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SOL (MSHA) V. RIVERWAY NORTH
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER
v.
RIVERWAY NORTH, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING
Docket No. KENT 83-132
A.C. No. 15-11450-03501
Riverway North Dock

ORDER OF DISMISSAL

Before: Judge Steffey

A prehearing order was issued on May 23, 1983, in the above-entitled proceeding requesting, among other things, that the parties advise me by June 20, 1983, whether a settlement of the issues had been achieved. Although return receipts in the official file show that both parties received the prehearing order 2 days after it was mailed, neither party submitted a reply to the prehearing order. Thereafter, an order to show cause was issued on August 2, 1983, pursuant to the provisions of 29 C.F.R.

2700.63(a), requesting the parties to show cause, by August 30 1983, why they should not be held in default for failure to reply to the prehearing order. Return receipts in the official file show that both parties received the show-cause order within 2 days after it was mailed but, again, neither party has responded to the show-cause order, although nearly 7 months have elapsed since replies to the show-cause order were due.

Since neither party replied to the show-cause order, each party could be held in default for its inaction. The show-cause order provided that if respondent were held in default, it would be ordered to pay the penalty of \$20 proposed by the Assessment Office, and that if the Secretary were held in default, the proposal for assessment of civil penalty would be dismissed for lack of prosecution. While respondent did not reply to the prehearing order or to the show-cause order, it did request a hearing with respect to the alleged violation of 30 C.F.R. 71.802, and it also filed an answer in which it fully stated its position. Since the Secretary has the burden of proving that a violation occurred, I believe that the Secretary should be held to be primarily at fault for failure to reply to two different procedural orders and that the proper action for the Secretary's apparent indifference about the disposition of this case should be a dismissal of the action. Therefore, I find that the Secretary of Labor is in default for failure to reply to the prehearing and show-cause orders issued May 23, 1983, and August 2, 1983, respectively.

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WHEREFORE, for the reason given above, it is ordered:

The proposal for assessment of civil penalty filed on March 21, 1983, in Docket No. KENT 83-132 is dismissed.

Richard C. Steffey
Administrative Law Judge