

ILLINOIS POLLUTION CONTROL BOARD

August 10, 2020

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)	
JOHNS MANVILLE, a Delaware corporation,)	
)	
Complainant,)	
)	
v.)	
)	PCB No. 14-3
ILLINOIS DEPARTMENT OF)	(Citizens Enforcement)
TRANSPORTATION,)	
)	
Respondent.)	

BACKGROUND

Procedural History

On October 25, 2019, Complainant Johns Manville (JM) filed a Motion to Exclude Witnesses from the Hearing Room (JM Mot.) in which JM requested that the Hearing Officer enter an Order excluding witnesses, other than a party representative, from being present in the Hearing room prior to their testimony and an instruction that witnesses are not to discuss their testimony with other witnesses. JM Motion at 2. Citing Illinois Rules of Evidence 615, JM states that “[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses...”. *Id.* at 1. Citing case law, JM further argues that exclusion “is to prevent the shaping of testimony by one witness to match that of another and discourage fabrication.” Smith v. City of Chicago, 299 Ill. App. 3d. 1047, 1053(Ill. App. Ct. 1998). *Id.* JM states that “[t]he likelihood of changing of expert opinion testimony would be mitigated by witness sequestration.” *Id.* at 2.

The Hearing in this matter was originally scheduled to be held November 19-22, 2019. On November 1, 2019, six days after it filed its Motion to Exclude Witnesses, JM filed a Motion to Cancel and Reschedule Hearing that was granted and rescheduled to February 3, 2019. Hearing Officer Order (Nov. 5, 2019). On December 24, 2019, IDOT filed a Motion to Reschedule the Hearing that was granted and was rescheduled to April 20-23, 2020. Hearing Officer Order (Jan. 8, 2020). Due to the Covid-19 pandemic, I cancelled the April 20, 2020 hearing and rescheduled the hearing to begin on September 21, 2020. Hearing Officer Order (Apr. 6, 2020).

On July 9, 2020, Respondent Illinois Department of Transportation (IDOT) filed a Motion for Leave to File a Response and attached as an Exhibit its response to JM’s Motion to Exclude Witnesses. (Resp.) IDOT contends in its Response that JM’s motion to cancel the

hearing scheduled for November 19, 2019 rendered its Motion to Exclude Witnesses filed on October 25, 2019 “premature and moot.” Resp. at 1. IDOT also states that the first time that JM’s Motion to Exclude Witnesses was discussed at any status conferences wasn’t until the June 23, 2020, status conference. *Id.* Citing Rule 615 of the Illinois Rules of Evidence, IDOT argues that Mr. Gobelman is an essential witness and that Rule 615 “does not authorize exclusion of...(3) a person whose presence is shown by a party to be essential to the presentation of the party’s cause...”. *Id.* at 2. IDOT states that the subject matter of the issue of remediation is complicated and Mr. Gobelman’s presence is “critical”. *Id.* Finally, IDOT argues that since “the experts have already analyzed and arrived at their opinions”, there is no danger of shaping or fabricating their respective testimony and therefore no compelling reason to sequester Mr. Gobelman. *Id.*

On July 21, 2020, JM filed an Objection (Obj.) to IDOT’s Motion for Leave. JM argues that IDOT has waived its right to appeal by failing to file a response to JM’s October 25, 2019 Motion to Exclude within 14 days. Obj. at 3. Moreover, JM contends that the language of Illinois Rule of Evidence 615 imposes a mandatory obligation on the to order the exclusion of witnesses upon the request of a party. *Id.* at 3-4. It appears that JM is only requesting that the respective expert witnesses be sequestered when the other is testifying because JM alleges that IDOT’s expert, Mr. Gobelman, tends to be inconsistent and that he changes his opinion often. *See* Obj. at 4.

ANALYSIS AND ORDER

The Board’s procedural rules allow a party 14 days to submit a response to any filed motion...[but] “if no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its deposition of the motion.” 35 Ill. Adm. Code 101.500(d). Further, the filing of a motion does not extend the time to respond. 35 Ill. Adm. Code 101.502(c). Accordingly, the November 1, 2019 filing of the JM Motion to Reschedule did not extend the time for IDOT to submit its Response to the JM Motion to Exclude Witnesses. Having failed to file its Response by November 8, 2019, IDOT must demonstrate good cause for noncompliance in order to obtain leave to file an untimely submission. 35 Ill. Adm. Code 101.522. IDOT does not allege that it was not served with JM’s Motion to Exclude. Instead IDOT argues that intervening motions to cancel and a motion for interlocutory appeal made such response moot. IDOT further faults its failure to timely file its’ response was because JM’s Motion to Exclude was never mentioned in any of my Hearing Officer Orders nor discussed at prior conference calls. IDOT Motion for Leave at 2. IDOT has made no showing of good cause and has waived its right to object, but waiver does not bind me in the deposition of the motion.

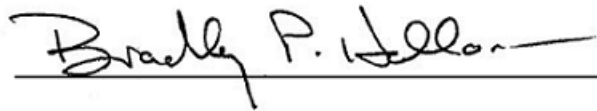
IDOT’s waiver of its right to object notwithstanding, the exclusion of witnesses is not a matter of right and the Hearing Officer maintains the discretion to deny JM’s Motion to Exclude Witnesses. Smith v. City of Chicago, 299 Ill. App. 3d 1048, 1053 (1st Dist. 1998). Smith also opined that the court “in appropriate circumstances, order the exclusion of expert witnesses, although the reasons are far less compelling than in the case of fact witnesses.” *Id.* (citations

omitted). Illinois Rules of Evidence 615 does not authorize exclusion of a witness if it is shown by a party that the witness is essential to the party's cause.

Here, IDOT maintains that Mr. Gobelman's expertise is needed due to the complicated and highly technical issues to be testified to at hearing. I presided at the first hearing and agree with IDOT that Mr. Gobelman is an essential witness and must not be excluded from the hearing room. Furthermore, Mr. Gobelman's presence will assist the Board, as the trier of fact, including questions from the Board's environmental scientists, in arriving at a just and well-informed decision.

I hereby deny JM's Motion to Exclude Witnesses- as I construe to be expert witnesses-denied. I do, however, instruct that witnesses are not to discuss their testimony with other witnesses.

IT IS SO ORDERED.

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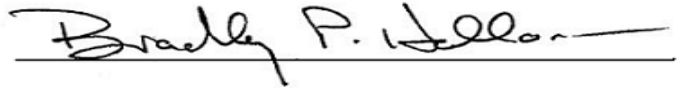
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
(312) 814-8917
Brad.Halloran@illinois.gov

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on August 10, 2020, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on August 10, 2020:

Don Brown
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

@ Consents to electronic service

SERVICE LIST

PCB 2014-003 @
Matthew D. Dougherty
Illinois Department of Transportation
2300 S. Dirksen Parkway
Springfield, IL 62764

PCB 2014-003@
Ellen O’Laughlin
Office of the Attorney General
69 W. Washington Street, Suite 1800
Chicago, IL 60602

PCB 2014-003 @
Lauren J. Caisman
Bryan Cave Leighton Paisner, LLC
161 N. Clark Street
Suite 4300
Chicago, IL 60601-3715

PCB 2014-003 @
Susan Brice
Bryan Cave Leighton Paisner, LLC
161 N. Clark Street
Suite 4300
Chicago, IL 60601-3715

PCB 2014-003 @
Evan J. McGinley
Office of the Attorney General
69 W. Washington Street, Suite 1800
Chicago, IL 60602

PCB 2014-003@
Alexander J. Bandza
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654

PCB 2014-003@
Gabrielle Sigel
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654

PCB 2014-003@
Robert W. Brunner
Bryan Cave Leighton Paisner, LLC
161 N. Clark Street
Suite 4300
Chicago, IL 60601-3715