

ILLINOIS POLLUTION CONTROL BOARD

August 1, 1996

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 96-208
)	(Enforcement - RCRA)
)	
FRANK MERKENDORFER, BELDEN)	
TOOLS, INC. and PHIL PINELLO,)	
)	
Respondent.)	

ORDER OF THE BOARD (by E. Dunham):

On July 18, 1996, the People of the State of Illinois, complainant, filed a motion to strike Belden Tool Inc.'s (Belden) affirmative defenses. Complainant requests that the Board strike the second and/or fourth affirmative defense or grant complainant 21 days to respond to each affirmative defense. Belden filed a response to the motion to strike on July 29, 1996.

The complaint in this matter was filed on March 29, 1996. Belden filed its answer and affirmative defenses on June 25, 1996. In its second affirmative defense, Belden asserts that if any liability is found it should be allocated among all respondents. In its fourth affirmative defense, Belden reserves the right to raise additional affirmative defenses and supplement those asserted, if necessary.

Complainant asserts that Belden Tool's second and fourth affirmative defense should be stricken because respondent has failed to plead any facts which would inform complainant of the nature of its defense. Complainant maintains that respondent has not plainly set forth its defense as required by 5/2-613(d) of the Code of Civil Procedure of Illinois.

Belden asserts that the affirmative defenses are properly pled and reasonably inform the complainant of the nature of its defense. Belden argues that the test for a properly pled affirmative defense is whether the allegation of the defense gives color to the opposing party's claim and asserts a new matter on which the apparent claim is defeated. (See Goldman v. Walko Tool and Engineering Co., 243 Ill. App. 3d 981, 989, 614 N.E. 2d 42 (1st Dist. 1993); Vanlandingham v. Ivanow, 246 Ill. App. 3d 348, 357, 615 N.E. 2d 1361 (4th Dist. 1993).)

Section 101.100 of the Board's procedural rules specifically states that the Code of Civil Procedure shall not expressly apply to proceedings before the Board; however, parties may argue the applicability absent a provision in the Board's procedural rules. (35 Ill. Adm. Code 101.100.) Neither party has presented any arguments to the Board on the applicability of the requirements of the Code of Civil Procedure to the filing of affirmative defenses. The Board's procedural rules contain provisions on the filing of affirmative defenses.

Section 103.122(d) allows the filing of an affirmative defense with the answer or supplemental answer prior to hearing.

Respondent may file an answer within 30 days of receipt of the complaint. All material allegations of the complaint shall be taken as denied if not specifically admitted by answer, or if no answer is filed. Any facts constituting an affirmative defense which would be likely to take the complainant by surprise must be plainly set forth prior to hearing in the answer or supplemental answer filed pursuant to section 103.210(b).

The Board denies the complainant's motion to strike the affirmative defenses. The affirmative defenses asserted by respondent in its answer assert facts "constituting an affirmative defense which would be likely to take complainant by surprise". The affirmative defenses properly refer to facts already raised in the complaint and the answer and no additional facts need to be pled. (Fitzpatrick v. City of Chicago, 131 Ill. App. 3d 582, 475 N.E. 2d 995, 998 (1985).) The Board will not deny the respondent the opportunity to present facts and arguments at hearing in support of the affirmative defenses raised in the answer. The Board's procedural rules allow for the filing of supplemental pleadings in which additional affirmative defenses may be raised, so long as no undue surprise results that cannot be remedied by a continuance. (35 Ill. Adm. 103.210.)

The Board finds that the affirmative defenses are properly pled in this matter and denies the motion to strike. Complainant is granted leave of the Board for 21 days to file a response to the affirmative defenses.

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 ____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board