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| <b>FIREMAN'S FUND AGRIBUSINESS,</b> | ) | <b>AGBCA No . 2004-189-F</b> |
| <b>(Wilwand Compliance)</b>         | ) |                              |
|                                     | ) |                              |
| Appellant                           | ) |                              |
|                                     | ) |                              |
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**BOARD RULING ON JURISDICTION**

October 14, 2004

**Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.**

**Opinion for the Board by Administrative Judge WESTBROOK. Separate concurring opinion by Administrative Judge VERGILIO.**

This appeal arises out of a Standard Reinsurance Agreement (SRA) between Fireman's Fund Agribusiness (Fireman's Fund) and the Federal Crop Insurance Corporation (FCIC) for the 2000 crop year. On March 12, 2004, the Risk Management Agency (RMA) Deputy Administrator for Compliance issued a Final Administrative Determination denying Fireman's Fund's request for reconsideration of a disputed compliance office determination. RMA is an agency of the U. S. Department of Agriculture (USDA) with decision-making authority in FCIC matters. Fireman's Fund received the determination March 17, 2004. The appeal was received at the Board July 13, 2004, 118 days after Fireman's Fund's receipt of the determination. Because appeals of disputed FCIC determinations must be filed no later than 90 days after receipt of the determination, the parties were asked to file jurisdictional briefs. FCIC filed a Motion to Dismiss with Brief in Support

of Motion to Dismiss. Fireman's Fund filed a Jurisdictional Brief.

**FINDINGS OF FACT**

1. Board jurisdiction to decide appeals of final administrative determinations of the FCIC derives from regulations at 7 CFR § 24.4(b) and 400 CFR § 400.169. Such appeals do not arise under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended.

2. Board Rule 1(a) specifies: "Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a Contracting Officer's decision."

3. Regulations provide that a notice of appeal under 7 CFR § 24.4(a) shall be filed within 90 days from the date of receipt of a contracting officer's decision and 7 CFR § 24.4(b) shall be filed within 90 days from the date of receipt of a final determination of FCIC. Regulations also provide that the time for filing a notice of appeal shall not be extended by the Board. (7 CFR § 24.5.) Regulations direct that all correspondence and all documents to be filed with the Board should be addressed to the Board of Contract Appeals, United States Department of Agriculture, Washington D.C. 20250-0600 (7 CFR § 24.6). Board regulations provide a definition for the word, "days", and state in part that if mailing is required, the date of the postmark shall be treated as the date action was taken (7 CFR § 24.9).

4. On November 15, 2001, the Board issued an Order, signed by the Chair, subject: Receipt of Materials at the Board, reading as follows:

For several weeks, the Board has received no mail from the Postal Service because of screening procedures in place at this Department. Also, materials sent by private services often have been delayed in delivery to the Board because of screening procedures. The Board issues this order to advise parties of appeals or other materials sent by a method which reasonably would have permitted timely delivery, but for these delays, will not be deemed untimely filed.

5. The Order was updated on March 25, 2004, and posted on the Board's website. The updated version reads as follows:

From time to time, the Board has received delayed mail from the Postal Service because of screening procedures in place at this Department. Also, materials sent by private services have at times been delayed in delivery to the Board because of screening procedures. The Board issues this order to advise parties that notices of appeals, and other materials sent by a method which reasonably would have permitted timely delivery, but for the delays, will not be deemed untimely filed.

6. The Final Administrative Determination from which this appeal is taken was dated March 12,

2004. Fireman's Fund was advised that if it disagreed with the determination, it could appeal in accordance with 7 CFR § 400.169. The 90-day appeal period was cited and the Board's address was shown as "United States Department of Agriculture Board of Contract Appeals, United States Department of Agriculture, Washington D.C. 20250-0600." Fireman's Fund received RMA's Final Administrative Determination on March 17, 2004 (Affidavit of Alan R. Peterson; FCIC's Brief in Support of Motion to Dismiss). The 90-day period in which to appeal ended on June 15, 2004. The Notice of Appeal was received at the Board July 13, 2004.

7. Alan R. Peterson, an employee of Fireman's Fund, drafted the Notice of Appeal on June 9, 2004, addressing it to "United States Department of Agriculture, Board of Contract Appeals, 1400 Independence Avenue, S.W., Washington D.C. 20250." He forwarded the Notice of Appeal to the Board by depositing it with United Parcel Service (UPS) via UPS Next Day Air on the same day. UPS records indicate that the Notice was in Washington on the next day, June 10, 2004. However, it was not delivered to the Board. Rather, it was returned to Fireman's Fund on or about June 16, 2004, with the notation "suite number needed." (Affidavit of Alan R. Peterson and Exhibit 3 thereto).

8. In his affidavit, Mr. Peterson stated that he chose an overnight delivery service because reinsured companies had been instructed by the USDA to avoid using the U. S. Mail when forwarding "time-sensitive mail." The referenced instruction was contained in an Informational Memorandum from RMA dated January 25, 2002. The full text of the memorandum, signed by the Acting Administrator of RMA, is as follows:

On January 17, 2002, the Risk Management Agency (RMA) announced on our web page that, "All incoming first-class mail to RMA received between October 1 and November 14, 2001, beginning with zip codes 202-205 has been destroyed due to possible anthrax contamination. If you sent us first-class mail during that time, please resend it. Time-sensitive mail should be sent using other mail delivery services or by fax or e-mail. First-class mail is being delayed a month or more because it must be irradiated off-site."

I am sending this Informational Memorandum today to let you know that any time-sensitive correspondence addressed to the RMA Administrator's Office can also be faxed to 202-690-2818 to ensure that I am timely made aware of any concerns you may have. I became aware of the impact of mail delay on January 23, 2002, when we received a first-class letter dated December 5, 2001, on a subject of importance to a reinsured company. I regret any inconvenience this situation may have caused you and I thank you.

(Peterson Affidavit and Exhibit 5 thereto.)

9. The Notice of Appeal, received at the Board July 13, 2004, was dated June 9, 2004, and contained the following handwritten notation: "Please accept this as timely submitted. UPS returned for lack of a suite number, we have never put a suite number on previous appeals and none have been returned. Alan R. Peterson 6-21-04." According to Mr. Peterson's affidavit, he returned the Notice of

Appeal to the Board June 21, 2004. (Peterson Affidavit and Exhibit 4 thereto.) The record contains no evidence regarding the passage of time between June 21, 2004, and receipt of the Notice of Appeal at the Board on July 13, 2004.

### DISCUSSION

FCIC moves to dismiss pursuant to Board Rule 5 on the ground that Fireman's Fund failed to appeal FCIC's final administrative determination within 90 days of receipt.

Appellant argues that it complied with the Board's rules with respect to the filing of its appeal because it "issued" its notice of appeal June 9, 2004, and the notice was in Washington the following day. Appellant compares the address placed on its notice of appeal and argues that it did more than required by the Board's rules and regulations. It explained that it utilized an overnight delivery service because reinsured companies had been instructed by RMA to avoid using the U. S. Mail when forwarding "time-sensitive" mail. Fireman's Fund stresses that this is not a CDA appeal and an appellant filing untimely does not have an alternate remedy as is available to contractors under the CDA, which can appeal to the U. S. Court of Federal Claims within one year of receipt of an unfavorable Contracting Officer's (CO's) decision. The final argument is that equity favors a finding of jurisdiction as Fireman's Fund had used the exact mode and method of delivery in previous appeals without a problem.

To consider the question of timeliness, our first consideration is to consult our rules. Rule 1(a) provides for an appeal to be "mailed or otherwise furnished" to the Board within the 90-day period. The rule refers to receipt of a CO's decision, denoting a CDA appeal, but otherwise draws no distinction between CDA and non-CDA appeals (Finding of Fact (FF) 2). No other rule specifically addresses manner, method or timing of filing non-CDA appeals. Further, 7 CFR § 24.5 describes the filing of appeals (those under 7 CFR § 24.4(a)) and FCIC appeals (those under 7 CFR § 24.4(b)) in identical language except for the terms "contracting officers decision" and "Corporation's final determination." (FF 3.)

Prior to the Board's assumption of jurisdiction to adjudicate FCIC appeals, it was well established that timeliness for a CDA appeal is determined by the date of mailing of an appeal. Mailing is defined as delivery of a properly addressed appeal with adequate postage affixed into the custody of the United States Postal Service (USPS). Kenneth Dolen, AGBCA No. 94-152-1, 94-2 BCA ¶ 26,734, Doris Bookout, AGBCA No. 89-147-1, 89-1 BCA ¶ 21,570. The use of a private delivery service has not been afforded the same status as use of USPS. Unless an appellant sends the Notice of Appeal through the USPS, the Board considers the date of receipt as the filing date. Golden West Environmental Services, AGBCA No. 93-232-1, 94-1 BCA ¶ 26,551; Leixab, S.A., ASBCA No. 51581, 98-2 BCA ¶ 29,962; Kirchhan Indus. Inc., ASBCA No. 39260, 90-1 BCA ¶ 22,340.

Appellant's argument that decisions in CDA appeals are not controlling in non-CDA cases, such as the instant FCIC appeal, is correct. We have consistently recognized that FCIC appeals are not governed by the CDA. To the extent our decisions reference the CDA statutory scheme, they use that

scheme as guidance and not as controlling authority. Nonetheless, the Board has in the past adopted the CDA model for use in FCIC appeals on some issues. Rural Community Insurance Company, Inc., AGBCA No. 2000-154-F, 02-1 BCA ¶ 31,761. Moreover, as to whether the Board's Rules apply to appeals arising under FCIC SRAs and compliance reviews, the Board has acknowledged that it formerly had two sets of rules; one for CDA appeals and the other for non-statutory appeals. In the same final rule in which the Board published 7 CFR § 24.4(b), adding to its jurisdiction appeals arising under SRAs and compliance reviews, the Board eliminated the rules of procedure for non-statutory appeals. The Board made one set of rules applicable to all proceedings before the Board. 60 Fed. Reg. 56,206 (1995). Rain & Hail Insurance Service, Inc., et al., AGBCA No. 97-173-F, et al., 97-2 ¶ 29,120.

To avoid a finding of lack of jurisdiction, an appellant in either a CDA or an FCIC case must show defective Government action, resulting in a failure to trigger the start of an appeal period. In this case, we find no such action which would serve as a basis for circumventing the rule. Fireman's Fund cites Northeast Utilities Service Co., 1987 WL 41275 (EBCA No. 383-1-87) (May 26, 1987), a decision lacking precedential value here, where an otherwise untimely appeal was held timely because the CO's decision merely directed the contractor to an article in the contract rather than specifically informing it that all rights would be cut off unless it appealed the decision to the Board within 90 days. The final agency determination in this case did not contain such a defect. The appeal rights notification was entirely consistent with regulations. (FF 3, 6.)

Here the record demonstrates no Government action causing late delivery. Instead, the late delivery appears to be due to the failure of UPS to secure delivery. (FF 7.) The matter of late delivery by a private service (such as UPS) has been addressed in various CDA appeals. In Dan Nelson, AGBCA No. 97-130-1, 97-1, BCA ¶ 28,967, cited by Appellant, the Board found untimely an appeal sent by Federal Express to the CO and not forwarded to the Board. Appellant contends it lacks precedential value because it is a CDA case. Notwithstanding the fact that the instant appeal is not a CDA case, Dan Nelson is nonetheless instructive for affirming the principle that delivery to a private carrier should not be considered the same as delivery to the USPS for the purpose of timely filing. As demonstrated supra, the Board has consistently held that filing by a private delivery service is tantamount to hand-delivery, which is effective only upon receipt. C & S Managing Service, AGBCA No. 96-184-1, 97-1 BCA ¶ 28,625.

Appellant's case is not strengthened by RMA's January 25, 2002 Informational Bulletin instructing companies to resend mail sent between October 1 and November 14, 2001, which had been destroyed in the wake of the anthrax attacks of late 2001. Recipients of that Memorandum were advised that time-sensitive mail being resent should be sent using other mail delivery services or by fax or e-mail. RMA's Memorandum did not purport to apply to correspondence with the Board, nor was RMA authorized to affect a change to the directions in the Board's Rules. (FF 8.)

The Board has made a concession to the mail delays caused by screening delays. The Board's Order of November 15, 2001 provided that where USDA screening of material causes delay, such material will be treated as timely. Thereafter, the Order was reissued without change in directions pertaining to delay. (FF 4, 5.) The delay in the instant case, however, resulted from a delivery decision made by

Appellant's chosen carrier on a single occasion. The record does not demonstrate that the delay arose from USDA's screening procedures. The delay thus does not fall within the exception of the Board's Order. (FF 7.)

We have considered Appellant's arguments regarding the alternate remedy accorded contractors under the CDA and the fact it had previously submitted appeals via UPS without incident. Those arguments do not alter the outcome mandated by rules and regulations.

**RULING**

The Motion to dismiss is granted. The appeal is dismissed for lack of jurisdiction.

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**ANNE W. WESTBROOK**  
Administrative Judge

**Concurring:**

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**HOWARD A. POLLACK**  
Administrative Judge

**Concurring opinion by Administrative Judge VERGILIO.**

I concur with the result of the majority; this appeal was untimely filed. I write separately because I arrive at the result utilizing a different rationale.

Fireman's Fund Agribusiness files this appeal of a compliance matter, relying upon regulation, 7 CFR 24.4(b) and 400.169, not the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (CDA). Regulation dictates that a notice of appeal of a final administrative determination with respect to a compliance matter involving the Federal Crop Insurance Corporation (FCIC) and a Standard Reinsurance Agreement (SRA) may be submitted to this Board. 7 CFR 400.169(d). Board regulations specify that such a notice of appeal shall be filed within 90 days from the date of receipt of the final administrative determination; the regulations also specify that the time for filing a notice of appeal shall not be extended by the Board. 7 CFR 24.5.

Board Rule 1 states how and when an appeal is to be taken: "Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision." (Rule 1(a), 7 CFR 24.21). Board regulations define "contracting officer" to mean "any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto and includes the authorized representative of the contracting officer, acting within the limits of his/her authority." 7 CFR 24.9. Although the Deputy Administrator of Compliance may not be a "contracting officer" within the meaning of that term as often used in federal procurement, he does fit the definition quoted above. 7 CFR 400.169(b) ("The Deputy Administrator of Compliance will render the final administrative determination of the Corporation with respect to these issues."). An insurance company's receipt of a final administration determination triggers the 90-day appeal period.

Board Rule 16, Service of Papers Other Than Subpoenas, identifies the acceptable methods for filing material with the Board (as well as with a party):

(a) *Service of Papers.* Papers shall be served personally or by certified mail, return receipt requested, addressed to the Board or to the party upon whom service is to be made. Parties shall furnish three copies of Complaints directly to the Board. Parties shall furnish two copies of Answers and briefs directly with the Board, with one copy being served on the opposing party and the Board's copies containing a notation to that effect. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in Rule 21.

(b) *Facsimile Transmissions.* Facsimile transmissions to the Board and the parties are permitted. Parties are expected to submit their facsimile machine numbers with their filings. The Board's facsimile number is (202) 720-3059. The filing of a document by facsimile transmission occurs upon receipt by the Board of the entire printed submission. Parties are specifically cautioned that deadlines for the filing of appeals will not be extended merely because the Board's facsimile machine is busy or

otherwise unavailable at the time the filing is due. A document submitted by facsimile should be followed by a copy of the document sent by U.S. Postal Service or other delivery method.

On March 17, 2004, the insurance company received the underlying final administrative determination. The determination notifies the insurance company of its appeal rights, including a reference to regulation, and the address and telephone number of the Board; it also states that any appeal must be filed within 90 days of the letter. On June 9, 2004, the insurance company provided to the UPS, for Next Day Air delivery, a notice of appeal addressed to this Board. The notice of appeal did not arrive at the Board; it was returned to the sender with the notation "suite number needed, not delivered." The Board received a notice of appeal on July 13, 2004, with a signed and dated (June 21, 2004), hand-written notation reading: "Please accept this as timely submitted. UPS returned for lack of a suite number, we have never put a suite number on previous appeals and none have been returned."

The insurance company asserts that it timely filed its notice of appeal by submitting it to the UPS in sufficient time to permit delivery no later than June 15 (the ninetieth day after its receipt of the determination). The insurance company misconstrues the Board rules. The insurance company did not utilize the mail. It furnished the notice of appeal to UPS so as to permit timely delivery; however, that is not the test. When the mail is not used, the notice of appeal must be furnished to (that is, received by) the Board within the allowed period. Because the insurance company neither mailed nor furnished the notice of appeal within the time frame, the appeal is untimely.

Contrary to the contention of the insurance company (Brief at 4), it did not mail the notice of appeal to the Board. Use of UPS, or any private delivery service, does not constitute mailing. Pursuant to Rule 16, mailing is accomplished by use of certified mail; otherwise service is accomplished by personal delivery or use of facsimile transmission.<sup>1</sup> Board decisions have interpreted the rule regarding "mailed or otherwise furnished." To be mailed requires use of the United States Postal Service. To be "otherwise furnished" encompasses all other means of having the notice received at the Board. C&S Managing Service, AGBCA No. 96-184-1, 97-1 BCA ¶ 28,625 (this Board adopted the position of the GSBCA: "Filing by a private delivery service is tantamount to hand-delivery; hand-delivery is effective only upon receipt"); Dan Nelson, AGBCA No. 97-130-1, 97-1 BCA

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<sup>1</sup> Although I favor a more explicit, self-contained, and enlightening rule, such as the GSBCA rule applicable to non-CDA transportation rate cases ("A claim is filed when it is received by the Office of the Clerk of the Board during the Board's working hours. Claims should be sent to the Board at the following address: . . . . The Board's working hours are 8:00 a.m. to 4:30 p.m., Eastern Time, on each day other than a Saturday, Sunday, or federal holiday." GSBCA Rule 202 (48 CFR 6103.2)) or that applicable to CDA cases ("A notice of appeal . . . is filed upon the earlier of (A) its receipt by the Office of the Clerk of the Board or (B) if mailed, the date on which it is mailed." GSBCA Rule 101 (b)(5) (48 CFR 6101.1)), a reader of this Board's rules cannot reasonably conclude that depositing a notice of appeal with UPS will result in a timely filing of the appeal.

¶ 28,967 (“Finally, we do not accept Appellant’s assertion that delivery to the Federal Express should be considered the same as delivery to the U. S. Postal Service for purposes of timely filing”). Furnishing a notice of appeal to UPS is not equivalent to furnishing the notice to the Board.

Unavailing is the explanation of the insurance company that it opted to utilize the overnight delivery service because the USDA had provided instructions to avoid using the U. S. Mail when forwarding time-sensitive mail (Brief at 5). The insurance company relies upon an informational memorandum dated January 25, 2002, issued by the Acting Administrator for RMA, Farm and Foreign Agricultural Services and, as referenced therein, an RMA web page announcement of January 17, 2002, that time-sensitive mail should be sent using other mail delivery services (i.e., other than first class mail) or by fax or e-mail. The memorandum addresses incoming mail to RMA, not to this Board. It is not reasonable to rely simply on such a memorandum that is in excess of two years old and that is issued by other than this Board. The insurance company does not reference or rely upon Board orders (posted on the Board website, and dated November 15, 2001, and March 25, 2004) that address delays because of screening procedures. The orders specify that notices of appeal sent by a method which reasonably would have permitted timely delivery, but for screening delays, will not be deemed untimely filed. However, the record does not establish that screening delays occurred. Rather, the stated basis for non-delivery is the lack of a suite number; screening procedures did not delay delivery. The filing here was not timely, even when the memorandum and orders are considered.

The insurance company has not provided a convincing basis to differentiate what constitutes filing or use of the mail for CDA and non-CDA cases. To adopt such a position, with differing interpretations of the same language, would contravene what the Board wrote with the publication and implementation of the existing rules: “The intended effect of these changes is to provide one streamlined set of rules of procedure applicable to all appeals within the AGBCA’s jurisdiction.” 60 Fed. Reg. 56,207 (1995). The insurance company suggests that a different rule should apply in this non-CDA case because a party in a CDA case may elect to utilize a different forum. (Brief at 6.) The existence or not of an alternative forum does not alter the interpretation of the Board’s rules. A filing is timely or not based upon the rules and facts. The suggested sympathy is misplaced. Lacking an alternative forum, one could take actions so as to ensure that the notice of appeal is timely submitted and received.

Further, the insurance company contends that equity and justice dictate that the appeal be permitted to proceed because the insurance company successfully has utilized the same mode and method of delivery in the past, with prompt delivery and no delay (Brief at 6). These past actions do not alter the interpretation of the rules or the outcome in this case. The insurance company opted not to utilize the Postal Service or certified mail or a facsimile transmission. The Board may not extend the time for filing a notice of appeal.

The use of UPS by the insurance company for submission of its notice of appeal is a form of personal service. Such service is not accomplished until the Board has been served; that is, material is furnished to the Board at the time the Board receives the materials. Accordingly, I conclude that the insurance company did not mail or other furnish its notice of appeal to the Board within 90 days of receipt of the final administrative determination. Without a timely notice of appeal, the Board must

dismiss this matter for lack of jurisdiction.

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**JOSEPH A. VERGILIO**

Administrative Judge

**Issued at Washington, D.C.**

**October 14, 2004**