

CCASE:
SOL (MSHA) V. POWER OPERATING
DDATE:
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TTEXT:

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-849
Petitioner	:	A. C. No. 36-02713-03572
v.	:	
	:	Docket No. PENN 92-850
POWER OPERATING COMPANY,	:	A. C. No. 36-02713-03573
INCORPORATED,	:	
Respondent	:	Frenchtown Mine

ORDER DENYING MOTION TO DISMISS
ORDER DIRECTING SERVICE
ORDER DIRECTING OPERATOR TO ANSWER

On October 29, 1992, the Solicitor filed the penalty petitions in the above-captioned cases. On November 25, 1992, the operator filed identical motions to dismiss for these cases because the penalty petitions were not file within the prescribed time limits and were not properly served. On January 4, 1993, the Solicitor filed a motion in opposition to the operator's motions to dismiss.

Commission Rule 27 requires that the Secretary file the penalty proposal within 45 days of the date he receives an operator's notice of contest for the proposed penalty. 29 C.F.R. 2700.27. An operator ordinarily contests the proposed penalty by mailing in the so called "blue card" which has been provided to it for this purpose. And such contest is effective upon mailing. J. P. Burroughs, 3 FMSHRC 854 (April 1981). In these cases the operator's counsel filed documents entitled notice of contest of citation and assessment and MSHA created corresponding blue cards copies of which were sent to the Commission. The blue cards show that the Secretary received the operator's notices of contest on August 19, 1992. The petitions filed at the Commission on October 29 were, therefore, 24 days late.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty proposal upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981).

The Solicitor's motion in opposition represents that the delay occurred because the cases were not received in her office until October 23, 1992. The Solicitor attaches a memorandum from C. Bryon Don, Chief, Civil Penalty Compliance Office, Office for Assessments for MSHA which states that the delay in sending the

cases was due to the increase number of cases received in that office. In Salt Lake County Road Department, *supra*, decided early in the administration of the Act, the Commission held that the extraordinarily high caseload and lack of personnel confronting the Secretary at that time constituted adequate cause for late filing. At the present juncture, I take note of the precipitous rise in the volume of contested cases over the last few years, as indicated by the Commission's own records. (Footnote 1) I find these circumstances constitute adequate cause for the short delay in the filing of the penalty petitions. Finally, the record does not indicate any prejudice to the operator from the 24 day delay.

The operator's assertion that these penalty petitions be dismissed because of defective service is without merit. The Solicitor served copies of the petitions upon the operator's safety director who was identified as the individual to receive such service in the legal identity report filed by the operator with MSHA and therefore noted as such on MSHA's computer. The Secretary was unaware the operator had retained counsel, but the Solicitor represents that MSHA's computer has now been changed to reflect counsel as the proper recipient of service.

Courts have broad discretion on whether to dismiss an action because of inadequate service or require the service be made properly. *Montalbano v. Easco Hand Tools Inc.*, 766 F.2d 737 (2d Cir. 1985); 5A C. Wright & A. Miller, *Wright & Miller, Federal Practice & Procedure*, 1354 (1990); 2A J. Moore & J. Lucas, *Moore's Federal Practice*, 12.07[2.-4] (2d ed. 1992). As a general matter the action will be preserved in those cases in which there is a reasonable prospect that the service can be accomplished properly. *Novak v. World Bank*, 703 F.2d 1305 (D.C. Cir. 1983); *Wright & Miller, Federal Practice & Procedure, supra*; *Moore's Federal Practice, supra*. In this case it is clear that service can be made upon operator's counsel in accordance with MSHA's updated computer.

In light of the foregoing, the operator's motions to dismiss the penalty petitions are DENIED.

It is ORDERED that the within 10 days of the date of this order the Solicitor serve operator's counsel with copies of the penalty petitions for these cases.

It is further ORDERED that within 40 days of the date of this order the operator file its answers to the penalty petitions.

Paul Merlin
Chief Administrative Law Judge

1 The number of new cases received for FY 90 was 2,029, for FY 91 was 2,267 and for FY 92 was 6,032.

Distribution:

Anita Eve Wright, Esq., Office of the Solicitor, U. S. Department
of Labor, Room 14480-Gateway Building, 3535 Market Street,
Philadelphia, PA 19104 (Certified Mail)

Frederick J. Bosch, Esq., Tim D. Norris, Esq., Stradley, Ronon,
Stevens & Young, 2600 One Commerce Square, Philadelphia, PA
19103-7098 (Certified Mail)

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