

Secretary of Labor,

Complainant,

v.

CSX Transportation

Respondent.

OSHRC Docket No. 01-0608

Appearances:

Thomas C. Shanahan, Esq.  
Office of the Solicitor  
U. S. Department of Labor  
Atlanta, Georgia  
For Complainant

Richard F. Kane, Esq.  
McGuire Woods, LLP  
Charlotte, North Carolina  
For Respondent

Before: Administrative Law Judge Nancy J. Spies

**ORDER AND DECISION  
DISMISSING LATE NOTICE OF CONTEST**

On March 8, 2001, CSX Transportation (CSX) filed a notice of contest of the citation and penalty issued by the Secretary on January 9, 2001. The Secretary contends that the notice of contest was untimely and that the citation and penalty constitute a final order pursuant to § 10(a) of the Occupational Safety and Health Act of 1970 (Act). On April 9, 2001, CSX filed a petition seeking relief from the effects of the untimely contest pursuant to Federal Rule of Civil Procedure 60(b). The Secretary filed her motion to dismiss and responded to CSX's petition on May 9, 2001.

A hearing on the petition and motion was held on July 18, 2001, in Atlanta, Georgia. Both parties submitted post-hearing briefs, and the case is ready for decision. For the reasons that follow, CSX is not entitled to relief from its untimely notice of contest.

**Background**

On December 19, 2000, Occupational Safety and Health Administration (OSHA) Compliance Officer A. J. Steel, Jr., inspected CSX's Hilton Drawbridge facility in Wilmington, North Carolina. L. D. Bidy represented CSX during the inspection. Bidy is the Assistant Regional Engineer of Structures, with an office in Florence, South Carolina. As a result of Steel's inspection, on

January 9, 2001, the Raleigh, North Carolina, OSHA office issued CSX a three-item serious citation with a recommended penalty of \$10,800. The OSHA office mailed the citation certified, return-receipt requested, and addressed it to “CSX Transportation and its successors, P. O. Box 45052, Jacksonville, FL 32232-5052.” CSX’s corporate headquarters received the citation on January 12, 2001, as shown by the return receipt signed by James Gray, a CSX mailroom clerk with responsibility for handling CSX’s incoming mail (Exh. C-1, C-2; Tr. 15-16, 74). The Raleigh OSHA office received the return-receipt card on January 18, 2001 (Exh. C-2). CSX was required to contest the citation and penalty within 15-working days after its receipt of the citation, that is, by February 5, 2001.

Steel stated that when his office realized that the 15-working day period had expired, he attempted to contact Bidly in early March but was not successful (Tr. 22). On March 7, 2001, he called the corporate office and spoke with Theresa Galloway, Director of Structures Maintenance in the Engineering Department, in Jacksonville, to ask why CSX had not responded to the citation (Tr. 24). Galloway told Steel that she did not have the citation and requested that he telefax a copy to her (Tr. 24, 28, 67). The citation was faxed on March 8, 2001, and CSX filed a notice of contest contesting the citation and penalties on that same day.

### **Discussion**

It is undisputed that CSX filed its notice of contest approximately one month after the expiration of the 15-working day period. The issue is whether CSX should be granted relief from the effects of the untimely contest. Relief from a final order based on a late-filed notice of contest may be granted under Rule 60(b) of the Federal Rules of Civil Procedure for the following reasons:

(b) . . . (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud . . . misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

CSX contends that it is entitled to relief because its untimely filing was due to the Secretary’s misconduct, CSX’s excusable neglect, and other reasons justifying relief. The burden is on the employer to prove a sufficient basis for relief under Rule 60(b). *Roy Kay, Inc.*, 13 BNA OSHC

2021, 2022 (No. 88-1748, 1989); *Branciforte Builders*, 9 BNA OSHC 2113 (No. 80-1920, 1981).

### **Misconduct**

Rule 60(b)(3) incorporates the equitable tolling principles expressed by the United States Court of Appeals for the Fifth Circuit in *Atlantic Marine, Inc. v. OSHRC*, 524 F. 2d 476 (5<sup>th</sup> Cir. 1975). An untimely filing of a notice of contest may be excused where the delay was caused by “the Secretary’s deception or failure to follow proper procedures.” *Id.* at 478. CSX contends that the Secretary engaged in misconduct by failing to return two telephone calls and by sending the citation to a post office box rather than to Bidy in South Carolina.

Telephone Calls. On January 8, 2001, Steel held a closing conference with Bidy by telephone and told him that a citation would be issued (Tr. 21, 89). Steel testified that Bidy did not ask him during the closing conference to send the citation to any particular person or address (Tr. 21). After the telephone call, Bidy informed his supervisor and Galloway that the citation was coming (Tr. 21, 90). Bidy’s supervisors instructed him to find out where the citation would be sent. Bidy states that he called the Raleigh OSHA office on January 9 and 10, 2001, and left a message with a person who answered the telephone to have Steel call him (Tr. 91, 95, 96). Steel testified that he never received any telephone messages from Bidy in January (Tr. 52). Steel further testified that it is his practice at work to return all telephone requests for call backs (Tr. 56).

Even assuming that Steel did receive the two messages and neglected to return the calls, such inaction is not misconduct that justifies CSX’s late filing. “OSHA’s failure to return a phone call does not rise to a level of conduct sufficient to warrant relief under Rule 60(b)(3)” from an untimely filed notice of contest. *CalHar Construction, Inc.*, 18 BNA OSHC 2151, 2154 (No. 98-0367, 2000). *See Craig Mechanical, Inc.*, 16 BNA OSHC 1763, 1766 (No. 92-0372-S, 1994) (OSHA’s failure to return an employer’s two phone calls is not a basis for relief from late filing of notice of contest). Missed telephone contacts assume less importance because CSX actually received the citation.<sup>1</sup>

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<sup>1</sup> The citation and notification of penalty state in bold type that they must be contested in writing within 15-working days and that if not, the citation and proposed penalties become a final order (Exh. C-1). *See Keefe Earth Boring Co.*, 14 BNA OSHC 2178 (No. 88-2521, 1991) (since OSHA provided extensive instructions of a plain and simple nature as to how to contest citations in the citation itself, employer lacking experience with OSHA is not entitled to relief from the late notice of contest). CSX has dealt with OSHA and has received citations before and is experienced in OSHA procedures.

CSX failed to prove that the alleged unreturned phone calls constituted misconduct by OSHA. Accordingly, CSX is not entitled to relief on this basis.

Post Office Box. CSX further argues that OSHA engaged in misconduct by serving the citation on it at a post office box without including an individual's name in the address. It contends these errors effectively deprived it of notice of the citation and of due process. CSX contends that OSHA should have served the citation on Bidy, who participated in the inspection and who Steel knew was in Florence, South Carolina.

Steel accessed CSX's Jacksonville corporate mailing address from OSHA's records. CSX argues that OSHA should have known that it had problems receiving mail at that address. In fact, this scenario was previously played out in 1996. OSHA investigated work at the North Carolina bridges and issued CSX citations. The citations were sent to the same CSX post office box, were signed for, and then were "lost" by CSX. Also in that instance when the OSHA compliance officer called CSX to ask about the citations, Galloway advised that she had never seen them (Exhs. C-5, C-6, C-7; Tr. 29-33, 69). A copy of the 1996 citations were then telefaxed to Theresa Galloway (Tr. 28-30, 32-34, 69). CSX is incorrect that OSHA should have inferred from CSX's 1996 problem that it should never send citations to its corporate address. OSHA could well have concluded that the mailroom's problem was CSX's and that CSX would fix it.

It is undisputed that the post office box is a correct address for CSX. Steel was following OSHA's procedures to send citations to the main corporate office (Tr. 19, 21). As CSX admits, the post office box number on the citation is CSX's designation for Ms. Galloway's engineering department, and mail to this post office box number should have been routed there (Tr. 71, 83). The engineering department is responsible for handling all OSHA citations related to bridges (Tr. 85). In fact, Theresa Galloway specifically advised Steel that he had sent the citation to the correct address (Tr. 61-62).

The notice requirements for service of OSHA citations are governed by § 10(a) of the Act, which requires notification by certified mail. In the instant case, OSHA sent the citation to CSX by certified mail; and as evidenced by the return receipt, it was signed for by a CSX mailroom employee. The service was valid. The Commission has long held that service on an employee, who will know how to forward the citation in the corporate hierarchy is proper, since "the service is

reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest. *B. J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 (No. 76-2165, 1979). “(T)he Commission has upheld certified mail service of a citation where it was addressed to the company and was sent to the employer’s post office address, where it was received by a low-level employee.” *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999). See *Sroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989) (service is sufficient where citation addressed to company, not to any particular official, and sent to company’s post office address).

There is nothing in the record to indicate that Steel sought to deceive CSX about the citation or to prevent it from receiving the citation. To the contrary, Steel told Bidy that the citation was coming. Galloway testified that she did not believe Steel was in any way attempting to prevent delivery of the citation (Tr. 80). CSX has failed to prove any misconduct by OSHA, and it is not entitled to relief from the final order on the theory of misconduct.

#### **Excusable Neglect**

CSX contends that its failure to timely file a notice of contest was excusable neglect since it infrequently misdirected or lost mail destined for the engineering department. This was only the second time that Galloway had not received an OSHA citation, the first being in 1996. CSX also maintains that since no manager received the citation, CSX should be excused from the late filing.

The Supreme Court clarified “excusable neglect” in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993). The Court concluded that whether a party’s neglect of a deadline may be excused presents equitable questions taking account of all relevant surrounding circumstances, such as “the reasons for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Id.* at 395. Although *Pioneer* involved a Bankruptcy Act Rule, the United States Circuit Courts generally have held that *Pioneer’s* analysis of “excusable neglect” applies to Rule 60(b) motions. *Robb v. Norfolk & Western Railway Co.*, 122 F. 3d 354, 361-62 (7<sup>th</sup> Cir. 1997).

CSX does not know what happened to the citation after Gray signed for it. However, receiving, handling, and routing its mail are within CSX’s “reasonable control.” According to Galloway, CSX’s mailroom employees pick up mail at the post office, return with it to the mailroom

in its main office building on Waters Street in Jacksonville, and route it to the various departments (Tr. 76). The mailroom handles 3½ to 4 million pieces of mail in a year for approximately 5000 employees in the Jacksonville area (Tr. 100-101). According to Cheri Parks, CSX director of document services (*i.e.*, mail), CSX receives about 1500 to 2000 pieces of “mystery” mail (mail without a personal identifier) each week (Tr. 101). This mail goes into a “dead letter tub” and is opened, identified, then routed after all the “identified” mail has been dispersed. Parks admitted that even certified mail could end up in the dead letter tub (Tr. 103). Undoubtedly, distribution of such a large volume of mail could present a daunting task. Nevertheless, the responsibility to maintain orderly procedures for handling important business documents rests with CSX. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020 (No. 86-1266, 1989).

The citation was sent to the post office box number for the engineering department, and with that address it should have been routed to the engineering department. The engineering department has its own mailroom (Tr. 71). Parks stated that she did not know how that department’s mailroom handled “mystery” mail (Tr. 102). CSX admits that its mail-handling system can be inadequate. When first contacted by Steel, Galloway forthrightly “bad-mouthed” the CSX mail system (Tr. 78). In a later three-way conversation including Galloway, the individual in charge of the mailroom told Steel that the “mail system is just terrible here” (Tr. 28). Galloway testified that she “was receiving mail for people who had been retired and dead for the last six to ten years,” that express mail arrived late, and that mail could be misdirected (Tr. 78-79).

Rule 60(b)(1) “requires a showing of ‘excusable neglect’ and not just a showing of simple negligence.” *Louisiana-Pacific Corp., supra*, 13 BNA OSHC 2021 . *See, J. F. Shea Co., Inc.*, 15 BNA OSHC 1092 (simple negligence is not an adequate excuse for relief under Rule 60(b)). CSX did not appear to have timely procedures for handling important and date sensitive mail. Failure of its mailroom to bring certified mail to the attention of the proper officer or manager of the company does not constitute excusable neglect. *See Stroudsburg Dyeing* (failure of employee, who received mailed citation, to bring it to the attention of proper officer of the company does not constitute “excusable neglect” or “any other reason justifying relief”).

The Commission has consistently denied Rule 60(b) relief where the employer’s procedures for handling documents were to blame for the untimely filing of its notice of contest of OSHA

citations. See *Montgomery Security Doors & Ornamental Iron, Inc.*, 18 BNA OSHC 2145, 2148 (No. 97-1906, 2000) (record showed a breakdown of business procedures and delay unjustified even assuming it was due to employee sabotage); *NYNEX*, 18 BNA OSHC 1944, 1947 (No. 95-1671, 1999) (no relief where employee redirected certified mail since company was without adequate procedures); *J. F. Shea, supra* (late notice of contest based on incorrect date stamp on citation by office assistant is not excusable neglect); and *Louisiana-Pacific Corp., supra* (change in management resulting in a failure to properly handle important documents is insufficient excuse for late filing).

CSX relies on *Russell B. LeFrois Builder, Inc.*, 18 BNA OSHC 1978 (No. 98-1099, 1999). In that case the Commission found excusable neglect for an employer who had not experienced a problem with its mail system during the previous 18 years and whose employee picked up the certified mail at its post office box but it fell beneath the car seat. Distinguishing CSX's situation from that case is the fact that misdirected or lost mail sent to its corporate office does not appear to be not an isolated event. CSX has had problems with its mail system for certified mail as evidenced by loss of the 1996 OSHA citations and by ongoing problems identified by Galloway and Parks. CSX has failed to prove excusable neglect.

#### **Other Reasons for Relief**

CSX contends that it is entitled to relief under Rule 60(b)(6) because of a combination of mitigating factors occurring without deliberate fault or carelessness. The mitigating factors it cites are OSHA's questionable conduct in sending the citation to the post office box and the asserted lack of responsiveness.

Generally, in applying Rule 60(b)(6) the "courts have set aside a final judgment or order when circumstances such as absence, illness, or a similar disability prevent a party from acting to protect its interests." *Branciforte Builders supra* at 2117. In the instant case, CSX has not established any basis justifying relief. CSX failed to prove misconduct on OSHA's part, and it failed to prove an excusable mistake on its own part.

CSX did not carry its burden of proving misconduct, mistake, inadvertence, surprise, excusable neglect, or another reason justifying relief under Rule 60(b). The citation issued on January 9, 2001, is a final order of the Commission pursuant to § 10(a) of the Act.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

The Secretary's motion to dismiss the untimely notice of contest is GRANTED, and the January 9, 2001, citation and penalty of \$10,800 are affirmed.

/s/  
NANCY J. SPIES  
Judge

Date: March 18, 2002