

ILLINOIS POLLUTION CONTROL BOARD
August 26, 1993

PEOPLE OF THE STATE)	
OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 93-58
)	(Enforcement)
L. KELLER OIL)	
PROPERTIES, INC.,)	
)	
Respondent.)	

ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on a July 26, 1993 motion for summary judgment, filed by complainant the People of the State of Illinois. Complainant seeks summary judgment in its favor on a six count complaint against respondent L. Keller Oil Properties (Keller) filed on March 19, 1993. The complaint is brought pursuant to Section 31 of the Environmental Protection Act (Act). (415 ILCS 5/31 (1992).) On August 24, 1993, Keller filed a response to the motion for summary judgment, along with a motion for leave to file that response instanter. On August 25, 1993, complainant filed a motion to strike Keller's response to complainant's request to admit facts.

MOTION TO FILE INSTANTER

The Board's procedural rules allow a non-moving party seven days after service of a motion to respond to that motion. (35 Ill. Adm. Code 101.241(b).) Thus, Keller's response should have been filed on or around August 2, 1993. In support of its motion for leave to file its response instanter, Keller states that although the certificate of service attached to complainant's motion for summary judgment indicates that the motion was served on both C.J. Keller (Keller's registered agent) and Keller's attorney on July 22, 1993, neither of the two received the motion as a result of that purported service. Keller states that its attorney first became aware of the filing of the motion during a conversation with complainant's attorney on August 17, 1993, and that its attorney first examined the motion on August 18, 1993, when the attorney received a duplicate copy of the motion sent by complainant's attorney. Keller contends that its attorney believes that the lack of service of the motion for summary judgment was the result of inadvertent clerical error, and not bad faith on the part of complainant's attorney. Thus, Keller asks that it be given leave to file its response instanter.

Given the circumstances set forth in the motion for leave to

file instanter, as supported by the attached affidavit, the motion for leave to file instanter is granted. The Board notes that it is granting this motion without a response from complainant, but finds that undue delay would result from waiting to act.¹

MOTION FOR SUMMARY JUDGMENT

Complainant's motion for summary judgment is based upon Keller's failure to timely respond to complainant's request to admit facts. The request to admit was filed on June 10, 1993. Pursuant to a hearing officer order, Keller's answer was due on July 10, 1993. As of the time of filing of the motion for summary judgment, Keller had not filed any response to the request to admit. Complainant notes that the Board's procedural rules provide that each of the facts in the request to admit is deemed admitted unless specifically denied. (35 Ill. Adm. Code 103.162(c).) Complainant argues that given the facts admitted, in combination with the complaint and affidavit, there is no genuine issue of fact in this case.

In response, Keller contends that it was delayed in responding to the request to admit because Gregory H. Kemper, Keller's employee with responsibility for identifying the necessary information to respond, was hampered by the fact that he was not Keller's employee at the time of the alleged incidents. Keller states that there is not any other person currently in its employ who had primary responsibility for such matters at the time of the alleged incidents. Keller maintains that its response to the request to admit, a copy of which is attached to the instant response to the motion for summary judgment, indicates that there are genuine issues of fact in this case. Keller then argues that complainant has not suffered any prejudice from the late filing of the response to the request to admit, and that some of the alleged facts involved in the request to admit involve essential issues of the case. Keller asserts that the Illinois appellate courts have held that "a party's late responses to requests for admissions of facts ought to be allowed upon a showing of good cause, a lack of prejudice to the requesting party, or when facts sought to be admitted concern the essential issue of the case." (Response at 4.)

Initially, the Board must note its concern over the pleadings submitted by Keller. Keller has not filed either a motion for extension of time (prior to the July 10 deadline for Keller's response) or a motion for leave to file its response to the request to admit instanter, although that response is six

¹ The Board notes that a hearing in this matter is scheduled for August 31 and September 1, 1993.

weeks late. The Board finds that omission particularly troubling when considering Keller's reference to complainant's failure file a motion for extension of the hearing officer's discovery schedule.² Keller cannot logically contend that complainant's late-filed request to admit was improper in the absence of a motion for extension of time, when Keller itself has not even filed a motion for leave to file its request instanter, let alone move for an extension of time. The Board will not continue to tolerate such careless practice in this case.

However, the Board will, on its own motion, accept Keller's late filing of its response to the request to admit. We interpret the appellate court cases cited by Keller slightly differently than Keller--i.e., we believe that the cited cases either uphold a trial court decision to allow a late response or state that the trial court has the discretion to do so, as opposed to Keller's view that the cases affirmatively hold that a late response should be allowed. (Kisner v. Antonovich (5th Dist. 1986), 148 Ill.App.3d 508, 499 N.E.2d 707, 102 Ill.Dec. 150; Thomas v. Village of Westchester (1st Dist. 1985), 132 Ill.App.3d 190, 477 N.E.2d 49, 87 Ill.Dec. 448; Bluestein v. Upjohn Co. (1st Dist. 1981), 102 Ill.App.3d 672, 430 N.E.2d 580, 58 Ill.Dec. 548.) Because the Board has discretion to allow a late filing, we will accept Keller's response. Here, Keller's failure to timely file is based upon difficulty in obtaining information, and the response is six weeks late. These facts compare favorably to cases where the response was filed nine months late (Bluestein), and where the late filing was based upon the attorney's work schedule (Kisner).

As noted above, on August 25, 1993 complainant filed a motion to strike Keller's response to complainant's request to admit facts. Complainant contends that Keller's response was filed approximately 74 days after complainant filed its request to admit, while the Board's procedural rules require a response within 21 days.³ Complainant argues that Keller's response is insufficient since it was filed very late, and asserts that the response should be stricken.

The Board shares complainant's frustration over the very

² The hearing officer originally set June 1, 1993 as the deadline for the filing of discovery requests. Complainant's request to admit was not filed until June 10, 1993. The hearing officer subsequently amended the scheduling order to allow the request to admit.

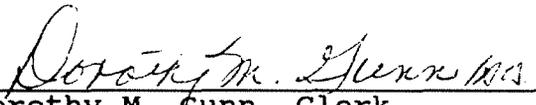
³ The Board again notes that the hearing officer allowed Keller 30 days, until July 10, to respond, rather than the 21 days cited by complainant.

late filing of Keller's request to admit. However, we have found that the appellate court case law leads to a conclusion that, under these facts, the late filing should be accepted. Complainant has not addressed any of the cases cited by Keller regarding late filing of responses to request to admit. Thus, complainant's motion to strike Keller's response is denied.

Because we have accepted Keller's response to the request to admit, which denies the material allegations contained in the complaint, the Board finds that there are indeed genuine issues of material fact in this case. Thus, complainant's motion for summary judgment is denied. This case will proceed to hearing as previously scheduled.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 26th day of August, 1993, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board