

CCASE:

MSHA V. J. P. BURROUGHS AND SONS

DDATE:

19810430

TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

April 30, 1981

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. LAKE 80-223-M

J. P. BURROUGHS AND SON, INC.

DECISION

This case involves the interpretation of section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The provision at issue concerns notification to the Secretary of Labor of an operator's intention to contest a citation or a proposed assessment of penalty. In an order issued June 27, 1980, the administrative law judge dismissed as untimely a notice of contest in which the operator, J. P. Burroughs and Son, Inc. challenged penalty assessments for four section 104(a) citations. The judge adopted the Secretary's proposed assessments as the final order of the Commission. Burroughs filed a petition for discretionary review, which we granted. For the reasons that follow, we reverse. On January 14, 1980, Burroughs received from the Mine Safety and Health Administration (MSHA) a notice of proposed assessment for alleged violations cited under section 104(a). The operator mailed its notice of contest to MSHA on February 13, 1980, the 30th day after receipt of the proposed assessment. MSHA received that notice of contest two days later. On April 17, 1980, the Secretary initiated a civil penalty proceeding against the operator. At the same time, he filed a motion to dismiss the operator's notice of contest. He argued that the notice was untimely because MSHA had not received it within 30 days of Burroughs' receipt of the notification of proposed penalty as, the Secretary contended, is required by section 105(a). The judge agreed with the Secretary and granted the motion to dismiss. The question before us is one of statutory interpretation. Section 105(a) provides:

... If, within 30 days from the receipt of the notification [of proposed assessment of penalty issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, ... the

citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.... [Emphasis added.]

~855

The issue is whether MSHA must receive the operator's notice of contest within 30 days, as held by the judge, or whether the operator satisfies the requirement of notifying the Secretary if it mails its notice of contest within 30 days.

The Act does not define the key word "notify", nor does the legislative history provide direct guidance. The language of section 105(a) as a whole is instructive, however. The Secretary argues that "notice" does not occur until it is received. But, in speaking of the document that triggers the 30-day contest period, the section refers to "receipt [by the operator] of the notification" of proposed assessment of penalty. If, as the Secretary contends, notice equals receipt, there would have been no need whatsoever for Congress to have mentioned "receipt" in speaking of "receipt of the notification" of proposed assessment. Notification to the operator would not occur until it was received. The word "receipt" would be superfluous. We read Congress as saying that notice and receipt of notice are two separate things in this context. No reason is apparent as to why the two notice requirements (first to the operator, second to the Secretary) in section 105(a) should not be interpreted in the same way. Thus, the overall language of the section supports the operator's position that notice occurs before receipt (i.e., upon mailing).

Practical and policy considerations also support the conclusion that a notice of contest is effective upon mailing. Fairness to the operator requires that it should not be penalized for vagaries in the U.S. mails. In order to try to ensure timely arrival of its notice of contest, the operator would be constrained to mail that document well before the 30th day. This would effectively deprive it of a full 30 days in which to contest a penalty. At the extreme, this arguably could even deprive the operator of any adjudication should slow or unpredictable mail service cause late receipt of a notice of contest, even though the operator mailed that notice well in advance of the 30th day.

In any case, the Secretary's position may encourage frivolous contests. Congress wanted the operator to have some reasonable period to determine whether it seriously wished to contest the Secretary. Lacking sufficient time to really consider whether to contest or not, an operator may mail a notice of contest automatically, even though it may not necessarily have contested if given adequate time to reflect and decide. A procedure that encourages unnecessary penalty contests is likely to slow the overall penalty assessment and collection

process, which would be counterproductive to Congress' stated goal. The Secretary contends nonetheless that a major concern of Congress was expediting enforcement proceedings, including penalty assessments. He argues that receipt by him of a notice of contest within the 30-day period speeds the penalty assessment and collection process. 1/ If notification is effective upon mailing, however, enforcement will be

1/ The Senate Report states: "Penalty matters should be finally determined as quickly as possible." S. Rep. No. 95-181, 34, 95th Cong., 1st. Sess. (1977); reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 622 (1978).

~856

slowed at most for the period of time that a notice of contest is en route to the Secretary; that is, the operator could mail its notice of contest on the 30th day and the delay envisioned by the Secretary in final assessment of a penalty normally would be a few days at most, the time it takes the mailed contest to be delivered. Certainly, the brief delay for the time in transit would do no appreciable damage to Congress' desire to achieve reasonable promptness in penalty assessment and collection.

Accordingly, we hold that a notice of contest is effective if mailed within 30 days after the operator receives a notice of proposed assessment of penalty. The decision of the judge is reversed and remanded for further proceedings consistent with this opinion.

~857

Distribution

Robert J. Krupka, Esq.
Cook, Nash & Deibel
1201 Second National Bank Building
Saginaw, Michigan 48607
Michael McCord, Esq.
Ann Rosenthal, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203
Chief Administrative Law Judge
James A. Broderick
FMSHRC
1730 K Street, N.W.
Washington, D.C. 20006