation 1, item 1, which alleges a violation of 29 CFR 1904.7. The parties have submitted the remaining item on a joint stipulation of facts pursuant to Commission Rule §2200.61. This matter is ready for disposition.

¹ Those citations and proposed penalties were affirmed as Final Orders of the Commission per this judge's December 1, 1995 Order.

Alleged Violation

Citation 1, item 1 alleges:

29 CFR 1904.7: OSHA Form(s) and 200 were not available for inspection and copying:

At the Technical Services Division, the employer refused to provide the OSHA Compliance Officer with a copy of the 1994 OSHA 200 Log, complete with names of employees who suffered recordable injuries on or after June 21, 1994.

The cited standard provides:

Each employer shall provide, upon request, records provided for in §§1904.2, 1904.4, 1904.5, for inspection and copying by any representative of the Secretary of Labor for the purpose of carrying out the provisions of the Act. . . .

Facts

On September 12, 1994, OSHA began an on-site inspection of Respondent's Mossville work site; however, when Respondent objected to a striking employee accompanying OSHA on its walk-around, the inspection was suspended. On November 21, 1994 OSHA recommenced its inspection pursuant to a warrant (Stipulation 9). The warrant authorized OSHA to inspect complaint areas, as well as:

. . . all other things therein (including a review of records required by the Act . . .) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injuries to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act. and the rules, regulations, and orders issued pursuant to the Act.

(Joint Exh. 2).

OSHA investigator Leland Darrow requested a copy of the OSHA-200 logs for calendar years 1993 and 1994 during the opening conference of the inspection. Darrow received a computer generated copy of the 1993 OSHA-200 log dated January 25, 1994. Darrow was allowed to examine the 1994 log, but was provided a copy with the names and badge numbers of employees injured on or after June 21, 1994 deleted. Darrow was told that the UAW had been seeking to learn the names of nonstriking workers. Because Darrow could not guarantee that OSHA would withhold the names from the UAW, Caterpillar refused to provide him with a copy of the unredacted 200 logs, fearing that the nonstriking workers would be threatened, or otherwise harassed. (Stipulation 10).

Prior to and during the UAW strike, and up to November 21, 1994, Caterpillar had received approximately 1,500 reposts of incidents of alleged vandalism, harassment and threats of violence,

including over 100 reported incidents at the Tech Center, directed at Caterpillar management and non-striking hourly personnel.² (Stipulation 14).

Caterpillar was aware that §1904.7 required employers to provide copies of the 200 logs to OSHA representatives upon request. (Stipulation 12). The decision to provide OSHA with redacted copies of the 200 log was made after consultation with, and reliance upon the advice of Caterpillar's legal counsel. (Stipulation 11).

Discussion

Caterpillar admits it intentionally refused to supply OSHA with copies of its 1994 log despite OSHA's request, accompanied by a valid warrant, that it produce copies pursuant to its obligations under §1904.7.

Caterpillar argues that it was justified in withholding hard copies of the 1994 200 log because the warrant issued in this matter authorized only review, and not copying of those records. Caterpillar cites *Taft Broadcasting Co., Kings Island Division*, 13 BNA OSHC 1137 (No. 82-1016, 1987). In *Taft Broadcasting*, the Commission held that employers retained some expectation of privacy in records required under the Act, and that §1904.7 was invalid to the extent that it allowed the Secretary to obtain such records without compulsory legal process. *Taft Broadcasting* is inapposite here; Caterpillar's records were inspected pursuant to a warrant. Respondent could not reasonably retain any expectation of privacy in hard copies of its injury and illness records after producing those records for OSHA's inspection.

Respondent's argument is without merit; Complainant has established the violation.

In its answer, Caterpillar raised the affirmative defense of "greater hazard." Though it was addressed by both the Complainant and the Authorized Employee Representative, Caterpillar failed to brief this issue, and it is deemed abandoned. Caterpillar submits that its refusal to fully comply with the warrant was undertaken in good faith, however, in an effort to protect non-striking employees from a perceived threat. A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act. *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶27,893 (No. 85-355, 1987). Moreover, such intentional disregard of OSHA requirements is "willful" despite the employer's lack of bad faith. *Reich v. Trinity Industries, Inc.*, 16 F.3d 1149 (11th Cir., 1994).

The violation is established as "willful."

² The parties agree that Stipulation 14 "in no way goes to the truth of the matter asserted, *i.e.* whether alleged acts of vandalism, violence, harassment and threats of violence occurred."

Penalty


Caterpillar maintains that any violation of the Act was *de minimis* in that it did not interfere with the Secretary's ability to enforce the Act. *De minimis* violations need not be abated and carry no penalty. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987). Record keeping violations generally are not *de minimis*, as they play a crucial role in ensuring safe workplaces. *General Motors Corp., Electro-Motive Division*, 14 OSHC 2064, 1991-93 CCH OSHD ¶29,240 (No. 82-620, 84-731, 84-816, 1991). Because a finding of *de minimis* would allow Caterpillar to withhold safety and health records to which the Secretary is entitled under the Act, the undersigned finds that a *de minimis* classification would be inappropriate.

The parties stipulate that Caterpillar is a large employer with annual sales in excess of 10 billion dollars and over 40,000 employees. (Stipulation 15). Prior Record keeping citations received by Caterpillar in 1993 and 1994 have been affirmed by the Commission. (Stipulation 16).

Taking into account the relevant factors, the undersigned finds that the proposed penalty of \$10,000.00 is appropriate and will be assessed.

ORDER

1. Willful citation 1, item 1, alleging violation of 1904.7, is AFFIRMED, and a penalty of \$10,000.00 is ASSESSED.


James H. Barkley
Judge, OSHRC

Dated: April 26, 1996