



INDIANA

DEPARTMENT OF LABOR

ERIC J. HOLCOMB, GOVERNOR
Joe B. Hoage, Commissioner
402 West Washington Street, Room W195
Indianapolis, Indiana 46204-2751
Phone: (317) 232-2655
Fax: (317) 233-3790

I DOL
FILE

February 1, 2021

Sent via U.S. Mail, First Class

Mr. Eric J. Conn
Conn Maciel Carey LLP
5335 Wisconsin Ave. NW, Ste. 660
Washington DC 20015

Re: Commissioner of Labor v. FedEx Express
OALP Case No. DOL-1019-001128
BSR Docket No. 19-043

Dear Mr. Conn:

Please find enclosed a copy of the *Agreed Entry* that I filed in the above referenced matter. This now completes our litigation and we should receive a *Final Order* after the next time the Board meets, which is mid-February. Please contact me if you have any questions or would like to further discuss this matter.

Sincerely,

J. Anthony Hardman
General Counsel
Indiana Department of Labor

Encl.



**STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS**

Administrative Cause No.: DOL-1019-001128
Underlying/State Agency Action No.: BSR No.: 19-043 / Inspection No.: 318115953

Ultimate Authority: the IOSHA Board of Safety Review

**Department of Labor
Complainant,**

v.

**FedEx Express and Its Successors,
Respondent.**

Issued: January 29, 2021



File Dated: January 29th, 2021

NOTICE OF AGREEMENT OF THE PARTIES

AND SUBMISSION TO THE IOSHA BOARD OF SAFETY REVIEW

On January 28, 2021 the above-mentioned Parties filed an Agreed Entry with the Office of Administrative Law Proceedings ("OALP"). The Parties request is not final and is subject to review by the IOSHA Board of Safety Review.

Thus, the OALP refers the attached filing to the IOSHA Board of Safety Review for review and final action. Parties to this proceeding may direct questions regarding the status of review by the IOSHA Board of Safety Review to: ctrusty@dol.in.gov.

SO ORDERED: January 29, 2021

/S/ Dan Vaughn

Hon. Dan Vaughn
Administrative Law Judge

Distributed to Parties:

Department of Labor –served by Counsel Tony Hardman by E-Mail at JoHardman@dol.IN.gov
FedEx Express and Its Successors – Respondent and served by Counsel Eric Conn by E-Mail at econn@connmaciel.com

IOSHA Board of Safety – Ultimate Authority and served by E-mail at boardofsafetyreview@dol.in.gov

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ADMINISTRATIVE LAW PROCEEDINGS,
SUBJECT TO THE ULTIMATE
AUTHORITY OF THE IOSHA BOARD OF
SAFETY REVIEW

IN THE MATTER OF:)
)
COMMISSIONER OF LABOR,)
)
Complainant,)
)
v.)
)
FEDEX EXPRESS)
AND ITS SUCCESSORS,)
)
Respondent.)

OALP CASE NO. DOL-1019-001128
BSR DOCKET NO. 19-043



File Dated: January 28th, 2021

AGREED ENTRY

The parties to the above-captioned proceeding, the Commissioner of the Indiana Department of Labor (hereinafter "Complainant") and FedEx Express (hereinafter "Respondent"), through their duly authorized representatives, desiring to enter into this Agreed Entry as final settlement of this matter, do hereby stipulate and agree as follows:

PART I.

1. From September 5, 2019, through September 12, 2019, authorized employees of the Indiana Department of Labor conducted an inspection at the Respondent's worksite located at 6648 S. Perimeter Rd., Indianapolis, Indiana 46241.

2. On September 27, 2019, Complainant issued a Safety Order and Notification of Penalty (hereinafter "Safety Order") resulting from Indiana Department of Labor Inspection No. 318115953 and alleging that Respondent had violated the Indiana Occupational Safety and Health Act (IC 22-8-1.1 *et seq.*) or the standards or rules thereunder. The Safety Order is attached hereto as Exhibit A and is incorporated herein.

3. On or about October 28, 2019, Respondent duly and timely petitioned for review of the Safety Order.

PART II.

4. The Safety Order consists of Safety Order 1, Item Nos. 1, 2, 3a, 3b, and 3c.

5. Safety Order 1, Item 1 alleges a "Serious" violation of 29 CFR 1910.22(c) and assesses a penalty of Five Thousand Dollars (\$5,000).

6. Safety Order 1, Item 2 alleges a "Serious" violation of 29 CFR 1910.135(a)(1) and assesses a penalty of Five Thousand Dollars (\$5,000).

7. Safety Order 1, Item 3a alleges a "Serious" violation of 29 CFR 1910.178(l)(1)(i) and assesses a shared penalty, grouped with Items 3b&c, of Five Thousand Dollars (\$5,000).

8. Safety Order 1, Item 3b alleges a "Serious" violation of 29 CFR 1910.178(n)(6) and assesses no additional penalty to what is assessed in Item 3a.

9. Safety Order 1, Item 3c alleges a "Serious" violation of 29 CFR 1910.178(q)(7) and assesses no additional penalty to what is assessed in Item 3a.

10. The total assessed penalty for Safety Order 1 is Fifteen Thousand Dollars (\$15,000).

PART III.

11. The Safety Order is hereby amended as follows.

12. Safety Order 1, Item 1 is re-classified as a "Non-Serious" violation of 29 CFR 1910.22(c) and the penalty remains Five Thousand Dollars (\$5,000).

13. Safety Order 1, Item 2 is deleted in its entirety.

14. Safety Order 1, Item 3a is deleted in its entirety.

15. Safety Order 1, Item 3b is upheld, but modified to a "Serious" violation of 29 CFR 1910.178(n)(15) and retains the original grouped penalty of Five Thousand Dollars (\$5,000).

16. Safety Order 1, Item 3c is re-classified as a "Non-Serious" violation of 29 CFR 1910.178(q)(7) and the penalty remains Zero Dollars (\$0).

17. The AGREED total penalty for all violations and all subparts thereunder, subject to this Agreed Entry, is Ten Thousand Dollars (\$10,000).

18. Within 60 days of execution of the Agreed Entry, Respondent further agrees to conduct an evaluation of the tug lot, including the foot and vehicle traffic in the lot, and identify the need for any additional markings, training, or other enhancements that may improve pedestrian safety.

19. It is understood and agreed by the Respondent and Complainant that this Agreed Entry and attachments will constitute a final, enforceable OSHA Safety Order(s) and penalties for the purposes of the Indiana Occupational Safety and Health Act ("Act").

20. Respondent confirms Complainant's right to re-inspect its workplaces, in accordance with the Act, and to verify abatement of the alleged violations as amended by this Agreed Entry.

21. If not already identified in the Safety Order and Notification of Penalty as completed during the inspection, all abatement, including any enhanced abatement identified and agreed upon herein, must still be completed in a timely manner and certified to IOSHA by completing a Letter of Abatement, State Form 44425, and sending the form, along with any supporting documentation and photographs, to IOSHA by any of the means listed in the box in the upper right portion of the form.

22. Respondent hereby withdraws its petition for review previously filed in this matter.

PART IV.

23. Nothing contained in this Agreed Entry shall be construed to affect Complainant's interpretation of the Act or any standard or regulation enforced pursuant thereto or the applicable

classification thereof.

24. Except for this agreement, and matters arising out of this agreement and any other subsequent IOSHA proceedings between the parties, none of the foregoing agreements, statements, findings, and actions taken by the Respondent shall be deemed an admission by Respondent of the allegations contained within the Safety Order(s) and Notification(s) of Penalty. The agreements, statements, findings, and actions taken herein are made in order to compromise and settle this matter economically and amicably, and they shall not be used for any other purpose, except as herein stated.

25. The invalidity or unenforceability of any section, subsection, clause or provision of this Agreed Entry does not affect the remaining sections, subsections, clauses, or provisions of this Agreed Entry.

26. Respondent, upon full execution of this Agreed Entry, will post this Agreed Entry for three (3) working days or until abatement is completed, whichever period is longer, pursuant to Board of Safety Review Rules of Procedure, 615 IAC 1-2-18(b)(3)(C).

AGREED this 27th JANUARY, 2021 for
day of ~~December, 2020~~.

FEDEX EXPRESS

By:

Larry Bizzell

Printed:

Larry Bizzell

Title:

Sr. Manager Safety, Health & Fire Prevention

COMMISSIONER OF LABOR

By:

Michelle K. Ellison for

Julie Alexander,

Director of General Industry,

IOSHA

Approved as to Form:

By:

Eric J. Conn

Eric J. Conn

Counsel for Respondent

By:

J. Anthony Hardman

J. Anthony Hardman,

Counsel for Complainant

Indiana Department of Labor

Indiana Occupational Safety and Health Administration
402 West Washington St - Room W195
Indianapolis, IN 46204
Phone: (317)232-2691 FAX: (317)233-3790



Safety Order and Notification of Penalty

To:

Fed EX Express
and its successors
6648 South Perimeter Road
Indianapolis, IN 46241

Inspection Number: 318115953

CSHO ID: V1065

Optional Report No.: 04319

Inspection Date(s): 9/5/2019 - 9/12/2019

Issuance Date: 9/27/2019

Inspection Site:

6648 S. Perimeter Road
Indianapolis, IN 46241

The violation(s) described in this Safety Order and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

An inspection of your place of employment has revealed conditions which we believe do not comply with the provisions of the Indiana Occupational Safety and Health Act (Indiana Code Chapter 22-8-1.1) or the standards or rules adopted thereunder. Accordingly, enclosed please find safety order(s) and notification(s) of penalty describing such violation(s) with references to applicable standards, rules, or provisions of the statute and stating the amount of any penalty(ies).

Informal Conference - Please be advised that it may be possible to informally settle any potential dispute without initiating the more elaborate proceedings brought on by a petition for review. Prior to filing a petition for review, you may request an informal conference concerning any of the results of the inspection (safety orders, penalties, abatement dates, etc.) by contacting the Indiana Department of Labor/IOSHA, preferably by telephone, in a prompt manner. Please be advised that a request for an informal conference cannot extend the fifteen working day period for filing a petition for review. Informal conferences frequently resolve any possible disputes, and therefore you are urged to take advantage of this opportunity. Because of the limited time period and in order to facilitate scheduling, any requests for an informal conference should be made promptly upon your receipt of the safety order(s) and notification(s) of penalty.

Right to Contest - You are hereby also notified that you are entitled to seek administrative review of the safety order(s), penalty(ies), or both by filing a written petition for review at the above address postmarked within fifteen working days of your receipt of the safety order(s) and notification(s) of penalty. ("Working days" means Mondays through Fridays, but does not include Saturdays, Sundays, legal holidays under a state statute or days on which the Indiana Department of Labor's offices are closed during regular business hours). If you do not file such a petition for review (contest), the safety order(s)

and penalty(ies) shall be deemed final orders of the Board of Safety Review and not subject to review by any court or agency. The issuance of a safety order does not constitute a finding that a violation has occurred unless no petition for review is filed, or if a petition for review (contest) is filed, it must contain a statement of its basis and should reference the above inspection number. Upon receipt of your petition for review, we will affirm, amend or dismiss the safety order(s) and notification(s) of penalty. If we affirm, your petition for review will be granted (unless it was not timely) and the dispute will be certified by the Board of Safety Review for further proceedings. The Board of Safety Review is an independent agency appointed by the governor with authority to conduct hearings and to issue decisions concerning disputed safety order(s) and notification(s) of penalty. If we amend the safety order(s) or notification(s) of penalty, your petition for review shall be deemed moot. However, you will then be given an opportunity to file a petition for review concerning the amended safety order(s) and notification(s) of penalty.

Please be advised that an employee or representative of employees may file a petition for review to contest the reasonableness of the time stated in the safety order(s) for the abatement of any violation.

Posting - Upon receipt of any safety order(s) you are required to post such safety order(s), or a copy thereof, unedited, at or near each place an alleged violation referred to in the safety order(s) occurred. However, if your operations are such that it is not practicable to post the safety order(s) at or near each place of alleged violation, such safety order(s) shall be posted, unedited, in a prominent place where it will be readily observable by all affected employees. For example, if you are engaged in activities which are physically dispersed, the safety order(s) may be posted at the location from which the employees operate to carry out their activities. You must take steps to ensure that the safety order is not altered, defaced, or covered by other material. Posting shall be until the violation is abated, or for three working days, whichever is longer.

Penalties - Penalties are due within fifteen (15) working days of receipt of this notification unless contested. Abatement does not constitute payment of penalties.

Abatement - The conditions cited in the safety order(s) must be corrected (abated) on or before the date shown for each item on the safety order(s) and notification(s) of penalty and proof of abatement must be sent to the email address: AbatementGI@dol.in.gov unless:

- (1) You file a petition for review concerning the violation, in which case the full abatement period shall commence from the issuance of a final decision by the Board of Safety Review or the courts which requires compliance with the safety order; or
- (2) The abatement period is extended by the granting of a petition for modification of abatement date.

PMAs - The petition for modification of abatement date is a manner in which you may seek additional time to correct (abate) a violation without having to file a petition for review concerning the safety order, or after the expiration of the time period to file such a petition for review when it becomes apparent that you need extra time to abate the violation. A petition for modification of abatement date shall be in writing and shall be sent to the email address: AbatementGI@dol.in.gov shall include the following information:

(1) All steps you have taken, and the dates of such actions, in an effort to achieve compliance during the prescribed abatement period.

(2) The specific additional abatement time necessary in order to achieve compliance.

(3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(4) All available interim steps being taken to safeguard employees against the cited hazard during the abatement period.

(5) A certification that a copy of the petition has been posted, and if appropriate, served on the authorized representative of affected employees, and a certification of the date upon which such posting and service was made.

A petition for modification of abatement date shall be filed with the Indiana Department of Labor/IOSHA no later than the close of the next working day following the date on which abatement was originally required sending the Petition to AbatementGI@dol.in.gov. A later-filed petition shall be accompanied by the employer's statement of exceptional circumstances explaining the delay. A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice thereof or near such location where the violation occurred. The petition shall remain posted until the time period for the filing of a petition for review of the Commissioner's granting or denying the petition expires. Where affected employees are represented by an authorized representative, said representative shall be served a copy of such petition.

Notification of Corrective Action - Correction of the alleged violations which have an abatement period of thirty (30) days or less should be reported in writing to us promptly upon correction and sent to the email address AbatementGI@dol.in.gov. A "Letter of Abatement" form and an "Abatement Photographs" worksheet are enclosed for your assistance in providing adequate documentation of abatement. Reports of corrections should show specific corrective action on each alleged violation and the date of such action. On alleged violations with abatement periods of more than thirty (30) days, a written progress report should be submitted via email at AbatementGI@dol.in.gov, detailing what has been done, what remains to be done, and the time needed to fully abate each such violation. When the alleged violation is fully abated, we should be so advised. Timely correction of an alleged violation does not affect the initial proposed penalty..

Followup Inspections - Please be advised that a followup inspection may be made for the purpose of ascertaining that you have posted the safety order(s) and corrected the alleged violations. Failure to correct an alleged violation may result in additional penalties for each day that the violation has not been corrected.

Employer Discrimination Unlawful - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 30 days after the discrimination occurred with the Indiana Department of Labor/IOSHA at the address shown above.

Notice to Employees - The law gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the Indiana Department of Labor/IOSHA at the address shown above within fifteen (15) working days (excluding weekends and State holidays) or receipt by the employer of this safety order and penalty.

If you wish additional information, you may direct such requests to us at the address or telephone number stated above.

Indiana Department of Labor

NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with IOSHA to discuss the safety order(s) issued on 9/27/2019. The conference will be held at the IOSHA office located at 402 West Washington Street, Room W195, Indianapolis, IN 46204 on _____ at _____. Employees and/or representatives of employees have a right to attend an informal conference.

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318115953
Inspection Date(s): 9/5/2019 - 9/12/2019
Issuance Date: 9/27/2019
CSHO ID: V1065
Optional Report No.: 04319

Safety Order and Notification of Penalty

Company Name: Fed EX Express
Inspection Site: 6648 S. Perimeter Road, Indianapolis, IN 46241

Safety Order 01 Item 001 Type of Violation: **Serious**

29 CFR 1910.22(c): The employer had not provided, and/or ensured that each employee used, a safe means of access and egress to and from walking-working surfaces.

Facility - There was no designated safe walking area or procedure for employees entering and exiting the tug storage lot. The employees walked between vehicles and in vehicle travel lanes, which exposed the employees to struck-by hazards.

Date By Which Violation Must Be Abated: **10/31/2019**
Proposed Penalty: **\$5,000.00**

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318115953
Inspection Date(s): 9/5/2019 - 9/12/2019
Issuance Date: 9/27/2019
CSHO ID: V1065
Optional Report No.: 04319

Safety Order and Notification of Penalty

Company Name: Fed EX Express
Inspection Site: 6648 S. Perimeter Road, Indianapolis, IN 46241

Safety Order 01 Item 002 Type of Violation: **Serious**

29 CFR 1910.135(a)(1): The employer did not ensure that each affected employee wear a protective helmet when working in areas where there is a potential for injury to the head from falling objects:

Facility - Employees were exposed to struck-by hazards to the head due to hazards such as, but not limited to, falling material.

Date By Which Violation Must Be Abated: **10/31/2019**
Proposed Penalty: **\$5,000.00**

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318115953
Inspection Date(s): 9/5/2019 - 9/12/2019
Issuance Date: 9/27/2019
CSHO ID: V1065
Optional Report No.: 04319

Safety Order and Notification of Penalty

Company Name: Fed EX Express
Inspection Site: 6648 S. Perimeter Road, Indianapolis, IN 46241

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury or illness.

Safety Order 01 Item 003a Type of Violation: **Serious**

29 CFR 1910.178(l)(1)(i): The employer did not ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l):

Facility – Employees who operated powered industrial trucks such as, but not limited to, Tiger Tractor TIG-50 were not effectively trained in operation of the powered industrial truck, which exposed employees to struck-by hazards.

Date By Which Violation Must Be Abated: **10/31/2019**
Proposed Penalty: **\$5,000.00**

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318115953
Inspection Date(s): 9/5/2019 - 9/12/2019
Issuance Date: 9/27/2019
CSHO ID: V1065
Optional Report No.: 04319

Safety Order and Notification of Penalty

Company Name: Fed EX Express
Inspection Site: 6648 S. Perimeter Road, Indianapolis, IN 46241

Safety Order 01 Item 003b Type of Violation: **Serious**

29 CFR 1910.178(n)(6): Industrial truck drivers were not required to look in the direction of, and keep a clear view of the path of travel:

Facility – Employees who operated equipment such as, but not limited to, Tiger Tractor TIG-50 trucks did not maintain a clear view of the path of travel, which exposed employees to struck-by hazards.

Date By Which Violation Must Be Abated:
Proposed Penalty:

Corrected During Inspection
\$0.00

Indiana Department of Labor
Occupational Safety and Health Administration

Inspection Number: 318115953
Inspection Date(s): 9/5/2019 - 9/12/2019
Issuance Date: 9/27/2019
CSHO ID: V1065
Optional Report No.: 04319

Safety Order and Notification of Penalty

Company Name: Fed EX Express
Inspection Site: 6648 S. Perimeter Road, Indianapolis, IN 46241

Safety Order 01 Item 003c Type of Violation: **Serious**

29 CFR 1910.178(q)(7): Industrial trucks were not examined before being placed in service:

Facility – Tiger Tractor TIG-50 trucks, which were operated by employees, were not inspected for condition and operation prior to being put into service for the shift, which exposed employees to struck-by hazards.

Date By Which Violation Must Be Abated: **10/31/2019**
Proposed Penalty: **\$0.00**

Julie C. Alexander, JD
Director of General Industry

Indiana Department of Labor

Indiana Occupational Safety and Health Administration
402 West Washington St - Room W195
Indianapolis, IN 46204
Phone: (317)232-2691 FAX: (317)233-3790



INVOICE/DEBT COLLECTION NOTICE

Company Name: Fed EX Express
and its successors
Inspection Site: 6648 S. Perimeter Road, Indianapolis, IN 46241
Issuance Date: 9/27/2019

Summary of Penalties for Inspection Number: 318115953


| | |
|--------------------------------|----------------------|
| Safety Order 1, Serious | = \$15,000.00 |
| TOTAL PENALTIES | = \$15,000.00 |

Penalties are due within fifteen (15) working days of receipt of this notification unless contested. Make your check or money order payable to: "Indiana DOL/IOSHA". Please indicate IOSHA's Inspection Number (indicated above) on the remittance. You may also make a payment online at <https://payingov.com/dol/>. Your account number is your inspection number.

IOSHA does not agree to any restrictions or conditions or endorsements put on any check or money order for less than full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

Corrective action, taken by you for each alleged violation should be submitted to this office on or about the abatement dates indicated on the Safety Order and Notification of Penalty.

A work sheet has been provided to assist in providing the required abatement information. A completed copy of this work sheet should be posted at the worksite with the safety order(s).


Julie C. Alexander, J.D.
Director of General Industry

Date

9/27/2019