

United States Court of Appeals
for the Third Circuit

Docket No. 99-5457 (3rd Cir.)

OSHA DATA/CIH, Inc.,
Appellant
v.
United States Department of Labor,
Appellee

Appeal from
the United States District Court
for the District of New Jersey

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

Appellant, OSHA DATA/CIH, Inc. (“OSHA DATA”) incorporates by reference its Statement of the Case and Legal Argument set forth in the Brief of Appellant.

The within Reply Brief of Appellant addresses the more salient problems with the Brief For the Appellee, the United States Department of Labor (“DOL”). In the most general terms, DOL has not shown the existence of either prong of the two prong test for a stay under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552; namely, the exercise of due diligence and the existence of exceptional circumstances. Assuming DOL has made such a showing, there is no demonstration that the regulations impose on OSHA DATA the cost of soliciting submitters of information and reviewing any responses. Finally, DOL attempts to use OSHA DATA’s preparation, through counsel, of a document never used in this litigation as a basis to circumvent the otherwise undisputed fact that the records requested under the Third Count have never been supplied.

LEGAL ARGUMENT

POINT I: THE STAY GRANTED FOR THE PURPOSE OF SOLICITING EMPLOYERS WAS IMPROVIDENTLY GRANTED BECAUSE DOL NEVER ESTABLISHED EITHER ITS EXERCISE OF DUE DILIGENCE NOR THE EXISTENCE OF EXCEPTIONAL CIRCUMSTANCES.

As explained in Appellant's Brief, further proceedings on the First and Second Counts were stayed on the basis of 5 U.S.C. § 552(a)(6)(C)(i). That provision states:

If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

Even now on appeal, there is still no explanation of OSHA's complete lack of "due diligence." No reason is given why, following OSHA DATA's administrative appeal in January 1997, nothing was done with respect to its FOIA request until after this litigation was commenced and DOL filed its March 1998 motion for a stay. This factor alone should have resulted in a denial of a stay.

The purported "exceptional circumstances" is the alleged need to solicit the submitters of the information so that they could claim that the information is covered by FOIA Exemption 4 as confidential commercial information and, assuming such claims were asserted, for DOL to review and determine the merit of each claim. DOL

has not demonstrated, however, that the threshold for conducting that solicitation has been met. The threshold is met under either one of two circumstances: the submitter designated the information as “sensitive,” or DOL “has reason to believe that disclosure of the information could *reasonably be expected to cause substantial competitive harm.*” 29 C.F.R. §70.26 (d)(2) (emphasis added). DOL has never claimed that any submitter ever claimed the information to be sensitive. Had that been the case, there would be no room for any analysis as the regulations would compel soliciting the submitter (unless other exceptions applied). Thus, the issue boils down to the alternate threshold: whether DOL had reason to believe that there existed a reasonable expectation of a causal link between disclosure of the information and the occurrence of substantial competitive harm.

There has been no showing of any basis to reasonably expect any substantial competitive harm caused by disclosure.¹ Appellee does not argue that disclosure of any

¹ Appellee relies heavily on Executive Order 12,600 because it appears to set forth a lower threshold than 29 C.F.R. §70.26 by its use of the term “arguably.” While an agency may be obligated to follow an Executive Order, this fact cannot override FOIA’s requirements. Moreover, Section 1 of the Executive Order directs the implementation of regulations. In conformity with Section 1, 29 C.F.R. §70.26 was adopted. Thus, 29 C.F.R. §70.26 should be followed, not the Executive Order. Even if the Executive Order were followed, it defines “confidential commercial information” as records which “*arguably* contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552 (b)(4), *because disclosure could reasonably be expected to cause substantial competitive harm.*” Executive Order 12,600 (emphasis added). Appellee has not set forth *any* argument proposing a reasonable expectation of a causal link between disclosure and substantial competitive

item contained in a completed data collection initiative form (i.e., the records sought in the First Count) or disclosure of the LWDII or any data used to compute the LWDII (i.e., the records sought in the Second Count) could reasonably be expected to cause substantial competitive harm.

It cannot be disputed that the trigger for soliciting business submitters requires something more than simply that the information found its source in those submitters. If that were the threshold, then the triggers found in 29 C.F.R. §70.26(d)(2) would have no meaning. Rather, the regulations require the agency to look to see if the submitter designated the information sensitive (and there is no claim that any submitter made such a claim in this case). Alternatively, the agency must exercise some intelligence to form a reasonable belief of a reasonable expectation of causation between disclosure and substantial competitive harm. The second alternative threshold does not require any input from outside. Thus, for example, were the government to obtain “business sales statistics, inventories, customer lists, and manufacturing processes” from a commercial entity, no one could quibble with the agency’s decision to follow the solicitation procedure regardless of whether the submitter designated the information as sensitive. S.Rep.No.813, 89th Cong., 2d Sess. 9 (1964). Thus, the application of the trigger under 29 C.F.R. §70.26 (d)(2)(ii) requires the infusion of agency thought – and not, as here,

harm.

the abdication of thought by reliance on outside parties' conclusory opinions (namely, a trucking association, a Congressman, and unknown Goodyear representative at an unknown meeting²).

Thus, DOL has not proffered any explanation of how disclosure of this information could, in reason, cause substantial competitive harm (not simply competitive harm, but *substantial* competitive harm). Instead, it has eschewed that analysis in favor of saying that others have said harm would come. There is no attempt to reason – even on the most superficial level – as to whether there exists any basis for any of these outside opinions.

DOL cites the District Court decision in *Westinghouse Elec. Corp. v. Schlesinger*, 392 F.Supp. 1246 (E.D. Va. 1974) *aff'd* 542 F.2d 1190 (4th Cir. 1976) *cert. den. sub nom. Brown v. Westinghouse Elec. Corp.*, 431 U.S. 924 (1977) for the proposition that the subject information might be confidential because workforce data is confidential. In *Westinghouse*, at 1250, the court, based on an evidential record including expert testimony, concluded that there existed a “relation of the information contained in the documents to processes, operations and profit margins,” and therefore

² It seems implausible that Goodyear took this position since the very information sought as to Goodyear is already public. Employment figures are in its 10-K filings available at the Securities and Exchange Commission's site. See <http://www.sec.gov/Archives/edgar/data/42582/0000950152-97-002174.txt>. Goodyear's safety record is publicize at its own site, including its 1996 and 1997 LWDII rates. See <http://www.goodyear.com/us/corporate/environment/97ehs.html>.

the information fell within Exemption 4. There was no such type of evidential record here – either before the District Court or the administrative agency. On appeal, the Fourth Circuit Court of Appeals observed:

They [the reports submitted by the employers] are to include extensive information on staffing patterns, pay scales, actual and expected shifts in employment, promotions, seniority and related matters as well as forecasts of future employment, goals, time-tables and future employment projections, promotion and utilization of minorities and females. [*Id.* 542 F.2d at 1195.]

The information sought here does not approach that sought to be obtained in *Westinghouse* – neither in terms of categorical scope nor in terms of detail. The only relevance of disclosure here would be the promotion of OSHA’s mission to promote greater safety in the workplace. 29 U.S.C. § 651³. Employers with higher workplace injury rates could be identified. That information might be important to communities

³ In particular, 29 U.S.C. § 651(b) provides:

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources -

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions... .

hosting unsafe employers or it might be a factor to a potential customer of the employer. If so, the incentive would be on the employer to improve workplace safety.

In addition, businesses which consult with employers on workplace safety could contact those employers; thereby making the resources to improve workplace safety more available to employers.

Notwithstanding DOL's protested concerns, the plain fact is that the number of employees and workplace injury rates are routinely disclosed by OSHA. As shown on OSHA's own Website from March through July of 1999. Employee figures and rates are routinely publicized. Consider:

1. "The Hopwood site employs 71 workers."
<http://www.osha.gov/media/oshnews/july99/reg3-19990726.html>
2. "This commitment to enhance the safety and health program will provide a significant long-term benefit to the facility's 1050 employees." [Quoting Diane M. Braydon, director of OSHA's Syracuse, New York area office.]
<http://www.osha.gov/media/oshnews/july99/reg2-19990726.html>
3. "Approximately 250 workers are employed at the manufacturing plant"
<http://www.osha.gov/media/oshnews/july99/reg1-19990726.html>
4. "In its headquarter city of Savannah, Roger Wood Foods employs 220 workers in the production of sausages and other prepared meats."
<http://www.osha.gov/media/oshnews/july99/reg4-19990709.html>
5. "Magna-Lomason employs about 250 people at its facility on 1000 Olive St., Marianna." <http://www.osha.gov/media/oshnews/june99/reg6-19990617.html>
6. "Coastal Refining and Marketing, Inc., in Corpus Christi, TX. is a non-union petroleum refining company which employs 363 workers."
<http://www.osha.gov/media/oshnews/june99/reg6-19990610.html>
7. "P.S.I., Inc. is an engineering and consulting firm located at 905 Turnpike Street, Suite H, in Canton. Approximately 27 workers are employed at that location." <http://www.osha.gov/media/oshnews/june99/reg1-19990610a.html>
8. "OSHA cited Maine Ag, LLC, an egg grading and packing company with

- about 150 employees at its Maine site, for safety and health violations...”
<http://www.osha.gov/media/oshnews/june99/national-19990601.html>
9. “Maine Contract Farming, LLC, an egg producing agri-business, with about 150 workers at its Maine site...”
<http://www.osha.gov/media/oshnews/june99/national-19990601.html>
10. “Turner Maintenance & Services, Inc., which provides maintenance services and has 13 employees...”
<http://www.osha.gov/media/oshnews/june99/national-19990601.html>
11. “PFS Loading Services, Inc., a chicken delivery company with 20 employees...”
<http://www.osha.gov/media/oshnews/june99/national-19990601.html>
12. “Northern Transportation, LLC, a trucking company which delivers chicken feed and ships packaged eggs, with 45 employees...”
<http://www.osha.gov/media/oshnews/june99/national-19990601.html>
13. “At this plant, the company, which employs 600 workers, re-manufactures drive axles for automobiles and light trucks.”
<http://www.osha.gov/media/oshnews/june99/reg1-19990601.html>
14. “Koppers produces organic light oils including benzene, toluene and xylene and employs 2,000 nationwide and 71 workers at this site.”
<http://www.osha.gov/media/oshnews/may99/reg3-19990520.html>
15. “The company, which builds front-end frames for Honda of America, employs 460 permanent workers, in addition to 160 temporary employees, at the Columbus plant.”
<http://www.osha.gov/media/oshnews/jan99/tomasco.html>
16. “Tomasco’s lost workday injury and illness rate of 13.3 nearly doubles the 7.5 national rate for auto parts manufacturing companies.”
<http://www.osha.gov/media/oshnews/jan99/tomasco.html>
17. “Spirit Homes, Inc., which employs approximately 500 employees at its facility at 830 McNutt Road in Conway manufactures mobile homes.”
<http://www.osha.gov/media/oshnews/may99/reg6-19990518.html>
18. “Wheatland employs about 900 employees at its facility at 8200 Frazier Pike in Little Rock where the steel tubing is manufactured. “
<http://www.osha.gov/media/oshnews/may99/reg6-19990518a.html>
19. “One of the largest concrete formwork contractors in the eastern United States, SPS employs 800 workers. Sixty-eight employees worked on the Home Depot project.”
<http://www.osha.gov/media/oshnews/may99/trade-19990513.html>
20. “Fair Contracting Company employs approximately 100 workers, nine of

- whom were on the Tuscaloosa job site.”
<http://www.osha.gov/media/oshnews/may99/reg4-19990511.html>
21. “Georgia Pacific employs 180 workers at the Monticello plant and over 46,000 nationwide.”
<http://www.osha.gov/media/oshnews/may99/reg4-19990510.html>
22. “Gulf States Manufacturers employs 395 workers at the Starkville plant to produce prefabricated metal buildings.”
<http://www.osha.gov/media/oshnews/may99/reg4-19990506.html>
23. “The company, headquartered in Tarpon Springs, Fla., employs 40 workers to perform lead paint removal and to repaint industrial structures.”
<http://www.osha.gov/media/oshnews/may99/reg4-19990505.html>
24. “Approximately 58 employees work at the plant which is located at 401 Berlin Street in East Berlin.”
<http://www.osha.gov/media/oshnews/may99/reg1-19990504a.html>
25. “The company manufactures railroad cars and employs 463 at this site.”
<http://www.osha.gov/media/oshnews/may99/reg3-19990503.html>
26. “Major Construction Co. employs approximately 60 workers and was formerly known as MJP Construction Corp.”
<http://www.osha.gov/media/oshnews/apr99/trade-19990430.html>
27. “Avcon, Inc., established in April 1997, employs approximately 70 workers.”
<http://www.osha.gov/media/oshnews/apr99/reg2-19990421a.html>
28. “Trinity, a metal fabrication and rail car repair company, is a multinational corporation and employs about 500 workers in Beaumont.”
<http://www.osha.gov/media/oshnews/apr99/reg6-19990416b.html>
29. “OSHA cited the company, which manufactures oil and gas field equipment and employs about 325 workers...”
<http://www.osha.gov/media/oshnews/apr99/reg6-19990416a.html>
30. “Olshan, which employs about 400 workers nationwide, had 10 people demolishing an old power plant at 144 Landa St. in New Braunfels.”
<http://www.osha.gov/media/oshnews/apr99/reg6-19990416.html>
31. “Tosco sells retail automotive fuels, employing 380 workers at the Trainer site.” <http://www.osha.gov/media/oshnews/apr99/reg3-19990413.html>
32. “Avondale Industries has 6,600 employees in the shipyard, building ships for commercial ventures and the U.S. Navy. The employees are represented by the New Orleans Metal Trades Council, which has 11 trade unions at the shipyard.”
<http://www.osha.gov/media/oshnews/apr99/national-19990405.html>
33. “Derr Construction Co. had 18 people employed at the construction site of

the New Orleans Sports Arena adjacent to the Louisiana Superdome in downtown New Orleans.”

<http://www.osha.gov/media/oshnews/mar99/reg6-19990319.html>

34. “Metro Linen Company, which has 45 employees at its McKinney facility, was previously inspected by OSHA in 1987.”

<http://www.osha.gov/media/oshnews/mar99/reg6-19990316.html>

35. “Allen Canning Company, which employs about 200 employees at its facility at 700 South 13th Street in Van Buren, Arkansas, is a low-acid cannery, processing and canning products such as potatoes, spinach, and green beans. The company’s corporate headquarters are located in Siloam Springs, Arkansas.” <http://www.osha.gov/media/oshnews/mar99/reg6-19990308.html>

36. “According to James Borders, OSHA’s Jacksonville area director, the firm employs 85 workers in Ocala to manufacture various types of wood charcoal.”

<http://www.osha.gov/media/oshnews/mar99/royaloak19990301.html>

During the same time frame, Charles N. Jeffress, the Assistant Secretary of Labor for Occupational Safety And Health has testified before Congressional committees reporting injury rates, as well as other data directly revealing employer labor costs. On

July 22, 1999, he testified:

“For example, Mereen-Johnson Machine Co. worked with its 95 employees in Minneapolis, Minnesota to implement a program and achieve a lost workday injury rate 60 percent below the industry average. Applied Engineering, Inc., a manufacturer of specialties materials with 74 employees, located in Yankton, South Dakota, reduced its lost workday injury rate from 6.0 in 1993 to 0.0 in 1997, a success the company’s president attributes to implementing a safety and health program.”

“Between 1994 and 1998, Ryder reduced lost time cases by 50 percent, lost workdays by 58 percent and its lost workday incidence rate by 42 percent.

As a result, they [Mon Valley Petroleum in McKeesport, Pennsylvania] reduced lost workdays from 70 between 1992 and 1994 to zero from 1995 through 1998.”

http://www.osha-slc.gov/OshDoc/Testimony_data/T19990722.html.

On March 23, 1999, Mr. Jeffress testified to Congress:

“Calcon Constructors, for example, reduced its workers’ compensation rate by almost two-thirds, saving sixty-three cents on every dollar in workers’ compensation costs as a result of its partnership with OSHA. In addition, since the time Calcon initiated partnership efforts with OSHA in 1992, the company has reduced its rate of injuries and illnesses by over e i g h t y p e r c e n t . ”
[http://www.osha-slc.gov/OshDoc/Testimony_data/T19990323.html.]

He gave the same testimony to a different House subcommittee on March 17, 1999. See

http://www.osha-slc.gov/OshDoc/Testimony_data/T19990317.html.

In an article entitled “Success Stories,” OSHA not only published injury rates, but specific total work hours. Excerpts include:

1. “As a result, since the inspection, the number of total recordable injuries and illnesses [at Adam Wuest, Inc., a bedding manufacturer in Cincinnati, Ohio] dropped from 56 in 1991 to between 16 and 22 during each of the succeeding 3 years. The total number of lost-workdays due to injury decreased from 320 in 1992 to 142 in 1993, and to just 62 in 1994. The total number of sprains, strains, and cumulative trauma disorders declined from 26 in 1991 to 12 or 13 in each of the succeeding 3 years.”
2. “As a result of a detailed complaint filed by the United Paperworkers International Union, OSHA inspected the Boise Cascade Paper Company, Rumford, Maine. ... [T]o date [the company] has achieved: 4 million manhours without a lost-time accident in 1992; another 2.5 million hours without a lost-time accident in 1993; and after 1 lost-time injury in 1994, the company twice exceeded 1 million hours without a lost-time injury during 1994-1995. Boise Cascade reached its lowest recordable incident rate ever (5.10), dropping 22 percent from 1993 to 1994 and from about \$120,000 to \$86,000 in workers’ compensation costs, or a 28-percent decline for that period.”
3. “The lost-workday injury and illness cases [for New Balance Athletic Shoe, Inc.] dropped from 55 cases with 11,190 lost workdays in 1990 to 2 cases with

549 lost workdays in 1994. Workers' compensation claims declined from \$1,213,176 in 1990 to \$89,154 in 1994. As a result, the company is now saving more than \$1 million per year on worker's compensation costs by implementing an effective safety program."

4. "For example, after requesting a comprehensive safety survey, Colt Plastics, Inc., of Dayville, Connecticut, reduced its lost-workday injury rate from 14.2 to 5.0. In addition, compliance officers found only four hazards on the revisit compared with 138 identified at the initial visit."
5. "Alabama's Carter Manufacturing Company, a metal fabrication business that manufactures peanut processing equipment, reduced the total number of injuries from 21 in 1991 to 15 in 1994--a 29- percent improvement. The injuries involving lost workdays declined from 7 in 1991 to just 3 in 1994, a 57-percent reduction. And the total lost-workdays dropped from 26 to 6 for the same period--a 77-percent reduction!"
6. "KLN Steel Products in San Antonio, Texas, which manufactures fabricated structural steel items, has been an active participant in OSHA's consultation program for 3 years. To date, the company estimates to have saved more than \$50,000 in workers' compensation insurance premiums. And the lost-workday injury rate has dropped dramatically, from 14.0 to just 1.0."
7. "The lost-workday case rate at the Thrall Car Manufacturing Company in Winder, Georgia, decreased from 17.9 in 1989 when the facility began implementing VPP to 4.6 in 1992 when the plant qualified for the Star Program. And continued participation has dropped their rates even farther--from 3.5 in 1993 to 0.6 in 1994--93 percent below the industry average! Workers' compensation costs also have declined by a whopping 85 percent since preparing for the VPP--from \$1,376,000 in 1989 to \$204,000 in 1992. For 1994, results indicate a 1-year savings of \$1,107,000 by avoiding 41 lost-workdays."
8. "Mobil Chemical Company reduced its workers' compensation costs by 70 percent, or more than \$1.6 million from 1983 to 1986 during the years it was qualifying its facilities (plastics production and chemical plants) for VPP. During this same period, Mobil's recordable injuries dropped by 32 percent, and lost-workday cases declined by 39 percent. This reduction has lasted through 1994, when Mobil saved \$3,780,000 in lost-workday injury costs."
[<http://www.osha.gov/oshinfo/success.html>.]

There are numerous other examples of OSHA's open disclosure of the number of employees and injury rates to be found in OSHA's press releases published on its

Website at <http://www.osha.gov/media/oshnews>. These cover press releases, organized by month, back to June 1995. Moreover, OSHA has disclosed the specific identities of employers with high injury rates obtained from its 1997 data collection initiative. See, http://www.osha-slc.gov/html/hot_2.html (a database of 12,500 workplaces with the highest injury and illness rates can be downloaded at this site). DOL has no excuse for not providing OSHA DATA this same information regarding the 1996 data collection initiative.

All of these disclosures by DOL demonstrates that it never reasonably believed that there was any causal link between disclosure and any competitive harm – let alone *substantial* competitive harm. The defense of the First and Second Counts represents nothing more than creative lawyering some fifteen months after an agency refused to disclose its records.

Since DOL has neither shown that it acted with “due diligence” nor that “exceptional circumstances” exist which would require soliciting business submitters, no stay should have been granted.

POINT II: DOL HAS NOT SHOWN THAT THE SOLICITATION PROCESS IS A “REVIEW” COST PAYABLE BY OSHA DATA.

There is no dispute that the costs payable by a FOIA requester are based on the type of a requester. A commercial use requester, such as OSHA DATA, must pay for more of the costs than any other type of requester. This fact, however, does not equate to a commercial use requester paying for all of the costs.

The determination in the court below was that Appellant must pay for all the costs sought by DOL. Supplemental Appendix p. 1. This is all of the costs associated with soliciting all submitters to assert that information falls under Exemption 4 and reviewing the responses. DOL claims that these are “review” costs. A fair reading of all the “review” cost regulations found in Title 29 of the Code of Federal Regulations, Subtitle A, Part 70, entitled “Production or Disclosure of Information or Materials” is that “review” is limited to the initial review of the document. Review costs do not include subsequent work. This Part 70 also included the solicitation provisions at 29 C.F.R. 70.26. The cost provisions could easily have been drafted to say that review costs include the solicitation. It did not.

If the Court is inclined to affirm the stay in order to permit solicitation of business submitters, the cost of the solicitation should not be saddled on OSHA DATA.

POINT III: THE RECORDS REQUESTED IN THE THIRD COUNT WERE NEVER SUPPLIED; DOL'S USE OF A PLEADING ON A MOTION NEVER DECIDED BELOW IS INAPPROPRIATE.

DOL submits, by way of supplementing the record, a copy of a statement of material fact submitted on a summary judgment motion which the District Court refused to consider. See Order at Appellant's Brief p. 51. As of this writing, OSHA DATA has not been made aware of the outcome of DOL's motion to supplement.

In that statement of material fact, it was indeed stated that the records sought in the FOIA request (which was the basis for the Third Count) were provided. This was in error. The position, never relied on by the District Court, was abandoned and not submitted on the summary judgment motion ultimately considered and decided by the District Court (and which led to the final Order of May 10, 1999). Appellant's Brief p. 52.

As requested, the records sought were those records in the IMIS derived file of OSHA inspections through the date of creation and limited to the prior 30 days. Appendix p. 46. As a factual matter, no party contends that any records were provided which complied with the request as framed⁴. DOL would like to rely on a statement

⁴ Indeed, subsequent to this litigation, OSHA wrote that it was in fact withholding the newest 30 day of material. DOL should not contend otherwise. See copy of December 4, 1998 Letter attached.

made on another motion which was not relied on by the District Court and which, upon further review of the specific FOIA request, resulted in a change of OSHA DATA's legal position. OSHA DATA should not be bound by that statement which is plainly inconsistent with both the language of the FOIA request and the undisputed fact that OSHA withheld the newest 30 days of data without any basis under FOIA.

Therefore, the dismissal of the Third Count as moot was error and should be reversed.

CONCLUSION

For the foregoing reasons, Appellant, OSHA DATA/CIH, Inc., respectfully requests that the Orders dismissing the First, Second and Third Counts, staying the proceedings and affirming the stay of proceedings be reversed and remanded with instructions to enter judgment on the First, Second and Third Counts in favor of Appellant.

Respectfully submitted,

Dated: December 15, 1999

PHILIP D. STERN

CERTIFICATION OF SERVICE

I, Philip D. Stern, certify as follows:

9. I am the attorney representing the Plaintiff-Appellant in the civil action OSHA DATA/CIH, Inc., Appellant v. United States Department of Labor, Appellee, designated by Docket No. 99-5457.
10. The within Reply Brief of Appellant were served on counsel for Appellee by United Parcel Service next day delivery on December 16, 1999 being sent on December 15, 1999

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: December 15, 1999

PHILIP D. STERN