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2013

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)
)
Lester Sykes,) **Docket No. TSCA-05-2008-0013**
Chicago, Illinois,)
)
Respondent.)
_____)

**ORDER ON MOTION AND NOTICE OF WITHDRAWN “SERVICE FILING”
AND “FILING OF ANSWER”**

This case involves a matter of first impression regarding the method of service of an administrative complaint; specifically, whether service of a complaint by U.S. Postal Service priority mail with delivery confirmation is proper under the Consolidated Rules. In my Order Denying Motion for Default (Default Order), I concluded that the answer to this question is an unequivocal “no.” Notwithstanding that Order, EPA now moves for leave to enter documents, most of which it previously submitted as exhibits in support of its Motion for Default Order, Finding of Liability and Penalty (Motion for Default), into the record to establish that its service of the Complaint by U.S. Postal Service priority mail with delivery confirmation was proper; therefore, the question is before me again. Again, I conclude that EPA has not properly served the Complaint in this matter. This Order reflects my determination.

I. Background

On November 8, 2012, EPA filed a Filing of Certification of Service and Filing of Proof of Service of Complaint (Service Filing) and Filing of Answer with the Regional Hearing Clerk. EPA did not file either of these documents by motion nor did it provide a supportable legal basis for its filings; therefore, I ordered EPA to show cause (Show Cause Order) how its Service Filing established completed service and proof of service of the Complaint and why its Filing of Answer should not be excluded from the record. EPA timely filed a Response to Order to Show Cause, and Motion for Leave to File Exhibits to Demonstrate Proof of Service of Complaint and Return Receipt Signed (Show Cause Response).

II. Discussion

In the Show Cause Order, I ordered EPA to explain how its Service Filing and the attached “Track & Confirm search results” establish completed service and proof of service of the Complaint. In addressing this broader question, I also required EPA to respond to three specific questions relating to its Service Filing:

- a. Why should it be allowed to demonstrate proof of service by U.S. Postal Service priority mail with delivery confirmation when that is not one of the methods of service by U.S. Postal Service mail specified in the Consolidated Rules at 40 C.F.R. § 22.5(b)(1)(i);
- b. Why should the requirements for service of a complaint by reliable commercial delivery service be applicable to its attempt at service of the Complaint by U.S. Postal Service mail; and
- c. How do the “Track & Confirm search results” attached to its Service Filing prove service of the Complaint as required by 40 C.F.R. § 22.5(b)(1)(iii) and demonstrate completed service in accordance with 40 C.F.R. § 22.7(c)?

Rather than responding to these questions directly,¹ EPA posits two arguments to establish that it satisfied the procedural rules for service of a complaint. EPA also argues that it satisfied due process.²

EPA first contends that Mr. Sykes acknowledged his receipt of the Complaint, thereby satisfying the procedural rules for service of an administrative complaint. Show Cause Resp. 7. EPA cites *In re C.W. Smith*, Docket No. CWA-04-2001-1501, 2002 EPA ALJ LEXIS 7 (Feb. 6, 2002), to support its position that Mr. Sykes’ actual receipt of the Complaint is sufficient to establish that service was completed. *Id.* at 9. In *C.W. Smith*, where the return receipt for the complaint was signed by a non-employee and the respondents did not dispute that they had received the complaint, the Presiding Officer concluded that the “achievement of actual service of process obviate[d] the failure of Complainant to strictly comply with the service of process procedures” of the Consolidated Rules. 2002 EPA ALJ LEXIS 7 at *16-*17.

C.W. Smith is distinguishable from this matter because EPA served the complaint in *C.W. Smith* by certified mail with return receipt requested. *Id.* at *13. The service issue in *C.W. Smith*, like so many other cases, turned on whether the person who signed the return receipt was authorized to do so on behalf of the Respondent,³ not, as here, whether EPA had used one of the methods of service required by the Consolidated Rules.

Further, as discussed in the Default Order, EPA administrative decisions—all in the context of service of a complaint by certified mail with return receipt requested—have been split on whether actual receipt of a complaint overcomes deficiencies in service. Default Order at 5. A more recent decision, issued by the Chief ALJ, reached the opposite conclusion of *C.W. Smith*: that actual receipt of a complaint does not establish adequate service of the complaint. *See In re Burnham Assoc., Inc.*, Docket No. MPRSA-01-2010-0078, 2010 EPA ALJ LEXIS 25, at *5-*6 (Dec. 21, 2010) (citing *Dahl v. Kanawha Inv. Holding Co.*, 161 F.R.D. 673, 681 (N.D. Iowa 1995)). EPA does not cite nor can I locate any matter, other than this one, that has taken up the

¹ EPA never squarely addresses the first two of these questions and ultimately acknowledges that delivery confirmation on its own is insufficient to demonstrate mail service. Show Cause Resp. 5.

² Although I discussed due process in the Default Order, it was not an issue in either of EPA’s filings or the Show Cause Order and, therefore, arguably, is improperly raised in EPA’s Show Cause Response.

³ *See* Default Order at 2 n.2.

issue of whether actual receipt of a complaint overcomes EPA's failure to use one of the methods of service required by the Consolidated Rules. I reaffirm my conclusion that it does not.

EPA's due process argument follows a similar vein. Citing *Katzson Bros., Inc. v. U.S. Environmental Protection Agency*, 839 F.2d 1396 (10th Cir. 1988), EPA asserts that because it made multiple efforts to contact Mr. Sykes and there is no dispute that Mr. Sykes received EPA's Complaint, he was afforded due process. Show Cause Resp. 7. In *Katzson*, the court discussed how mail could be used to effectuate service of process and that if an agency employs a procedure reasonably calculated to achieve notice, successful achievement is not necessary to satisfy due process requirements. 839 F.2d. at 1400 (internal citations omitted). The court concluded that EPA's service of the complaint by registered mail with return receipt requested and its substantial efforts to contact Mr. Katzson over a 16-month period were procedures reasonably calculated to achieve notice, even though Mr. Katzson himself did not sign the return receipt for the complaint on behalf of his company. *Id.*

Katzson is also distinguishable on a number of grounds. First, it involves service of an administrative complaint on a corporation, not a person. The service issue in *Katzson* was whether the complaint had to be delivered to an officer, partner, agent or authorized individual or if it simply must be addressed to such a person. *Id.* at 1399. The court pointed out that, in the context of service on a corporation, the Consolidated Rules ensure that the representative who actually receives the mail will know to whom it should be delivered, but to require a postal service employee to wait at a corporation's premises until the officer, partner or agent could sign the return receipt would severely hinder service of process on corporations. *Id.* The court did not suggest that its interpretation of the rules for service on corporations should be extended to other types of respondents and, in fact, distinguished the rules for corporations from those for state and local governments. *Id.* Second, *Katzson* involved service by certified mail with return receipt requested. As in *C.W. Smith*, there was no question whether EPA used one of the methods available for service of a complaint on a corporation; rather, the issue was whether using the method specified by the regulation satisfied due process.

EPA advocates an approach whereby it is not necessary to comply with the Consolidated Rules as long as due process concerns are satisfied; however, "[f]undamental concepts of due process, even in the administrative arena, require that the Complainant demonstrate in the record that a respondent who is subject to the Act has been properly served." *In re Taylor Auto. Co.*, Docket No. VII-94-CAA-137, 1995 EPA RJO LEXIS 4 (Mar. 8, 1995). As discussed in more detail below, EPA has not presented any new information that persuades me that this is the case.

EPA's final argument is that it can demonstrate that it satisfied the procedural rules for service of a complaint. EPA first asserts that it has provided written verification of delivery as required by 40 C.F.R. § 22.5(b)(1) to prove service. Show Cause Resp. 9-10.

40 C.F.R. § 22.5(b)(1)(i) states:

Service [of the complaint] shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

EPA skims over the fact that it did not use one of the methods of service specified by the Consolidated Rules and avers that its Certification of Service of the Complaint and the U.S. Postal Service's written confirmation of delivery meet the requirements for service of a complaint at 40 C.F.R. § 22.5(b)(1). Show Cause Resp. 10. EPA improperly conflates proof of delivery with proof of service and fails to distinguish between the rules applicable to service by the U.S. Postal Service and service by a reliable commercial delivery service.

U.S. Postal Service mail is clearly distinguished from and does not fall under the ambit of "reliable commercial delivery service" in the Consolidated Rules.⁴ EPA chose to serve the Complaint by U.S. Postal Service mail and, therefore, was obligated to follow the procedural rules for that type of service. Furthermore, as discussed in the Default Order, even complaints sent by "reliable commercial delivery service with written verification of delivery" require the signature of the recipient to be properly served. *See In re Cheerful Cesspool Serv.*, Docket No. CWA-08-2009-0017, 2011 EPA RJO LEXIS 389, at *389 & nn.1-2 (Nov. 15, 2011) (concluding that service of the complaint via Federal Express (FedEx) with confirmed delivery was inadequate, but service of the complaint via FedEx with signature confirmation constituted proper service).

EPA nonetheless argues that "written verification of delivery," without the signature of the recipient, is sufficient when EPA serves a complaint, referring to *Burnham* for support. In its Show Cause Response, EPA discusses *Burnham*, stating:

As ordered by the Chief ALJ, ... Complainant promptly filed the United Parcel Service (UPS) Shipping Document with tracking number, and the UPS Internet Tracking Information, including the "Proof of Delivery" page, for that tracking number. *These filed documents do not include respondent's written signature.*

Show Cause Resp. 11 (emphasis added). Based on this interpretation of *Burnham*, and without explaining why the rules for service of a complaint by reliable commercial delivery service apply to its service of the Complaint by U.S. Postal Service mail, EPA seeks permission to file its Certification of Service, the U.S. Postal Service delivery confirmation receipt, an internet copy the U.S. Postal Service delivery confirmation receipt and Mr. Sykes's April 30, 2009, and February 15, 2001, letters to EPA (Show Cause Resp. Exs. R, S, T, U and V) to demonstrate proof of service. *Id.*

⁴ Under the Consolidated Rules promulgated in 1980, service of an administrative complaint could only be achieved "personally or by certified mail, return receipt requested." 40 C.F.R. § 22.05(b)(1)(i) (1980). When EPA proposed amendments to the Consolidated Rules in 1998, it added service by "any reliable commercial delivery service" to 40 C.F.R. § 22.05(b) to allow more flexible service of documents. 63 Fed. Reg. 9464, 9468 (Feb. 25, 1998). The final rule codified this distinction, using "or" to distinguish service by certified mail with return receipt requested from service by a reliable commercial delivery service. *See* 64 Fed. Reg. 40138, 40179 (July 23, 1999); codified at 40 C.F.R. § 22.5(b) (1999) (the section number format was changed in the final rule to conform to the standard numbering of the C.F.R. 64 Fed. Reg. at 40171-72).

EPA administrative decisions have accepted the reliability of commercial delivery services, such as Federal Express (FedEx) and the United Parcel Service (UPS), when serving complaints. *See, e.g., Burnham*, 2010 EPA ALJ LEXIS 25 (service of the complaint by UPS with signature required); *In re Cheerful Cesspool Serv.*, Docket No. CWA-08-2009-0017, 2011 EPA RJO LEXIS 389 (Nov. 15, 2011) (service of the complaint by FedEx with signature required).

A review of *Burnham* reveals a different set of facts. When shipping by UPS, a recipient must sign for a package, unless the shipper affirmatively releases the signature requirement.⁵ In *Burnham*, EPA did not check the “shipper release” box on the original shipping document (see [http://yosemite.epa.gov/OA/RHC/EPAAdmin.nsf/Filings/CB91CF3636B56D18852578120020F7F6/\\$File/MPRSA-01-2010-0078%20Proof%20of%20Delivery.pdf](http://yosemite.epa.gov/OA/RHC/EPAAdmin.nsf/Filings/CB91CF3636B56D18852578120020F7F6/$File/MPRSA-01-2010-0078%20Proof%20of%20Delivery.pdf)); therefore, UPS could not have released the package without a signature from the intended recipient. In addition, the online UPS tracking information pages, “Proof of Delivery” and “Track Shipments,” both indicate that someone named “ALERCON” signed for the complaint package. *Id.*⁶ Even if I was willing to treat “priority mail with delivery confirmation” as interchangeable with a “reliable commercial delivery service with delivery confirmation,” EPA administrative case law has established that the standard for service of a complaint by reliable commercial delivery service with delivery confirmation is the same as that of certified mail with return receipt requested—the signature of the intended recipient or its authorized representative is required for proper service.

EPA also argues that the correspondence signed and sent by Mr. Sykes to EPA after he received the Complaint is the functional equivalent of and should be allowed to be filed as the “return receipt” required by 40 C.F.R. §§ 22.5(b)(1)(iii) and 22.7(c). Show Cause Resp. 7, 9-11. EPA contends that, although the Consolidated Rules contemplate that a respondent’s signature on a U.S. Postal Service return receipt or from a commercial delivery service would create a signed return receipt, “there is no limitation on what constitutes ‘return receipt signed’ in the regulations.” *Id.* at 10. Without such limitation, EPA argues that the written return receipt is Mr. Sykes’ signature on his April 30, 2009, letter to EPA. *Id.*

Under 40 C.F.R. § 22.7(c), service of a complaint is complete when the return receipt is signed. Proof of service is the properly executed receipt. 40 C.F.R. § 22.5(b)(1)(iii). While these sections do not specifically define “return receipt,” this phrase has clear meaning elsewhere in the requirements for service of a complaint. Specifically, as discussed above, 40 C.F.R. § 22.5(b)(1)(i) requires service of a complaint by “certified mail *with* return receipt requested.” (emphasis added). The word “with” was added when EPA amended the Consolidated Rules in 1999 to clarify that “certified mail, return receipt requested” is one method of service, 64 Fed. Reg. at 40146; in other words, the sender must use both the certified mail and return receipt requested services available from the U.S. Postal Service for this method of service to be proper.

EPA argues that it should be allowed to mail a complaint by certified mail (or, presumably, any other type of mail service since it used priority mail with delivery confirmation) without return receipt requested and then, post hoc, submit an informal letter as the properly signed return receipt. EPA essentially suggests that it can satisfy the “return receipt requested” requirement without actually requesting a return receipt. This interpretation runs afoul of the Consolidated Rules’ plain meaning and procedural history. Mr. Sykes’ signature on his letter to EPA does not complete service of the Complaint as required by 40 C.F.R. § 22.7(c) and is not proof of service as required by 40 C.F.R. § 22.5(b)(1)(iii).

⁵ See the definition of “Shipper Release” on the UPS website: <http://www.ups.com/content/us/en/resources/ship/glossary/index.html#S>, last accessed on July 29, 2013.

⁶ The image of the recipient’s signature is no longer available on the UPS website because it is only searchable for the previous 365 days. See http://www.ups.com/WebTracking/track?loc=en_US&WT.svl=PNRO_L1, last accessed on July 29, 2013.

Finally, EPA asserts that it has filed proof of service of the Complaint, stating:

As 40 C.F.R. § 22.5(b)(1)(iii) requires the Complainant to file a proof of service with the Regional Hearing Clerk, following receipt of the Regional Judicial Officer's Order, Complainant filed Complainant's Certification of Service and written confirmation that the U.S. Postal Service delivered the Complaint to Respondent's home address on April 22, 2009.

Id. It is not clear to what RJO order EPA is referring and, even though EPA asserts that it already has filed these documents, it also seeks permission to do so in its Show Cause Response. *Id.* at 11. More importantly, as discussed above, EPA has only established proof of delivery; it has not demonstrated that it completed service nor does it have proof of service of the Complaint as required by the Consolidated Rules. The correspondence sent by Mr. Sykes to EPA may not be filed with the Regional Hearing Clerk as the properly executed return receipt providing proof of service. EPA cannot demonstrate proof of service; therefore, it cannot meet the requirements of 40 C.F.R. § 22.5(b)(1)(iii).

EPA's overarching argument is that, while delivery confirmation on its own is insufficient to demonstrate mail service, delivery confirmation taken with the letters from Mr. Sykes that acknowledge his receipt of the Complaint create an inference of service. *Id.* at 5. While this argument has certain practical appeal, service of an administrative complaint that does not satisfy the specific requirements of the Consolidated Rules constitutes inadequate service. *In re PECO Foods of Miss., Inc.*, Docket No. EPCRA-IV-93-234, 1995 EPA ALJ LEXIS 66, at *3-*4 (Oct. 24, 1995). Further, "there is no injustice in holding Complainant to strict compliance with the rules prescribing the manner of serving complaints." *In re City of Orlando, Fla.*, Docket No. CWA-04-501-9, 1999 EPA ALJ LEXIS 38, at *7 (July 7, 1999).⁷ EPA has not demonstrated that it satisfied the specific requirements for service of a complaint in the Consolidated Rules.

I reaffirm the conclusions of the Default Order. Proof of delivery is insufficient to establish proof of service without the signature of the intended recipient or its authorized representative. U.S. Postal Service priority mail with delivery confirmation is not one of the methods for service of a complaint specified in 40 C.F.R. § 22.5(b)(1)(i) and, because delivery confirmation does not require the signature of the recipient or create a signature receipt, EPA cannot provide proof of service as required by 40 C.F.R. § 22.5(b)(1)(iii) or demonstrate that it completed service in accordance with 40 C.F.R. § 22.7(c). U.S. Postal Service priority mail with delivery confirmation is not a satisfactory method of service of an administrative complaint under a due process analysis because evidence that a respondent received the complaint is insufficient to overcome the deficiencies in the method of service.

⁷ Lest EPA think that I am holding it to a higher standard than would be required for other entities involved in administrative litigation, even an ALJ has had to re-serve documents that it initially served improperly. *See In re Bio-Scientific Specialty Prods., Inc.*, I.F. & R. Docket No. 11-557-C, 1999 EPA ALJ LEXIS 61, *13 (Aug. 19, 1999) ("Although the initial Prehearing Order was improperly served by regular mail, this deficiency was cured by the proper service of the Reissued Prehearing Order ... by certified mail, return receipt requested. *See* 40 C.F.R. § 22.06"). The standards for service of amended complaints are similarly strict. *See Patrick J. Neman, d/b/a The Main Exchange*, 5 E.A.D. 450, 455 (EAB 1994) (in the context of service of an amended complaint, "strict adherence to the rules of service applying to original complaints is required").

III. Order on Motion and Prayer for Relief

In response to the Show Cause Order and in accordance with 40 C.F.R. § 22.16(a), EPA moves for leave to file Complainant's Exhibits B, C, D, F, G, H, K, O, P, Q, R, S, T, U and V to demonstrate proof of service and return receipt signed. Show Cause Resp. 12. While Mr. Sykes would not be prejudiced by allowing these documents to be filed, insofar as they are already in the record or otherwise have been provided to him, I am denying EPA's motion for the following reasons:

- Exhibits B, C, D, F and H. These documents are already in the record as exhibits in support of EPA's Motion for Default. They all predate the Complaint filing and are not relevant to the determination of whether EPA properly served the Complaint.
- Exhibits G, P and Q. These documents all predate the Complaint filing and are not relevant to the determination of whether EPA properly served the Complaint.
- Exhibit K. This document is already in the record as an exhibit in support of EPA's Motion for Default and does not demonstrate service of the Complaint by a method allowable under 40 C.F.R. § 22.5(b)(1)(i) or establish proof of service of the Complaint.
- Exhibits R, S and T. These documents are already in the record as exhibits in support of EPA's Motion for Default and, as discussed in detail above, do not demonstrate service of the Complaint by a method allowable under 40 C.F.R. § 22.5(b)(1)(i) or establish proof of service of the Complaint.
- Exhibits U and V. These documents are already in the record as exhibits in support of EPA's Motion for Default and, as discussed in detail above, are neither signed return receipts, as required by 40 C.F.R. § 22.7(c) to demonstrate completed service, nor properly executed receipts, as required by 40 C.F.R. § 22.5(b)(1)(iii) to prove service.
- Exhibit O. Because EPA's motion as to all of its other exhibits is denied, there is no need to include authentication of those documents in the record at this time.

In its Show Cause Response, EPA acknowledges that it had attempted to file Mr. Sykes' correspondence as Mr. Sykes' "answer" without his or the Presiding Officer's permission and that the correspondence did not comply with the requirements of 40 C.F.R. § 22.15. Show Cause Resp. 6. EPA seeks permission to withdraw its Filing of Answer, *id.*, and I am granting its request. This Order provides notice that EPA's Filing of Answer is hereby withdrawn from the record in this matter.

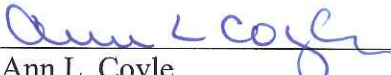
Finally, EPA has not shown that it properly served the Complaint and the arguments made and exhibits included with its Service Filing are addressed in this Order; therefore, to avoid confusion, I am ordering that EPA's Service Filing be withdrawn from the record in this matter.

IV. Conclusion

For the reasons set forth above, EPA's Filing of Certification of Service and Filing of Proof of Service of Complaint and Filing of Answer are ORDERED to be withdrawn from the record. In addition, EPA's motion for leave to file its Show Cause Response Exhibits B, C, D, F, G, H, K, O, P, Q, R, S, T, U and V to demonstrate proof of service and return receipt signed is DENIED. EPA has not properly served the Complaint in this matter.

IT IS SO ORDERED.

Date: July 30, 2013


Ann L. Coyle
Regional Judicial Officer
U.S. EPA Region 5

In the matter of: Lester Sykes
Docket No.: TSCA-05-2008-0013

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REGIONAL COUNSEL
U.S. EPA-REGION 5

2013 JUL 30 FRIDAY

CERTIFICATE OF SERVICE

I certify that I filed with the Regional Hearing Clerk the original and one copy of the foregoing **ORDER ON MOTION AND NOTICE OF WITHDRAWN "SERVICE FILING" AND "FILING OF ANSWER,"** dated July 30, 2013, by hand delivery at the following address:

LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard (E-19J)
Chicago, Illinois 60604

On the 30 day of July 2013.

By:



Darlene Weatherspoon
Administrative Program Assistant
Office of Regional Counsel

In the matter of: Lester Sykes
Docket No.: TSCA-05-2008-0013

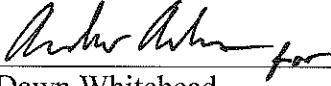
CERTIFICATE OF SERVICE

I certify that I sent the foregoing **ORDER ON MOTION AND NOTICE OF WITHDRAWN “SERVICE FILING” AND “FILING OF ANSWER,”** dated July __, 2013, to the following people in the following manner:

Copy, by EPA internal mail, to: Ann Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard (C-14J)
Chicago, Illinois 60604

Copy, by EPA internal mail, to attorney for Complainant: Mary T. McAuliffe
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard (C-14J)
Chicago, Illinois 60604

Copy, by United Parcel Service: Lester Sykes
200 East 96th Street
Chicago, Illinois 60628
Receipt no:

On the 30 day of July 2013. By: 
LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5