

1 S38328

2 STATE OF ILLINOIS)
3 COUNTY OF KANE) SS.

4 BEFORE THE ILLINOIS
5 POLLUTION CONTROL BOARD

6 OLIVE STREIT and LISA STREIT,)
7 Complainants,)
8 vs.) No. PCB 95-122
9 OBERWEISS DAIRY, INC.,)
10 RICHARD J. FETZER and JOHNNIE)
11 W. WARD, d/b/a Serve-N-Save,)
12 and RICHARD J. FETZER,)
13 Individually,)
14 Respondents.)

15 CONTINUED REPORT OF PROCEEDINGS had and
16 testimony taken at the hearing of the above-entitled
17 cause, before Mr. Michael L. Wallace, Chief Hearing
18 Officer, at the Kane County Courthouse, 100 South Third
19 Street, Geneva, Illinois, on the 1st day of April, A.D.
20 1997, at the hour of 9:30 a.m.

21 PRESENT:

22 LAW OFFICES OF MURPHY & MURPHY, P.C., by
23 MR. J. ROBERT MURPHY,
24 340 North Lake Street
Post Office Box 460
Aurora, IL 60507
(630) 896-9711

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1
2 appeared on behalf of Complainants;
3
4 ALTHEIMER & GRAY, by
5
6 MR. SAMUEL T. LAWTON, JR., and
7
8 MR. MYLES D. BERMAN,
9
10 Suite 4000
11 10 South Wacker Drive
12 Chicago, IL 60606
13 (312) 715-4000
14
15 and
16
17 DREYER, FOOTE, STREIT, FURGASON & SLOCUM, P.A., by
18
19 MR. RICHARD C. SLOCUM,
20
21 900 North Lake Street
22 Aurora, IL 60507
23 (630) 897-8764
24
25 appeared on behalf of Respondent Oberweiss
26 Dairy, Inc.; and
27
28 TYLER & HUGHES, P.A., by
29
30 MR. GORDON P. HUGHES, JR.,
31
32 320 East Indian Trail
33 Aurora, IL 60505
34 (630) 897-0559
35
36 appeared on behalf of Respondent Richard J.
37 Fetzer.
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1 HEARING OFFICER WALLACE: Pursuant to the direction
2 of the Illinois Pollution Control Board, I now call
3 Docket No. PCB 95-122.

4 This is the matter of Olive Streit and Lisa Streit
5 versus Oberweiss Dairy, Inc., Richard J. Fetzer and
6 Johnnie W. Ward, doing business as Serve-N-Save, and
7 Richard J. Fetzer, Individually.

8 May I have appearances for the record, please, for
9 the Complainant?

10 MR. MURPHY: For the Complainant, whose names are
11 Olive and Lisa Streit, S-t-r-e-i-t, J. Robert Murphy, law
12 firm of Murphy & Murphy, P.C., Aurora, 60507.

13 MR. HUGHES: Good morning, your Honor.

14 On behalf of Richard Fetzer, Gordon Hughes, the law
15 firm of Tyler & Hughes, P.A., located at 322 East Indian
16 Trail in Aurora, Illinois.

17 MR. LAWTON: On behalf of Respondent Oberweiss, I'm
18 Samuel T. Lawton, law firm of Altheimer & Gray. With me
19 is my partner, Myles Berman, and Rich Slocum, all
20 representing Oberweiss.

21 HEARING OFFICER WALLACE: Let the record reflect
22 there are no other appearances at today's hearing.

23 The Board has acted on the motion to voluntarily
24 dismiss Amoco Oil Company and Mobil Oil Corporation.

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1 It's the Board's practice that we drop those two
2 names off of our heading, and we also dropped their
3 Counsel from the service list. So to save yourselves
4 some mailing costs, you don't have to mail to Amoco and
5 Mobil Oil.

6 We have several preliminary items to bring up. I
7 would note for the record that the Hearing Officer had a
8 phone conversation with Mr. Berman, Mr. Lawton and Mr.
9 Murphy yesterday morning -- I believe it was around 10:00
10 or 10:30 in the morning -- discussing the various
11 procedural aspects that have come up in this case.

12 I made some preliminary rulings yesterday and will
13 place them on the record today.

14 With that said, I also did call Mr. Hughes and
15 inform him of our conference call, and I regret that --
16 I'm not afraid of technology, but I'm not sure how to
17 patch in more than two people at a time. Maybe the State
18 will fix that at some point.

19 Now, before I continue, Mr. Murphy, did you have
20 anything that you wanted to bring up?

21 MR. MURPHY: In the nature of motions, which I
22 believe the Hearing Officer is here to consider today and
23 to rule on on the record, I have kind of a housekeeping
24 and formal motion, and I believe that it has already

1 been -- I'm sure it has already been filed.

2 I don't know that there has ever been a response to
3 it from any of the adverse parties, but that is, very
4 simply, my motion to withdraw testimony that was entered
5 only with regard to Mobil.

6 Since the Board has ruled on the motion to dismiss
7 Mobil, it becomes, I think, totally irrelevant that I
8 spent a couple of hours with my engineer on the witness
9 stand before the previous hearing officer, and I have
10 pointed out in my motion the pages, et cetera, of the
11 transcript that are devoted to that testimony.

12 They have nothing to do with the remaining
13 Respondents, and my motion, therefore, is to merely
14 withdraw that testimony from the record.

15 That motion has been filed with your Honor as well
16 as, I believe, the Board. No, it was directed to your
17 Honor, not to the Board.

18 MR. LAWTON: May I respond, your Honor?

19 HEARING OFFICER WALLACE: Yes.

20 MR. LAWTON: Respondent Oberweiss will very
21 vigorously object to that motion; and while it's
22 premature perhaps to argue it to you, we would ask leave
23 to be able to file a response to the motion that was made
24 by Mr. Murphy.

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1 As your Honor is well aware, our position from the
2 very beginning is that Oberweiss is not responsible for
3 the alleged contamination and that the sources of
4 contamination include, among others, Mobil and Amoco.

5 There was testimony with respect to that by Mr.
6 Murphy and by Mr. Mehrens back in 1995 when this matter
7 was before the Board, and that is part of the record.

8 Among other things, the testimony of Mr. Mehrens
9 indicates that there was contamination of groundwater and
10 there was contamination of soil that was presumably with
11 respect to the Mobil operation. That was what Mr. Murphy
12 was trying to establish at that time. We likewise felt
13 that there was a basis for finding contamination from
14 Mobil.

15 I think it would severely prejudice our position
16 and our entire thesis of defense to have that testimony
17 removed from the record. It's in there. It's damaging
18 to Mobil, who is no longer in. It's supportive of the
19 position that we've asserted from the very beginning. I
20 think it would be a gross mistake to have that removed.

21 Now, I don't purport to argue it now. I'm sure Mr.
22 Murphy doesn't want to argue it now. We would ask leave
23 to file our response, and that will be the basis on which
24 our response is made.

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1 HEARING OFFICER WALLACE: When is your response
2 going to be sent in?

3 MR. LAWTON: We got it yesterday afternoon even
4 after we spoke on the telephone.

5 HEARING OFFICER WALLACE: You just did receive the
6 motion?

7 MR. LAWTON: We just received the motion yesterday
8 afternoon.

9 MR. MURPHY: I think you're thinking of another
10 motion, with due respect, Counsel. This motion was
11 filed, one of my earlier ones --

12 MR. LAWTON: To withdraw?

13 MR. MURPHY: Yes, to withdraw the testimony of
14 Mehrens.

15 MR. LAWTON: If it was filed, it wasn't received.
16 It was received after the telephone conversation that we
17 had with you and with the Hearing Officer.

18 MR. MURPHY: That doesn't say a lot for the U.S.
19 Mail.

20 MR. BERMAN: In fact, we received two motions
21 yesterday, one of which was the motion to withdraw,
22 Complainant's motion to withdraw.

23 MR. LAWTON: The response to our motion was also
24 received.

1 We won't take a great deal of time to respond that.

2 HEARING OFFICER WALLACE: My time stamp on those
3 two motions also shows March 31st in my office in
4 Springfield.

5 They are dated different dates. They may have been
6 received by the Clerk of the Board at different dates. I
7 know Mr. Murphy mentioned yesterday that he received one
8 of your motions on a later date. So there quite possibly
9 is a considerable delay in the postal service.

10 All right. Then I will await your written response
11 to the motion to withdraw testimony. Obviously, the
12 motion to dismiss filed by Oberweiss will have to be
13 handled by the full Board. I have Oberweiss' motion to
14 dismiss, and then I have the Complainant's response.

15 The Board's rules do not allow for a reply, except
16 with leave of the Board. You're aware of that.

17 MR. LAWTON: We would ask leave to be able to reply
18 to that, your Honor.

19 HEARING OFFICER WALLACE: That would have to be
20 directed to the Board.

21 MR. LAWTON: Very well. The request.

22 HEARING OFFICER WALLACE: Right.

23 MR. MURPHY: I'm sorry, but I'm not quite up on
24 what motion you're now talking about.

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1 HEARING OFFICER WALLACE: I was talking about
2 Oberweiss' motion to dismiss.

3 MR. MURPHY: Which is before the Board?

4 HEARING OFFICER WALLACE: Which is before the full
5 Board, and you've submitted your response.

6 MR. MURPHY: Correct.

7 HEARING OFFICER WALLACE: I was merely pointing out
8 that the Board does not allow reply except with leave of
9 the Board. So if there are going to be any further
10 filings, leave of the Board has to be requested.

11 MR. MURPHY: Fine.

12 MR. LAWTON: Yes.

13 HEARING OFFICER WALLACE: There is also the
14 Complainant's motion to rejoin the Environmental
15 Protection Agency.

16 MR. MURPHY: That's a motion to the Board.

17 HEARING OFFICER WALLACE: That's a motion to the
18 Board.

19 The Attorney General's Office has replied on behalf
20 of the Agency. I do not know if Oberweiss was going to
21 respond to that or not.

22 MR. LAWTON: We may adopt the position of the IEPA
23 on that.

24 HEARING OFFICER WALLACE: In any event, again, Mr.

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1 Murphy, if you wish to reply to the Agency's response,
2 you must request leave of the Board to do so.

3 Generally, you file your request for leave attached
4 with your reply so it's all there for them. Those two
5 motions have to be ruled upon by the Board.

6 I checked with the Clerk's office. Those two
7 motions are not on the agenda for the April 4th meeting,
8 so it will be, obviously, at a later meeting.

9 There is the motion in limine filed by the
10 Complainant and Oberweiss' response to the motion in
11 limine. That is directed to the Hearing Officer, and I
12 am going to defer ruling upon the motion in limine
13 awaiting the Board's ruling on the motion to dismiss.

14 It would seem to be somewhat dispositive in terms of
15 Mr. Eric Portz's letter. I certainly -- at this point in
16 time the Board has not taken a position that it is bound
17 by the Agency's letter. So since that's part of the
18 motion to dismiss, we should at least wait to see what
19 the Board says on that before I will rule on the motion
20 in limine.

21 The other item is the addition of a new witness. I
22 checked the docket. Apparently, that motion to
23 supplement and add a new witness was filed March the 6th
24 with our Clerk's office.

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1 MR. MURPHY: There is no motion to that effect. I
2 was responding to --

3 HEARING OFFICER WALLACE: I mischaracterized it.
4 Wasn't it entitled "Complainant's Supplemental
5 Discovery"?

6 MR. MURPHY: I was carrying out the directions of
7 the Hearing Officer in the January hearing.

8 HEARING OFFICER WALLACE: That's correct. I
9 mislabeled that. It's not a motion. It's Complainant's
10 supplement. Our Clerk's office has that docketed as
11 March 6th.

12 I have Oberweiss' objection. I believe it's
13 entitled "Motion to Bar or in the Alternative Continue
14 for Further Discovery." That was docketed on March 20th
15 by the Clerk of the Board.

16 As I said yesterday, my research indicates that
17 the -- it seems to be an either/or situation. If you
18 wish to proceed with that particular witness, then I am
19 going to allow additional time for further discovery.

20 It appears, from the Board's rules and supplemented
21 by looking at the New Illinois Supreme Court Rules, that
22 that probably is the most appropriate thing to do.

23 In light of that, we did discuss some certain
24 scheduling aspects of this new witness. There is

1 obviously no way to do any discovery during the four or
2 five days we had scheduled for hearing.

3 I do agree that we have been doing this hearing in
4 somewhat fitful starts, and I regret that we have to do
5 that. I would like for it to go a little smoother, but
6 it's not; and the only thing that I think is reasonable
7 to do is that we do continue the hearing for the further
8 discovery of this witness.

9 Mr. Murphy, you did indicate that you did intend to
10 proceed and use him.

11 Secondly, since the motion to rejoin the Agency and
12 the motion to dismiss are pending before the Board, I
13 further feel -- and for the purpose of the record, I will
14 do this on my own motion -- that it's better to continue
15 these days of hearing to a later date and allow the Board
16 to rule on those two motions.

17 That way I think that conserves our resources
18 better. To the extent that we would spend four days here
19 and the Board would grant the motion to dismiss, everyone
20 would have been put out quite a bit; and to the extent
21 that if the Board adds the Agency as a party in interest
22 or as a party, I would prefer that they have the
23 opportunity to participate in the continued hearings if
24 the Board let's them in.

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1 Now, if the Board denies the motion to dismiss and
2 the party is not -- the Agency is not joined as a party,
3 we're pretty much back at the same square we were; but
4 the Respondents will have the opportunity to do the
5 further discovery, certainly, on the new witness.

6 Again, that pretty well sums up everything. We just
7 need to try to set some new dates. I am very hopeful
8 that the Board will rule at the end of the April meeting
9 or, at the earliest, the first meeting in May. So we
10 could hopefully get going again the end of May, 1st of
11 June, depending on everyone's schedules. I know we have
12 to schedule way out in advance to try to catch everyone.

13 With that said, Mr. Murphy, if you want to comment on
14 any of that, you may do so.

15 MR. MURPHY: On the record, naturally, I want to
16 show the objection of the Complainants to the allowance
17 of time for further discovery, which, I take it, is in
18 the Hearing Officer's ruling on the motion that was filed
19 by Oberweiss for additional time.

20 I take it that you have thereby essentially said
21 you're going to let me add this witness, but you're going
22 to deny their motion to disqualify him for earlier
23 nonperformance or whatever they characterize it as; but
24 in the alternative, you are going to say and have said

1 that Oberweiss should have the opportunity to depose this
2 witness.

3 I do say on the record that we have offered
4 verbally -- in our conversation with the Hearing Officer
5 yesterday and with Oberweiss Counsel, we have offered to
6 make that witness available for a deposition at any time
7 that could be agreed on this week.

8 In response to that Oberweiss was taking the
9 position that they need at least 21 days or something
10 like that to be prepared to depose the witness.

11 That being the case, the whole thing is kind of on
12 hold, I gather, and that's fine. We will make him
13 available when we get into the scheduling of depositions,
14 which, I take it, will kind of hang on the scheduling of
15 the next hearing date.

16 I'm sorry if I'm a little confused about all the
17 scheduling, but it's at least a little simpler now with a
18 couple fewer respondents in the picture and having made
19 my record as far as the new witness is concerned and
20 having -- also wanting to make my record that I basically
21 object to the continuance of this because I was ready to
22 proceed this week and today, but I will live with that
23 and that's fine. We can get a new date.

24 I don't have a picture of what kind of timing the

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1 Hearing Officer is talking about, except in your last
2 words I think you indicated that we should start looking
3 at dates after the end of May.

4 HEARING OFFICER WALLACE: That's correct.

5 MR. MURPHY: That's probably it.

6 If that is true, it's only a suggestion, but perhaps
7 they should be given -- or I should be given a date
8 before the end of May in which this deposing of the
9 additional witness can take place.

10 If that's also true, they have indicated in their
11 responses to my discovery supplement that they also have
12 a new witness on the subject that my new witness is going
13 to be testifying about. I believe that was a geologist
14 by the name of Imse, I-m-s-e.

15 So I would like -- at the time that we fix a time to
16 depose Lyle Bruce, who is my expert, I'd like the same
17 time to apply to making Mr. Imse available for my
18 deposing of him.

19 HEARING OFFICER WALLACE: Mr. Lawton?

20 MR. LAWTON: We have no objection to the basic
21 program suggested by Mr. Murphy.

22 Our request for additional time, of course, was
23 responsive to the idea of his permitting Mr. Bruce to
24 have a deposition and then proceeding with his testimony

1 the following day. That was the thrust of why I asked
2 for additional time.

3 We would also like, since Mr. Imse's involvement in
4 this case would be responsive to that of Mr. Bruce, to
5 schedule it so that Mr. Bruce's deposition would precede
6 Mr. Imse, but beyond that we have no problem with it.

7 MR. MURPHY: I have no objection to that order of
8 the witnesses. That's fine.

9 HEARING OFFICER WALLACE: Yes, Mr. Hughes?

10 MR. HUGHES: On behalf of Mr. Fetzer, I would
11 object to any other witnesses being allowed at this time
12 either on behalf of Oberweiss or on behalf of the
13 Complainants.

14 We're in, I believe, the third or fourth or fifth
15 day of trial. In the middle of trial he dismisses --
16 Complainants dismiss out certain entities, which we
17 believe may have caused the contamination.

18 Now he uses their expert, which they originally had,
19 and now uses it to bootstrap himself up when his case is
20 failing on the merits halfway through the trial. I think
21 that puts my client in a definite disadvantage.

22 By the way, I think if you read back the record, I
23 don't think that you said -- and I could be wrong, but I
24 don't think that you said that you're granting the motion

1 to allow this additional witness. You said, "If I should
2 grant this witness, it would only be fair if we allowed
3 additional time to depose that witness."

4 So I'd like to suggest to this Court that that
5 witness be barred as well as the witness that Oberweiss
6 has set forth. It would severely prejudice my client.
7 We have to prepare a case. We have gone through the
8 dates of trial.

9 It would in essence put us in a situation of if Mr.
10 Murphy's witness testifies, as I believe he may, as a
11 hired gun witness, we then are going to have to hire
12 someone to counterbalance that.

13 We didn't think it was necessary because the other
14 witness that Mr. Murphy had, who was in the process of
15 testifying when we last quit, said nothing and had
16 nothing on the record that there was any contamination
17 from the subject property, so there was no liability on
18 my client in that case.

19 If now we're getting, at the last twelfth hour,
20 another expert witness, we're going to go back to the
21 beginning of discovery. I can assure you that that's
22 going to happen because if that expert witness says what
23 I think he's going to say, then I think we may have to
24 look for an expert witness, a geological witness.

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1 I think those witnesses are then going to have to be
2 deposed; and depending on what those expert witnesses
3 say, even the expert witness from Oberweiss, depending on
4 what they say, we may have to have other witnesses then
5 come forward.

6 I think it's highly irregular, unfair and
7 prejudicial to my client to allow either Mr. Murphy's or
8 Oberweiss' expert witnesses, especially when we're in the
9 middle of the trial.

10 I've never heard of that before. I just don't see
11 where that should be allowed. It would prejudice us
12 severely; and based upon that, I would object to this
13 Court allowing any expert witnesses that haven't already
14 been disclosed come forth and testify in this case.

15 HEARING OFFICER WALLACE: All right.

16 MR. MURPHY: May I respond?

17 HEARING OFFICER WALLACE: Yes.

18 MR. MURPHY: I think this objection -- which,
19 again, is not to a motion of mine because I haven't made
20 a motion. I've merely followed the orders as they have
21 come down to supplement my discovery.

22 It is true, as Counsel says, of course, that I have
23 in effect adopted a witness that came from another party
24 who is no longer in the case.

1 That being the case, though, we should realize that
2 that same witness was essentially in the discovery
3 sequence that was furnished by Amoco or by Mobil,
4 whichever one it was; but that witness was duly listed,
5 as it were, not by name but essentially by predecessor,
6 and your Honor already granted -- it was Amoco.

7 Your Honor granted Amoco's motion at the last
8 hearing to substitute their current geological expert
9 witness, which is an employee of Amoco, for the one that
10 had been listed.

11 Now, no effort had been made -- in the years that
12 this has been to the Board, no effort had been made by
13 either Oberweiss or Mr. Hughes to seek the testimony of
14 that geological witness that was available for being
15 deposed. Those had been furnished as a descriptive
16 furnishing a long time ago, and all that's happened is
17 that there is a different employee of Amoco in the
18 picture.

19 Yes, we have retained his services, and we're going
20 to put him on. As far as that is concerned, that really
21 only brings me to the description of this proceeding at
22 the Pollution Control Board of which your Honor is the
23 Hearing Officer.

24 This has indeed been cut up. I'm not blaming any of

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1 the parties for the way it has been cut up. It has
2 happened, and we're facing it, but it has been anything
3 but launched upon a three- or four-day trial, as Mr.
4 Hughes would put it.

5 What it has been is a couple of times we have been
6 before a Hearing Officer of the Board, and those times
7 that we have been before the Hearing Officer have been
8 spent largely in presentation by one party or another and
9 ruling by the Hearing Officer on the presentation by one
10 party or another of technical argumentative motions,
11 which are essentially calculated to delay the time when
12 the merits will be reached.

13 We have not yet reached the merits. The only thing
14 that was reached, by way of discussion and testimony, on
15 the merits was my presentation of the testimony of Robert
16 Mehrens, the engineer that I had put on the stand.

17 All that we had discussed in Mr. Mehrens' testimony
18 was not the defendant Mobil, not the defendant Oberweiss,
19 but strictly what he had found in the FOIA material that
20 had been furnished by Mobil.

21 He did not say -- he did not testify in any way that
22 there was any kind of tracking or migration of the
23 admitted existing soil and water involvement from the
24 Mobil site. He told what the FOIA material said, and

1 that was all.

2 We asked at the termination of that time when he was
3 on the stand whether or not we should proceed with his
4 testimony as to another defendant, and that was by, I
5 think, agreement of Counsel. I don't remember the exact
6 thing, but it was decided that we were going to terminate
7 for that day. He's never been back on the witness stand.

8 Your Honor knows that our plan was that when this
9 resumed on the merits, we were going to put Mr. Mehrens
10 back on the stand; and then we would hear what his
11 testimony about the site in question is, and that's the
12 Oberweiss site.

13 Now, it's been a long time before the Board, and I
14 think it would be essentially carrying out the concept of
15 lack of responsibility, which we've heard time and time
16 again from Oberweiss, as to their position whether they
17 are an owner or operator or anything else, but they're
18 saying that the merits of this case are that there is no
19 responsibility on their part.

20 Mr. Fetzer is riding on them, and that's fine. He's
21 entitled to do that. They're all in the same site, but
22 so far no one has had a chance to say anything about
23 whether or not that site was the source of the
24 contamination of the third-party citizens Complainants,

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1 the Streits.

2 If we are to be barred from bringing in the one
3 witness that is finally available to us to show that
4 there is a direct causal connection between that site and
5 its leaks of product and the water that was contaminated
6 on the Streits' property, then all that says is fine,
7 there is no way of getting any kind of effective
8 enforcement of the environmental law in this proceeding
9 or in this forum.

10 So that's fine, whatever everybody feels it is going
11 to be, but I'm still taking the position that as I hear
12 you today and as I heard you yesterday, we were going to
13 have the opportunity to present that witness when we do,
14 if we ever do, get to the merits of this thing, and I'm
15 going to insist on that as part of the rulings that we
16 hear today.

17 MR. HUGHES: May I respond again to that?

18 HEARING OFFICER WALLACE: Briefly.

19 MR. HUGHES: Your Honor, when Mr. Murphy says that
20 that witness was available to us a long time ago, that's
21 an incorrect and untruthful statement.

22 That particular person was not, and we may have made
23 a decision at that time to depose or not to depose that
24 witness. That's up to us.

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1 But now in the fourth day of trial -- I think it's
2 four days -- and after the Complainant has called four
3 witnesses, both plaintiffs, his own expert witness that
4 he disclosed many years ago and that we took the
5 depositions of and found, quite frankly, his testimony to
6 be so lacking that at the end of the plaintiffs' case we
7 were going to make a motion, and we thought we'd be
8 successful in that motion, and we didn't need to do
9 anything further, now at the last moment after we're in
10 trial he then pops another witness on us after he's
11 already paid money to settle the case with Amoco -- or
12 he's already been paid by Amoco to settle the case.

13 I think that's highly prejudicial and totally unfair
14 to my client, who has gone through the discovery process,
15 deposed witnesses, prepared their case, and at the
16 twelfth hour now when his witness -- his expert witness
17 is failing on the stand, we then have to have another
18 witness that he's got.

19 I'm telling you that this is going to result in a
20 situation where we're going to go all the way back
21 through discovery once again because whatever these two
22 expert witnesses, if your Honor allows them to, say, we
23 then are going to ask for an opportunity to call our own
24 witness -- expert witness and have him rebut what these

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1 expert witnesses say.

2 Then they're going to have to take the deposition of
3 my expert witness, and we're going to get into a year and
4 a half from now we may have a hearing. That's
5 ridiculous. My client is entitled to a hearing right
6 now, not a year and a half from now.

7 I think that this thing has been pending for years,
8 years, and my client is running up an extremely large
9 bill for my services. It's totally unfair for him to --
10 for the plaintiff to come in at the very last and have
11 another expert witness.

12 It's my understanding that discovery had been closed
13 off. That's why we started the trial.

14 If discovery hadn't been closed off and, Mr. Murphy,
15 if this witness had been disclosed to us so many years
16 ago, why didn't you take his deposition? Why didn't you
17 list him as an expert witness?

18 Because then I would have taken his deposition if he
19 had listed him as an expert witness. If he was available
20 to us at that time, he certainly was available to Mr.
21 Murphy at that time.

22 I would strongly and strenuously object to that
23 witness being allowed to testify.

24 HEARING OFFICER WALLACE: Thank you.

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1 Mr. Lawton? Mr. Berman?

2 MR. LAWTON: I don't intend to prolong this.

3 It's a little hard to answer Mr. Murphy's assertions
4 because he has pretty much argued his whole case while
5 we've been sitting here.

6 You'll recall that our initial request on our motion
7 to bar was that that be the case, Mr. Bruce be barred.
8 The concept of taking his deposition was an alternative
9 in the event the Board and your Honor concluded that he
10 should not be.

11 In that respect, we have the same viewpoint that Mr.
12 Hughes expressed. There has been nothing dilatory about
13 anything that Oberweiss has done. It's not up to us to
14 prove Mr. Murphy's case. We've been here. We've filed
15 what was required to be filed, and we have been ready to
16 proceed.

17 We're not the ones that introduced a new witness,
18 and that is a major aspect of this proceeding. So that
19 we feel that while the witness is not appropriately
20 before us because he was a representative of a party that
21 was withdrawn from the case and he now is shifting his
22 position to go after another defendant, we are prepared
23 to go ahead, pursuant to your Honor's orders, but we do
24 adopt Mr. Hughes' viewpoint with respect to the

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1 introduction of this witness.

2 HEARING OFFICER WALLACE: I understand that
3 probably in the confines of a court that might be highly
4 irregular. In the confines of an administrative body,
5 it's not all that unusual.

6 I'm going to allow Mr. Murphy to call Mr. Bruce as a
7 witness. I'm going to allow Oberweiss to call Mr. Imse
8 as a rebuttal witness.

9 Mr. Hughes, if you want to find an expert to rebut
10 any of that, you're free to do so.

11 MR. HUGHES: Your Honor, I'd like to request, then,
12 that I not have to disclose any expert witness until we
13 take his expert witness' deposition. I don't think I
14 should be put in that position. I don't know what he's
15 going to say.

16 How can I get a witness until I know what he's going
17 to say?

18 MR. MURPHY: I have no objection.

19 MR. HUGHES: Respectfully, I think it's highly
20 irregular to allow that witness to testify.

21 HEARING OFFICER WALLACE: It may be highly
22 irregular, but I'm going to allow this to proceed. I'm
23 not going to bar the witness.

24 I'm going to give you the opportunity, as you sit

1 there today -- if you say that Mr. Fetzer has not
2 retained the services of any witnesses, then, you know, I
3 guess I'm kind of at a loss as to what kind of defense
4 Mr. Fetzer was going to put on at some point in this
5 anyway.

6 MR. HUGHES: Let me address that because I don't
7 want to let that go on unanswered.

8 We don't have to put on any defense. They have to
9 prove their case. In taking the discovery deposition of
10 their expert witness, he says that he tested the whole
11 property, and there was no leakage from the site
12 location.

13 HEARING OFFICER WALLACE: That's not in evidence
14 yet.

15 MR. HUGHES: I'm telling you that I'm going to
16 represent to the Court that that's what his discovery
17 deposition says; and that being the case, he had no case.
18 Mr. Murphy had no case.

19 I didn't have to do a thing. All I had to do was
20 sit here and, at the end of his case, make the
21 appropriate motion. That being the case, we didn't need
22 to do discovery. We didn't need to have an expert
23 witness. Now by this ruling you're changing the whole
24 ball game.

1 HEARING OFFICER WALLACE: If that's how you
2 perceive it, that's how you perceive it. We might as
3 well get over it and move forward on setting another
4 schedule.

5 MR. HUGHES: But I don't want to be barred from or
6 that I have to set an expert witness or any other
7 discovery.

8 I want to have it left open so that once we take
9 those discovery depositions, at that time I can make the
10 decision for my client whether we should or shouldn't.

11 HEARING OFFICER WALLACE: To the extent that -- you
12 know, we're reopening this for essentially two
13 depositions. Now, if you can't live with that, you can't
14 live with it, but that's what we're doing.

15 We do need to set a new schedule, and we might as
16 well start thinking about that. It's not my plan to keep
17 prolonging this. I dislike this as much as any of you,
18 but that's the way it is. We might as well move on to
19 scheduling.

20 So let's go off the record.

21 (There followed a discussion
22 outside the Record.)

23 HEARING OFFICER WALLACE: Back on the record.

24 We've had a lengthy off-the-record discussion on

1 scheduling and many varied other things. The Hearing
2 Officer is ruling today that the Complainant, Olive
3 Streit, may add Lyle Bruce as a witness and that at this
4 time Oberweiss has identified a Mr. Imse as a rebuttal
5 witness.

6 I will reopen discovery to the extent of taking Mr.
7 Bruce's deposition and Mr. Imse's deposition. I will
8 further reopen discovery to the extent for Mr. Hughes'
9 client, Richard Fetzer, to look at the new information
10 and make a determination as to whether Respondent Richard
11 Fetzer will need to name an additional witness as a
12 result of the prior two witnesses.

13 We will schedule a telephone conference on June 30,
14 1997, at 11:30 A.M. Mr. Berman's office will initiate
15 the call to the Hearing Officer, the Complainants,
16 Attorney Mr. Hughes, Mr. Slocum.

17 If there are any other parties, then you should
18 notify Mr. Berman, but I think that's all; is that
19 correct?

20 You mentioned off the record that if you wanted
21 clients present, they should be at the respective
22 attorney's office because that makes it easier.

23 MR. BERMAN: It's preferable for clarity of the
24 phone call.

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1 HEARING OFFICER WALLACE: If you're going to have
2 clients or other persons present, it would be preferable
3 to have them in your office, and we will identify
4 everyone on the phone.

5 Tentatively, between now and June 30th, I would hope
6 and expect the parties to proceed on this reopened
7 discovery. Mr. Murphy will attempt to provide documents
8 concerning his new witness by May 1st. Depositions of
9 Mr. Bruce will follow that, if necessary.

10 I guess I should also note for the record that I
11 anticipate that the Board will rule on the pending
12 motions within the next two to three meetings. That
13 would -- the next meetings are April the 3rd, which they
14 will not rule on April 3rd. The next one is April 17th
15 and May 1st and May 15th.

16 It would be my anticipation that the Board would
17 rule, at the very latest, by May 15th. The depositions
18 and procedures do not have to be taken prior to the
19 Board's ruling. Once the Board does rule, I would want
20 the parties to get together, do the scheduling and get
21 those two depositions out of the way.

22 I guess after those two depositions, Mr. Hughes will
23 then review the material, make a determination and inform
24 the Hearing Officer and the parties whether or not he has

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1 future plans for an additional expert.

2 It looks like we probably won't be continuing
3 evidentiary hearings until sometime into the fall. If
4 there are any other objections to discovery, please file
5 them with me.

6 MR. BERMAN: May I have one moment, please?

7 HEARING OFFICER WALLACE: Yes.

8 (There followed a discussion
9 outside the record.)

10 MR. BERMAN: Oberweiss would respectfully request,
11 with respect to the verbal order that you are just about
12 to finalize, that with respect to the testimony of John
13 Imse, that we amend your verbal order ever so slightly to
14 say that Oberweiss be permitted to call a rebuttal
15 witness.

16 The reason for my suggested amendment is that given
17 we haven't seen any document from Lyle Bruce and we don't
18 have a clue as to what his testimony may be or will be,
19 I'm certain that Oberweiss will call a rebuttal expert,
20 and I believe that that rebuttal expert will be John
21 Imse.

22 But if Mr. Bruce heads off in some different
23 direction, we may need a different rebuttal expert, not
24 in addition to Mr. Imse but instead of.

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1 So I would respectfully ask that your order be
2 modified only insofar as to say that Oberweiss -- that
3 all of this will happen and that Oberweiss will provide a
4 rebuttal expert, and we can even go so far as to say we
5 presume it will be John Imse.

6 By the way, I don't expect Mr. Imse will have any
7 documents to provide. I believe that his testimony, such
8 as it is, and his deposition testimony will be based on
9 documents that are already in the record. So
10 documentarily, I don't think the Imse -- or the
11 rebuttal -- the Oberweiss rebuttal expert will be much --
12 will need to provide much by way of documents.

13 I would only ask that we be allowed to call a
14 rebuttal expert and not necessarily that we be locked
15 in to John Imse.

16 MR. MURPHY: No objection.

17 HEARING OFFICER WALLACE: What is your time frame
18 of identifying after?

19 MR. BERMAN: I wouldn't -- 21 days. I can find
20 somebody from the stable that quickly. 21 days after the
21 deposition of Mr. Bruce, after the close of Mr. Bruce's
22 deposition. I wouldn't need more --

23 HEARING OFFICER WALLACE: All right.

24 MR. BERMAN: -- if at all.

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1 HEARING OFFICER WALLACE: All right. Then I
2 will -- Oberweiss may call a rebuttal witness, who you've
3 previously identified as John Imse. Leave is granted to
4 call someone other than Mr. Imse if necessary.

5 MR. BERMAN: Thank you.

6 HEARING OFFICER WALLACE: Is there anything else
7 anyone wishes to bring up at this time? All right. Then
8 thank you.

9 MR. MURPHY: Is it necessary -- I ask -- I don't
10 mean to prolong this unnecessarily, but is it necessary
11 that I have kind of an open court order that subpoenaed
12 witnesses are still continued without the service of a
13 new subpoena?

14 If it is, I want such an order. If it isn't, then
15 forget I said anything.

16 MR. LAWTON: We have no objection to that.

17 HEARING OFFICER WALLACE: To the extent that you
18 may be subpoenaing the Agency people when we reconvene,
19 we probably should send out a subpoena to those
20 individuals.

21 MR. MURPHY: I've been working on what I felt was a
22 reasonable living together with some Counsel from the EPA
23 that said that after I've paid his witness about three
24 witness fees already, that I wouldn't need to do that

1 anymore, but it's all right with me. If I have to do it
2 in a subpoena, I have to do it in a subpoena.

3 HEARING OFFICER WALLACE: Well, that's totally up
4 to the Agency because the Agency has been known to move
5 to quash a subpoena.

6 MR. MURPHY: Right, right.

7 MR. LAWTON: As to non-Agency deponents, we would
8 provide whomever we have without the need for subpoena,
9 and I would assume you would do the same.

10 MR. MURPHY: Yes. I've asked Mrs. Oberweiss to be
11 present and available.

12 Thank you, your Honor. Nothing further.

13 HEARING OFFICER WALLACE: All right. Thank you
14 very much.

15 (Whereupon, the hearing was
16 continued sine die.)

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1 STATE OF ILLINOIS)
2 COUNTY OF DU PAGE) SS.
3)

4 I, Jean S. Busse, Certified Shorthand Reporter
5 No. 84-1860, Registered Professional Reporter, a Notary
6 Public in and for the County of DuPage, State of
7 Illinois, do hereby certify that I reported in shorthand
8 the proceedings had in the above-entitled matter and that
9 the foregoing is a true, correct and complete transcript
10 of my shorthand notes so taken as aforesaid.

11 IN TESTIMONY WHEREOF I have hereunto set my
12 hand and affixed my notarial seal this _____ day of
13 _____, A.D. 1997.

14
15
16 _____
17 Notary Public

18 My Commission Expires
19 June 3, 1997.

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