

**BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA**

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

NEW BREED LEASING OF NEW JERSEY,
INC.
and its successors

RESPONDENT.

DOCKET NO. OSHANC 2004-4382
OSHA INSPECTION NO. 307443192
CSHO ID NO. D3820

ORDER

APPEARANCES:

For Complainant: Linda Kimbell, Assistant Attorney General

For Respondent: Louis W. Doherty

Administrative Law Judge: R. Joyce Garrett

Citations:

Citation 1 Item 1: Serious violation of 29 CFR 1910.145(c)(2)(i) bearing a proposed penalty of \$1,375.00;

Citation 2 Item 1: Nonserious violation of 29 CFR 1910.37(k)(2);

Citation 2 Item 2: Nonserious violation of 29 CFR 1910.147(c)(6)(ii);

Citation 2 Item 3: Nonserious violation of 29 CFR 1910.176(b).

THIS MATTER came on for consideration upon joint Motion of Complainant and Respondent. By stipulation of the parties the primary issue for determination is whether the North Carolina Department of Labor OSH Division has inspection and enforcement jurisdiction over Respondent's operations at its Greensboro, North Carolina facility or whether that jurisdiction has been retained by Federal OSHA and the United States Department of Labor. The parties further stipulated that the underlying Citation and Notification of Penalty can be resolved without the necessity of further hearing after a decision is made on the jurisdictional question.

The parties further stipulated that the Undersigned may decide the issue on the basis of Stipulations and the parties' briefs and accompanying exhibits without the presentation of live testimony.

DISCUSSION

The Code of Federal Regulations sets out limits on federal OSHA enforcement in North Carolina:

In accordance with section 18(e), final approval relinquishes Federal OSHA authority only with regard to occupational safety and health issues covered by the North Carolina plan. OSHA retains full authority over issues which are not subject to State enforcement under the plan... Federal jurisdiction is also retained with respect to Federal government employers and employees; the U.S. Postal Service (USPS), including USPS employees, and contract employees and contractor-operated facilities engaged in USPS mail operations; and the American Red Cross. 29 USC 1952.155(b)(1).

In April 1999 Federal OSHA published a directive entitled "Enforcement Guidance for the U.S. Postal Service which delineates the jurisdictional limits of Federal OSHA over postal operations in State-plan States:

In State Plan States, Federal OSHA will exercise jurisdiction over the working conditions of U.S.Postal Service employees as well as contract employees engaged in U.S. Postal Service mail operations, e.g. contract mail carriers and truck drivers transporting and unloading mail. Federal OSHA will likewise exercise jurisdiction over contractor-operated facilities engaged in mail operations and postal stations in public or commercial facilities. CPL 02-00-122.

A determinative issue is whether Respondent's facility at Gallimore Dairy Road in Greensboro, North Carolina is a 'contractor-operated facility engaged in mail operations'. If it is, then the North Carolina Department of Labor would not have jurisdiction to issue citations and enforce applicable OSHA regulations at that facility. Otherwise, the North Carolina Department of Labor would have jurisdiction.

Respondent's facility at Gallimore Dairy Road is a facility that operates under a contract with the United States Postal Service, the principle purpose of the contract is to utilize the significant skills of Respondent in receiving, inspecting, repairing, handling, sorting, storing, retrieving and distributing mail transport equipment (known as "MTE", such as mailbags, trays, pallets, etc.) owned by the USPS. Respondent provides services not only to the USPS but also to other customers, both public and private, and has a reputation of being a national distribution service and supply chain consulting company. The services it provides to the USPS do not seem to be highly distinguishable from those it provides its other customers. Accordingly, the fact that Respondent is handling MTE would not of itself bring Respondent into the definition of being a mail handling operation. Respondent's job appears to not be that of handling mail, but rather that of making the USPS's job easier so that the USPS can more efficiently handle mail. By error mail may be in the MTE when it is delivered to Respondent for processing at the Gallimore Dairy Road facility. The USPS requires Respondent to preserve and return any mail which is found in the MTE, and in fact requires Respondent to establish a 'found mail' plan. Respondent asserts that found mail consists of a significant amount of main (ie 20 - 22 hampers per week) and that its actions in finding and returning the mail to the USPS constitutes mail handling functions. This assertion is not persuasive since such activity is required only if mail has been left by error in the MTE; if no mail were in the MTE delivered to Respondent, Respondent would at no time be handling mail.

The contract between Respondent and the USPS has been made available for review by the Undersigned on a confidential basis. Accordingly, the Undersigned is not permitted to quote from such contract or otherwise disclose its terms. However, the Undersigned's review of the contract causes the Undersigned to conclude that the services to be performed by Respondent at the Gallimore Dairy Road facility are not those of handling mail, are not dissimilar from those services provided to other contracting entities, and are consistent with Respondent's reputation of being a distinguished company in providing diversified logistical services on a national basis.

Based upon the parties' briefs and accompanying exhibits, the Undersigned makes the following Findings of Fact:

FINDINGS OF FACT

1. This Court has jurisdiction over the parties, provided, however, that Respondent contends that the North Carolina Department of Labor did not have jurisdiction to conduct the investigation leading to the citation at issue in this matter. Respondent contends that jurisdiction for enforcement of OSHA matters was retained by the federal Department of Labor pursuant to 29 C.F.R. § 1952.155 and that any enforcement proceedings should be initiated by the United States Department of Labor and contested before the United States Occupational Safety and Health Review Commission.

2. The Respondent is an employer as that term is defined in the United States Occupational Safety and Health Act and the Occupational Safety and Health Act of North Carolina.

3. All required notices have been given.

4. Neither party has any procedural objection to the decision of this matter by the Undersigned provided, however, that Respondent contends that substantively jurisdiction should rest exclusively with the federal Department of Labor and the United States Occupational Safety and Health Review Commission.

5. Complainant is an agency of the State of North Carolina charged with inspection for compliance with and enforcement of the Occupational Safety and Health Act of North Carolina.

6. Respondent is a corporation duly organized and existing under the laws of the State of New Jersey and maintains a place of business in Greensboro, North Carolina.

7. On March 8, 2004, a Compliance Officer for the North Carolina Department of Labor, Occupational Safety and Health Division, conducted an inspection at Respondent's facility located at 490 Gallimore Dairy Road in Greensboro, North Carolina (the "Gallimore Facility"). As a result of the inspection, a Citation and Notification of Penalty was issued to Respondent on March 25, 2004. The citation alleged one serious citation based on an alleged lack of caution signs and one citation with three (3) alleged nonserious violations.

8. Respondent duly filed its Notice of Contest to the Citation and Notification of Penalty, dated May 24, 2004. At all relevant times, Respondent has objected to issuance of the Citation and Notification of Penalty on grounds that the NC OSH Division does not have jurisdiction over its operations at the Gallimore Dairy Road facility. Respondent contends that it is subject to Federal OSHA jurisdiction pursuant to the Postal Service Employees Safety Enhancement Act and enforcement guidance published by the Federal OSH Administration, as well as the provisions of 29 C.F.R. § 1952.155.

9. The parties agree that the underlying Citation and Notification of Penalty can be resolved without the necessity of further hearing after a decision on the jurisdictional question.

10. Respondent has prepared Affidavits of Dennis Hunt and Paul Perryman to describe the nature of the work performed in the Gallimore Facility; counsel for Respondent has provided copies of these affidavits to counsel for Complainant; the parties stipulate and agree that these affidavits and accompanying exhibits represent admissible evidence, describe the nature of the work performed by Respondent in the Gallimore Facility, and may be considered by the Undersigned in deliberation of this matter.

11. Complainant submitted a brief ("Complainant's Brief") for consideration by the Undersigned. Attached to Complainant's Brief are exhibits in support of Complainant's position. Respondent's counsel has been furnished a copy of exhibits that are not easily accessible. Pursuant to Rules .0512(b) and .0513 of the Rules of Procedure of the North Carolina Occupational Safety and Health Review Commission; the parties agree that each of these exhibits, if relevant and not otherwise privileged material, may be received in evidence without further identification or proof.

12. Respondent submitted a brief ("Respondent's Brief") for consideration by the Undersigned. Attached to Respondent's Brief are exhibits in support of Respondent's position. Complainant's counsel has been furnished a copy of each exhibit. Pursuant to Rules .0512(b) and 0513 of the Rules of Procedure of the North Carolina Occupational Safety and Health Review Commission, the parties agree that each of these exhibits, if relevant and not otherwise privileged material, may be received in evidence without further identification or proof. Complainant does not object to Respondent's designating certain of its exhibits "Confidential Trade Secret" pursuant to N.C. Gen. Stat. § 95-152 and Review Commission Rule of Procedure .0111.

13. Attached to the affidavit of Dennis Hunt is a copy of the contract between Respondent and the Unites States Postal Service (the "Contract"). The Contract was submitted subject to an obligation of confidentiality; accordingly no portion of that Contract shall be recited herein. However, it can be stated that a review of the Contract by the Undersigned demonstrates to the reasonable satisfaction of the Undersigned that the words "contractor-operate facility engaged in USPS mail operations" (or similar words or words with similar meaning),or the words "mail handling/ distribution" (or similar words or words with similar meaning)do not appear in the Section which describes the Scope of Contract. The words in the Scope of Contract appear clear and unambiguous in describing the service which is to be provided by the Respondent under the Contract. The Contract does contain language which imposes on Respondent an obligation to secure and return to the USPS any mail which is found by Respondent (and to have an established plan for this process, which plan the Undersigned shall refer to as the "Found Mail Plan"). According to the Affidavit of Paul Perryman Respondent has established such a plan. According to Respondent the amount of found mail is about 20 to 22 hampers per week. Respondent argues that "there are postal facilities that are operated in corners of stores and in malls at various places throughout the country that handle and process less mail than this facility that New Breed operates on Gallimore Dairy Road in Greensboro".

14. According to Respondent, Respondent operates a mail transport equipment processing center for the United States Postal Service. Respondent receives at the Gallimore Facility between 300 and 400 truckloads of mail transport equipment ("MTE" ie mail bags, trays, bins, and other equipment used by the Postal Service to process, transport and deliver the mail), and sorts, repairs, handles and distributes the MTE. If any mail is found in the MTE that 'found mail' is handled according to the established Found Mail Plan.

15. Respondent describes itself as a "national distribution services and supply chain consulting company". The organizational and distribution services provided to the United States Postal Service with respect to MTE is similar to the organizational and distribution services it provides to other customers.

16. Based on the Undersigned's review of the Contract it appears to the Undersigned that Respondent's discovery and handling of found mail is only incidental to the services it provides with respect to the receiving, sorting, repairing, handling and distributing MTE.

17. Respondent asserts that its receiving, sorting, repairing, handling and distributing of MTE qualifies Respondent to be considered as being engaged in USPS mail operations because such activities were previously handled by Postal Service employees as part of its USPS mail operations, and if not performed by Respondent may again be handled by USPS employees.

Based on the Findings of Fact and applicable law the Undersigned makes the following

Conclusions of Law

1. The Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. This action was properly brought and the Undersigned has jurisdiction to hear the matter.

3. The handling of mail by Respondent is not the intended scope of work which is the subject of the Contract between Respondent and the United States Postal Service, but is an ancillary function required only if there is mail which is inadvertently left in the MTE which is delivered to Respondent.

4. Neither the handling of found mail nor the receiving, sorting, repairing, handling and distributing of MTE constitutes USPS mail operations.

5. The North Carolina Department of Labor has OSHA enforcement jurisdiction over the Respondent at the Gallimore Facility.

Based on the foregoing Findings of Fact and Conclusions of Law IT IS ORDERED, ADJUDGED AND DECREED that the North Carolina Department of Labor OSH Division has inspection and enforcement jurisdiction over Respondent's operations at its Greensboro, North Carolina facility.

This the 26 th day of September, 2005.