IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KREIDER DAIRY FARMS, INC.,	:	
Plaintiff,	:	
	:	
v.	:	**Civil No. 98-518**
	:	
DAN GLICKMAN, Secretary of	:	
the United States Department	:	
of Agriculture,	:	
Defendant.	:	

M E M O R A N D U M

Cahn, C.J. August _____, 1998

This case is back before the court following a remand. Currently pending is the Secretary's motion to dismiss Kreider's Amended Complaint. For the reasons that follow, the court will deny the motion. The court will also vacate the Judicial Officer's ("JO") January 12, 1998, and February 20, 1998, decisions (respectively, the "January 12 decision" and the "February 20 decision") and remand this case to the Secretary for a decision on the merits of Kreider's appeal of the Administrative Law Judge's ("ALJ") August 12, 1997, decision (the "August 12 decision").

I. BACKGROUND

The background of this case prior to the remand is set forth in Kreider Dairy Farms, Inc. v. Glickman, No. CIV. A. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996) ("Kreider I") (denying

motions for summary judgment and remanding).[1] In Kreider I,

> Kreider challenge[d] the ruling of the [JO] who affirmed the decision of the Market Administrator ("MA") for the New York-New Jersey Milk Marketing Order ("Order 2") to regulate Kreider as a handler under Order 2 rather than designating Kreider as a producer-handler exempt from paying certain fees for sales of fluid milk.

Id. at *1 (footnote omitted). The court held that

> neither the plain language of Order 2 nor its promulgation history supports a finding that Kreider should be denied producer-handler status without further factual findings that Kreider is 'riding the pool' in this factual context. Thus, the refusal to designate Kreider as a producer-handler appears arbitrary on the record before this court.

Id. at *11. Therefore, the court remanded this case to the Secretary and directed the Secretary "to hold such further proceedings necessary to determine whether in fact Kreider is 'riding the pool.'" Id. at *9.

On remand and following an evidentiary hearing, the ALJ issued the August 12 decision, in which he found, inter alia, that

> Kreider was 'riding the pool' and receiving an unearned economic benefit. Accordingly, the decision of the Market Administrator to deny Kreider producer-handler status must be upheld and the petition [challenging the MA's decision] must be denied.

In re: Kreider Dairy Farms, Inc., No. 94 AMA M-1-2, at 10 (U.S.D.A. ALJ 8/12/97 Decision & Order) (Admin. R., Tab 55). The ALJ therefore dismissed Kreider's petition.

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[1] Unless otherwise indicated, the court uses the same abbreviated terms used in Kreider I.

At the end of the August 12 decision, the ALJ notified the parties that the decision "shall become final and effective without further procedure thirty-five (35) days after service upon the parties unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service." Id.; see Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted From Marketing Orders ("Rules of Practice"), 7 C.F.R. §§ 900.50-71, at 900.64(c), 900.65(a) (1998) (same). The August 12 decision was served on Kreider on August 15, 1997.

On September 12, 1997, Kreider moved by telephone for an extension of time to file its appeal of the ALJ's decision, and the JO granted an extension until September 19, 1997. See In re: Kreider Dairy Farms, Inc., No. 94 AMA M-1-2 (U.S.D.A. JO 9/12/97 Informal Order) (Admin. R., Tab 56). On September 19, 1997, a Friday, Kreider gave its appeal petition (the "Appeal Petition") to Federal Express for delivery to the hearing clerk on the next business day. The Office of the Hearing Clerk stamped the Appeal Petition as received on September 25, 1997. (See Admin. R., Tab 57.)

Upon consideration of the Appeal Petition, the JO issued the January 12 decision, in which he noted that § 900.69(d) of the Rules of Practice provides, in relevant part:

> Any document or paper . . . required or authorized under these rules to be filed shall be deemed to have been filed

> when it is postmarked, or when it is received by the hearing clerk.

7 C.F.R. § 900.69(d). The JO focused on the term "postmarked," which the applicable regulations do not define. See In re: Kreider Dairy Farms, Inc., No. 94 AMA M-1-2, 1998 WL 25746, at *7 (U.S.D.A. JO Jan. 12, 1998); 7 C.F.R. §§ 1.132, 900.51 (1998) (definitions). The JO noted that several dictionaries define "postmark" as a mark placed on pieces of mail by the post office, and that some courts have adopted similar definitions. See id. & n.7 (citing, for example, Black's Law Dictionary 1167 (6th ed. 1990) and United States v. Maude, 481 F.2d 1062, 1065-66 (D.C. Cir. 1973) ("It is commonly known that a postmark is the official mark which the Post Office Department places on mail.")). In addition, the JO cited one decision by the Secretary suggesting such a definition. See id. at *7-8 (citing In re: Sequoia Orange Co., No. 90 AMA F&V 908-6, 56 Agric. Dec. 1632, 1992 WL 139549, at *1 (U.S.D.A. JO 1/3/92 Remand Order) (ruling that Pitney Bowes, Inc., meter stamp, which stamping individual can manipulate to show any desired date, is not a "postal department cancellation mark")).

In light of the foregoing definitions of "postmark," the JO ruled that because the Federal Express label (also known as an "airbill") accompanying the Appeal Petition does not contain the mark of the U.S. Postal Service, the Appeal Petition is not postmarked for purposes of § 900.69(d). See id. at *8.

Therefore, pursuant to 7 C.F.R. § 900.69(d), the JO deemed the Appeal Petition filed on the date the hearing clerk received it, September 25, 1997, which was six days after the September 19 deadline. See id. As a result, the JO found that the Appeal Petition was not timely, and that he lacked jurisdiction over the Appeal Petition. See id. In addition, the JO found that he lacked jurisdiction to further extend the time for filing the Appeal Petition because the August 12 decision had become final on September 20, 1997, thirty-five days after service on Kreider. See id. Accordingly, the JO denied the Appeal Petition without reaching the merits, and noted that the merits

> should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for the purpose of judicial review except a final decision issued by the Secretary[2] pursuant to an appeal [of the ALJ's decision] by a party to the proceeding."

Id. at *9 (citing 7 C.F.R. § 900.64(c)).

On January 27, 1998, Kreider filed a Petition for Reconsideration, which the JO denied in the February 20 decision. See In re: Kreider Dairy Farms, Inc., No. 94 AMA M-1-2, 1998 WL 92814 (U.S.D.A. JO Feb. 20, 1998). The JO again found that the Appeal Petition was not timely, citing the reasons set forth in the January 12 decision. The JO acknowledged that the Appeal Petition would have been timely if, on September 19, 1997,

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[2] Pursuant to 7 C.F.R. § 2.35 (1998), the Secretary delegated to a JO the authority to consider appeals of ALJ decisions and issue final agency decisions.

Kreider had sent it to the hearing clerk via the U.S. Postal Service[3] instead of Federal Express, but found this fact irrelevant. In addition, the JO distinguished Edmond v. United States Postal Service, 727 F. Supp. 7, 11 (D.D.C. 1989) (finding service by Federal Express to be service "by mail" for purposes of serving pleadings pursuant to Fed. R. Civ. P. 5(b)), rev'd in part on other grounds, 949 F.2d 415 (D.C. Cir. 1991), because the Federal Rules of Civil Procedure do not govern the administrative proceedings on remand in the instant case. The JO again declined to consider the merits of the Appeal Petition.

On February 2, 1998, while Kreider's Petition for Reconsideration was pending before the JO, Kreider filed a Complaint After Remand ("Complaint") in this court, seeking judicial review of the Secretary's decision to deny Kreider producer-handler status. (See Compl. at ¶ 28.) Kreider requests a declaration that it is exempt from Order 2, and a refund, with interest, of all of its payments to the Order 2 MA to date. (See id. at 7.) On April 3, 1998, after the JO denied the Petition for Reconsideration, Kreider filed a First Amended Complaint After Remand ("Amended Complaint") which: (1) adds a count challenging the JO's January 12 and February 20 decisions as

[3] Under this scenario, Kreider presumably would have secured a postmark dated September 19, 1997, and pursuant to § 900.69(d), the JO would deem the Appeal Petition filed on this date.

"arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law," (Am. Compl. ¶ 29); and (2) specifies that Kreider seeks the court's review of the ALJ's August 12 decision to deny Kreider producer-handler status, (see id. ¶ 30). Kreider alleges that as of the date it filed the Amended Complaint, the total payments it has made to the Order 2 MA exceed $800,000. (See id. ¶ 4.)

On April 7, 1998, the Secretary filed a motion to dismiss the Complaint,[4] unaware that Kreider filed the Amended Complaint four days earlier. On April 21, 1998, the Secretary filed a motion to dismiss the Amended Complaint. On May 29, 1998, Kreider filed a response, to which the Secretary filed a reply on June 16, 1998.

II. DISCUSSION

The Secretary makes three arguments in support of the motion to dismiss the Amended Complaint. As explained below, the court rejects the first and second arguments, but finds the third argument persuasive.

A. Jurisdiction to Review the JO's January 12 and February 20 Decisions

The Secretary first argues that the court lacks jurisdiction to review the JO's January 12 and February 20 decisions because Kreider appeals the decisions for the first time in the Amended

[4] The court will deny the motion as moot.

Complaint, which Kreider did not file within twenty days of the decisions as required by 7 U.S.C.A. § 608c(15)(B)(West 1980).

Section 608c of title 7 of the U.S. Code provides, in relevant part:

> **Petition by handler for modification of order or exemption; court review of ruling of Secretary**
>
> (15) . . .
> (B) The District Courts of the United States . . . are vested with jurisdiction in equity to review such ruling [of the Secretary on a petition for modification of order or exemption], provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling.

(Emphasis added.) The Secretary correctly notes that Kreider appeals the January 12 and February 20 decisions for the first time in the Amended Complaint, which Kreider filed on April 3, 1998, after the twenty-day period set forth in § 608c(15)(B) expired with respect to each decision. Given the statutory language and the above facts, the Secretary's argument appears to have merit.

Closer analysis, however, reveals that it does not. Rule 15(c) of the Federal Rules of Civil Procedure provides that

> [a]n amendment of a pleading relates back to the date of the original pleading when
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> * * *
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

(Emphasis added.) The Complaint makes explicit reference to the January 12 decision, (see Compl. ¶ 26), and the Petition for

Reconsideration which resulted in the February 20 decision, (see Compl. ¶ 27). Therefore, the Complaint "set forth or attempted to set forth" the occurrences that are the subject of the appeals of the January 12 and February 20 decisions raised in the Amended Complaint. Accordingly, Kreider satisfies the requirements of Rule 15(c)(2), and the Amended Complaint relates back to the filing date of the Complaint, February 2, 1998.

Treating the Amended Complaint as filed on February 2, 1998, the court finds that the appeal of the January 12 decision is timely. Although February 1, 1998, was the twentieth and final day to file a timely appeal of the January 12 decision pursuant to 7 U.S.C. § 608c(15)(B), February 1, 1998, was a Sunday. Therefore, the twenty-day period was automatically extended until February 2, 1998. See Fed. R. Civ. P. 6(a). Accordingly, the court has jurisdiction to review the January 12 decision.

The court also finds that the appeal of the February 20 decision is timely. Although the February 2, 1998, filing date of the Amended Complaint precedes the February 20 decision itself, the court of appeals has held that, "[i]n the civil context, . . . where only property interests are implicated, a premature appeal becomes operative upon entry of the final order and in the absence of a showing of prejudice to the other party." United States v. Hashagen, 816 F.2d 899, 905 (3d Cir. 1987) (in banc) (citing Richerson v. Jones, 551 F.2d 918, 922 (3d Cir.

1977)). Here, the Secretary suffers no prejudice from Kreider's premature appeal of the February 20 decision.[5] The court therefore regards the appeal of the February 20 decision as having ripened on the day the decision issued, February 20, 1998, which is well within the twenty-day period set forth in 7 U.S.C. § 608c(15)(B). Accordingly, the court has jurisdiction to review the February 20 decision.

B. The Postmark Requirement of Section 900.69(d) of the Rules of Practice[6]

The Secretary next argues that even if the court has jurisdiction to review the JO's January 12 and February 20 decisions, the decisions are correct. Although the JO made several rulings in each decision, the outcome of the instant dispute depends on one ruling in particular: the ruling that the Appeal Petition that Kreider gave to Federal Express on September 19, 1997, the last day to file a timely appeal of the ALJ's August 12 decision, is not postmarked within the meaning of the postmark requirement of section 900.69(d) of the Rules of

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[5] The Secretary had notice that Kreider would appeal the February 20 decision, because Kreider suggested in the Complaint that it would appeal an adverse decision on the then-pending Petition for Reconsideration. (See Compl. ¶ 27.)

[6] In this memorandum, the court uses the term "postmark requirement" to refer to the provision in § 900.69(d) for deeming a document "filed when it is postmarked."

Practice.[7]

The decision of the Secretary, and of the JO as the Secretary's delegatee, is entitled to substantial weight. As the court of appeals held in Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 315 (3d Cir. 1968), cert. denied sub nom. Lewes Dairy, Inc. v. Hardin, 394 U.S. 929 (1969),

> [t]he power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a de novo fact finding process. It is limited to a determination whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence.

(Footnote omitted.)

Although the standard of review is deferential, the JO's ruling regarding the postmark requirement cannot be upheld. The court first notes that the question of whether the Appeal Petition satisfies the postmark requirement is a legal one. Therefore, the court must determine whether the JO's ruling—pursuant to which a party that sends a document to the hearing clerk via the U.S. Postal Service satisfies the postmark requirement, whereas a party that sends a document to the hearing clerk via Federal Express does not—is in accordance with law. The court finds that the JO's ruling is not in accordance with

[7] The Secretary suggests that if the JO correctly ruled that the Appeal Petition was not timely, then the JO also correctly ruled that he lacked jurisdiction to consider the Appeal Petition's merits, and that this court lacks jurisdiction to review the ALJ's August 12 decision.

law for two reasons.

First, the JO's ruling elevates form over substance. The purpose of the postmark requirement is to ensure that there is reliable evidence of the date a party sends a document to the hearing clerk before the document will be deemed filed on such date.[8] By ruling that the only way a party can satisfy the postmark requirement is to send a document to the hearing clerk via the U.S. Postal Service, the JO construes the postmark requirement too literally and, as a result, too narrowly. Although Federal Express (also known as "FedEx") is not affiliated with the U.S. Postal Service, it is nevertheless a well-known delivery service, and there is no reason to doubt the reliability of a Federal Express label, especially one generated and affixed by Federal Express employees, insofar as it establishes the date a party gives an item to Federal Express for delivery.[9]

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[8] The court's explanation of the postmark requirement's purpose is consistent with the outcome in Sequoia Orange Co. At issue in that case was the reliability of the date shown by the Pitney Bowes, Inc., meter stamp. As the JO noted, a private individual applying the stamp could manipulate it to show any desired date. See 1992 WL 139549, at *1.

[9] Federal Express follows certain procedures that make it possible to reliably determine the date a party gives an item to Federal Express for delivery.

> All items [Federal Express] delivers carry an electronically generated label that includes the date on which the item was given to FedEx for delivery. . . . The information in FedEx's database can be used to show when the item was given

Moreover, in light of the fact that the applicable regulations do not define the term "postmark," a party that sends a document to the hearing clerk via Federal Express has made at least a reasonable effort to comply with the postmark requirement, and consequently should be permitted to consider the document filed on the date it was given to Federal Express for delivery. Cf. State of Oregon v. FCC, 102 F.3d 583, 585 (D.C. Cir. 1996) (Ginsburg, J.) (holding that "the FCC acts arbitrarily and capriciously when it rejects an application as untimely based on an ambiguous cut-off provision, not clarified by FCC interpretations, if the applicant made a reasonable effort to comply") (citation, brackets, and internal quotation marks omitted). Such a result is particularly appropriate when a literal construction of the postmark requirement would prevent the party from having its claims decided by the Secretary on the merits. As the Supreme Court explained with respect to the Federal Rules of Civil Procedure, "[i]t is too late in the day . . . for decisions on the merits to be avoided on the basis of such mere technicalities." Foman v. Davis, 371 U.S. 178, 181

> to or picked up by a FedEx employee if (1) there is a customer-generated label or (2) there is a FedEx-generated label but the date is illegible or otherwise unavailable.

Four Private Delivery Services Okayed, 86 J. Tax'n 259 (1997) (summarizing Notice 97-26, 1997-17 I.R.B. 6).

(1962).[10]

Second, the JO's ruling is at odds with the realities of the modern practice of law. Over the past several years, the court has observed that lawyers' use of delivery services such as Federal Express is rising steadily. Because delivery services can reliably deliver documents worldwide, and often faster than the U.S. Postal Service, it appears to the court that in at least some legal markets, delivery services have supplanted the U.S. Postal Service as the normal means of document delivery.[11] As a New York lawyer recently said in response to the court's suggestion that he send a document by "regular mail" (the U.S. Postal Service) instead of Federal Express, which costs more, "Out here, FedEx is regular mail."

The JO's construction of the postmark requirement bucks the current trend favoring the use of delivery services, because the JO's construction effectively compels a party that sends a document to the hearing clerk on the date the filing is due to use the U.S. Postal Service. Ironically, the use of a delivery

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[10] Kreider alleges that it "served its notice of appeal of the 1995 ALJ decision by Federal Express on the date the filing was due and it [was] accepted [by the JO] without objection." (Br. Opp. Mot. at 16.) If true, the allegation suggests that the JO rejected a literal construction of the postmark requirement in the past.

[11] In fact, the Secretary sent a copy of the administrative record and the motion to dismiss the Complaint to Kreider's counsel via Federal Express.

service in such a situation, while it may effect delivery of the document sooner, will result in a document that the JO deems to be filed later and, as in this case, too late to be considered.

In the instant case, the correct approach—one that elevates substance over form and is more in tune with the practices of today's legal community as the court perceives them—is to construe the postmark requirement to cover use of the U.S. Postal Service and Federal Express for purposes of determining a filing date.[12] The court notes that statutes and regulations regarding "postmarks" in some other contexts already take this approach. See, e.g., 26 U.S.C.A. § 7502(f)(1) (West 1989 & Supp. 1998) (Internal Revenue Code) ("[A]ny reference . . . to a postmark by the United States Postal Service shall be treated as including a reference to any date recorded or marked . . . by any designated delivery service."[13]); 50 C.F.R. § 285.2 (1998) (Wildlife and Fisheries) (defining postmark as, inter alia, "independently verifiable evidence of date of mailing, such as U.S. Postal

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[12] The court expresses no opinion on whether use of delivery services other than Federal Express satisfies the postmark requirement.

[13] Pursuant to 26 U.S.C.A. § 7502(f)(2), one of the requirements of a "designated delivery service" is that it "is at least as timely and reliable on a regular basis as the United States mail." Id. at § 7502(f)(2)(B). Federal Express is a designated private delivery service for purposes of § 7502(f). See Notice 97-26, 1997-17 I.R.B. 6, modified, Notice 97-50, 1997-37 I.R.B. 21 (providing that "the list [in Notice 97-26] of private delivery services . . . will remain in effect until further notice").

Service postmark, United Parcel Service (U.P.S.) or other private carrier postmark"); but see 38 U.S.C.A. § 7266(a)(3)(B) (West 1991 & Supp. 1998) (Veterans' Benefits) ("[A] notice of appeal shall be deemed to be received by the Court [of Veterans Appeals] . . . on the date of the United States Postal Service postmark.").

The Appeal Petition bears two Federal Express labels, one generated by Federal Express and the other apparently generated by Kreider. (See Resp't Opp'n to Pet'r Appeal Pet., Ex. A) (Admin. R., Tab 59). Each of the labels is dated September 19, 1997, indicating that Kreider gave the Appeal Petition to Federal Express on that date for delivery to the hearing clerk. On these facts, the court holds that the Appeal Petition is postmarked for purposes of section 900.69(d) of the Rules of Practice.[14] The court further holds that the Appeal Petition has a postmark date of September 19, 1997, is deemed filed on that date, and is timely.

C. Jurisdiction to Review the ALJ's August 12 Decision

The Secretary's final argument is that even if the court has jurisdiction to review the JO's January 12 and February 20 decisions, and the decisions are incorrect, the court lacks

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[14] The court's holding does not cover situations in which customer-generated and FedEx-generated labels have conflicting dates, or in which one of the labels is missing or illegible. The court notes, however, that these scenarios are addressed in the tax context. See Notice 97-26, 1997-17 I.R.B. 6.

jurisdiction to review the ALJ's August 12 decision because the August 12 decision is not a ruling of the Secretary for purposes of 7 U.S.C. § 608c(15)(B) or a "final decision issued by the Secretary" for purposes of 7 C.F.R. § 900.64(c).

This argument, which Kreider does not dispute, is correct. Pursuant to 7 U.S.C. § 608c(15)(B), the court may review a ruling of the Secretary as described in § 608c(15)(A). Section 608c(15)(A), in turn, describes such a ruling as a final ruling made by the Secretary after holding a hearing in accordance with applicable regulations. See 7 U.S.C.A. § 608c(15)(A) (West 1980). The applicable regulations provide that "no decision shall be final for the purpose of judicial review except a final decision issued by the Secretary pursuant to an appeal by a party to the proceeding." 7 C.F.R. § 900.64(c) (1998).

Here, the JO, as the Secretary's delegatee, did not consider the Appeal Petition's merits. As a result, for the purpose of judicial review, there has not been a "final decision issued by the Secretary," 7 C.F.R. § 900.64(c), or a ruling of the Secretary, 7 U.S.C. §§ 608c(15)(A)-(B), concerning the ALJ's August 12 decision. Accordingly, the court lacks jurisdiction to review the ALJ's August 12 decision.

The court will, however, remand this case to the Secretary. As provided in 7 U.S.C.A. § 609c(15)(B) (West 1980),

> [i]f the court determines that [the Secretary's] ruling is not in accordance with law, it shall remand such proceedings

> to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

Because the court has found that the JO's ruling regarding the postmark requirement is not in accordance with law, the court will vacate the JO's January 12 and February 20 decisions and remand this case to the Secretary. The court will also direct that on remand the JO treat the Appeal Petition as timely and consider and rule on the Appeal Petition's merits.

III. CONCLUSION

Kreider has sought producer-handler status for almost five years. Because a substantial amount of money is at stake, Kreider's persistence is understandable. What is surprising to the court, however, is the number of times during the litigation that Kreider has needlessly risked dismissal of its claims on the basis of late filings. Continued procrastination can only lead to more disputes such as the instant one that consume the parties' time and resources, and, at best, will further delay the merits determination that Kreider seeks.

For all the foregoing reasons, the court will deny the Secretary's motion to dismiss Kreider's Amended Complaint. In addition, the court will vacate the JO's January 12 and February 20 decisions and remand this case to the Secretary for further proceedings consistent with the court's decision.

An appropriate order follows.

BY THE COURT:

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Edward N. Cahn, C.J.