



Issue Date: 22 April 2009

BALCA Case No.: 2009-PER-00206

ETA Case No.: C-07101-26754

In the Matter of:

ROBERTO'S MEXICAN FOOD, INC.,

Employer,

on behalf of

SIVILINA TORRES-VAZQUEZ,

Alien.

Before:

Burke, Chapman, Vittone and Wood

Administrative Law Judges

ORDER REOPENING APPEAL

On April 7, 2009, the Board issued an Order of Dismissal in the above-captioned matter because it had no record of receipt of a Statement of Intent to Proceed from the Employer. On April 17, 2009, the Board received a "Response to Order of Dismissal" signed by Susan M. Jeannette, a legal assistant, on behalf of the Employer's lawyer, Kevin M. Tracy. Ms. Jeannette argued that Mr. Tracy's office had timely sent the Employer's Statement of Intent to Proceed by regular mail, and requested that the Board reopen the appeal.

The Board's requirement of the filing of a Statement of Intent to Proceed is only intended to filter out appeals that are moot, and is not to create a barrier for employers that truly want BALCA review and whose appeals were otherwise timely filed. Thus, given that it is clear that the Employer does want BALCA review, and that it was making efforts prior to the due date for the Statement of Intent to Proceed to notify the Board of that fact, this matter will be reopened.

This is the second appeal regarding Roberto's Mexican Food, Inc. that the Board has reopened despite lack of timely receipt of a Statement of Intent filed by Mr. Tracy's office. Although Ms. Jeannette seems to believe that Mr. Tracy's office bears no fault for the Board's lack of receipt of, or untimely receipt of, the Statements of Intent to Proceed, we have carefully reviewed the submissions in both cases, and have some concerns that the problem may be in Mr. Tracy's office.

In the instant case, we note that the Service Sheet signed by Ms. Elsie Ashcroft on March 13, 2009 does not show BALCA as one of the entities on which the document was being served. In the motion to reopen, Ms. Jeannette wrote that she could not "believe that not one of the letters did not make it to the U.S. Department of Labor/ETA, Room C-4312, FPB, or Room N-2101, FPB to 200 Constitution Ave., N.W. Washington, DC 20210 or to ALJ Certification Officer, U.S. Department of Labor/ETA, 844 North Rush Street, 12th Floor, Chicago, IL 60611. I had absolutely no trouble receiving mine at all." But none of these addresses are those of BALCA. As shown on the letterhead on all documents issued by BALCA, its address is 800 K St, NW, Suite 400N in Washington, DC. Serving the Certifying Officer, the Administrator of the Office of Foreign Labor Certification, and the Office of the Solicitor is NOT the equivalent of serving BALCA.

We also note that the service sheet for the motion to reopen (the "Response to the Order of Dismissal"), which was received by BALCA, on April 17, 2009, does have the Chief Docket Clerk for BALCA on the service sheet. Since BALCA timely received this document, but not the Statement of Intent on which it is not shown on the service sheet, the inference might be drawn that the Statement of Intent was served on all the parties to the case except the Board. We note that, to date, the Board still has not received the Statement of Intent to Proceed that was purportedly mailed on March 13, 2009.

We also note that in the prior case (2009-PER-00187), the Office of Foreign Labor Certification (OFLC) received seven copies of the Statement of Intent to Proceed, and forwarded a copy to the Board because it believed that the Board may not have been properly served. The fact the OFLC received seven copies suggests that the Employer's quality control fell down in that instance. The OFLC is only one addressee on the service list. Also, in the prior case, more than two weeks had passed between the dates of the meter stamp on the mailing envelope and the

Board's receipt of the Statement of Intent to Proceed. As noted in the order reopening that earlier appeal, a meter stamp applied by the law office is not proof of date of mailing. It is only proof of the date that the law firm applied the meter stamp. Although the document had to travel from California to Washington, DC, in the Board's experience two weeks for delivery of mail from California is excessive.

It is not possible to know for certain what happened to cause the Statements of Intent to Proceed not to be timely received by the Board in the two Roberto's Mexican Restaurant appeals. It is possible that there was a problem at the Postal Service or in the Board's docket room. But rather than assuming that the government is at fault, Mr. Tracy's office is encouraged to review its procedures for filing documents with the Board and consider whether some improvements on its end may be warranted.

Based on the foregoing, **IT IS ORDERED** that the Appeal in this matter is hereby reopened. **IT IS FURTHER ORDERED** that all parties shall have 20 days from the date of this Order Reopening Appeal to file an appellate brief or statement of position.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge