ILLINOIS POLLUTION CONTROL BOARD
February 1, 1996

OLIVE STREIT and LISA STREIT,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 95-122
	)	(Enforcement - UST)
OBERWEIS DAIRY, INC., RICHARD J. FETZER and JOHNNIE W. WARD d/b/a SERVE-N-SAVE, and RICHARD J. FETZER, individually, AMOCO OIL COMPANY, and MOBIL OIL CORPORATION,	)	
	)	
Respondents.	)	
	)	

ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on a citizen's enforcement action filed by Olive and Lisa Streit against the following respondents: Oberweis Dairy, Inc (Oberweis), Richard J. Fetzer and Johnnie W. Ward d/b/a Serve-N-Save, Amoco Oil Company (Amoco) and Mobil Oil Company (Mobil). This immediate order deals with an "Emergency Motion For Interlocutory Review of Hearing Officer's Ruling On Respondent Amoco's Request To Respondent Oberweis For The Admission Of Facts," filed with the Board on December 22, 1995 by Amoco. On December 29,1995, Respondent, Oberweis Dairy, Inc. (Oberweis), filed a Motion To Deny Interlocutory Appeal. On January 8, 1996, Amoco filed its Response To Motion To Deny Interlocutory Appeal and a Motion For Board's Allowance Of Interlocutory Review Of Hearing Officer's Ruling.

The background for the above procedural motions stems from the Board hearing officer's ruling allowing Oberweis additional time to file a response to a Request to Admit Facts which was served by co-respondent, Amoco, on November 27, 1995. Amoco's Request to Admit was made pursuant to Section 103.162 of the Board's procedural rules (See 35 Ill. Adm. Code 103.162). That section, similar to Illinois Supreme Court Rule 216, requires that a party respond to the Request to Admit within 20 days or, alternatively, file an objection with the hearing officer to said request. The rule further states that failure to respond or raise an objection with the hearing officer within the time prescribed will deem the facts admitted as true. Specifically, the relevant rule reads:

> Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 20 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying

> specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission. If good faith requires that a party deny only a part, or requires qualification, of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. Any objection to a request or to an answer shall be heard by the Hearing Officer upon prompt notice and motion of the party making the request.

In accordance with Section 103.162(c) Oberweis' response to Amoco's Request to Admit was due to be served upon Amoco by December 18, 1995, three days prior to a hearing on the merits in this matter, which was scheduled and held on December 21- 22, 1995. As Oberweis had not yet responded to Amoco's Request to Admit, counsel for Amoco requested a hearing officer ruling during the hearing that the matters set forth in the Request for Admission of Facts be deemed admitted and that any attempt to introduce evidence in contradiction of those admissions be excluded as irrelevant. Attorneys for complainants, Olive and Lisa Streit, and co-respondent Mobil, joined in Amoco's motion.[1]

In response to the oral motion, the attorney for Oberweis argued, based on a conversation he had with the hearing officer on December 18, 1995 and the hearing officer's issuance of a Third Discovery Order on the same day, he believed the hearing officer had closed all discovery and that, therefore, he was somehow excused from the 103.162 response requirement. (December 21, 1995 Hrg. Tr. at 15-18.) The hearing officer ruled that since it was possible the attorney for Oberweis was confused about her order and the request to admit included statements which were an admission of violations and liability rather than merely facts, it would constitute "oppression" under Section 103.200(c) of the Board's procedural rules to deem the facts admitted. (December 21, 1995 Hrg. Tr. at 21.) The hearing officer then ordered Oberweis to respond to the request as follows:

> "This request shall be responded to consistent with the procedural rules; in other words, it will respond to on an item-by-item basis or as is stated in Section 103.162, admitting, denying, or indicating why the request is otherwise improper in whole or in part; and that that response be provided, submitted to the Board, be provided to me, and be provided to all the parties within the next two business days....I would like this to be responded to by no later than 4:30 on Tuesday, December 26." (Id.)

While the Board received Oberweis' Response to Amoco's Request to Admit on Tuesday, December 26, 1995, Amoco did not receive Oberweis' response via U.S. mail

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[1] Amoco also served a Request to Admit on the complainants in this matter, Olive and Lisa Streit. The Streits timely responded in accordance with procedural rule 103.162.

until December 29, 1995. Though the Board's copy of Oberweis' response contained a verification of fact signed by Elaine Oberweis, the response served upon Amoco was not verified. These issues have been raised with the Board, by motion to the hearing officer, in a motion filed by Amoco on January 11, 1996. The Chief Hearing Officer referred this motion to the Board by hearing officer order dated January 22, 1996.

In its December 22, 1995 motion to the Board, Amoco requests that the Board entertain this interlocutory appeal and reverse the ruling of its hearing officer, deem all facts true as set forth in the Request for Admission pursuant to Section 103.162 and strike Oberweis' response to the Request to Admit. Amoco seeks similar relief in the January 11, 1996 motion to strike Oberweis' responses made pursuant to the hearing officer order. In its motion seeking interlocutory appeal of the hearing officer's December 21, 1995 ruling, Amoco argues that Oberweis' conversation with the Board hearing officer on December 18, 1995 constituted an *ex parte* communication, that Oberweis has not demonstrated good cause in order to allow late responses, and that the Board hearing officer had no authority to extend the date upon which responses are due under Section 103.162. Based upon the following, the Board denies Amoco's interlocutory appeal of the hearing officer's December 21, 1995 ruling.

Amoco's December 22, 1995 Motion.

Regarding the issue of *ex parte* communication, the Board believes that the December 18, 1995 conversation between Oberweis' attorney and the Board hearing officer concerned matters of procedure, not issues of substance or merit before the Board. (See "Hearing Officer Statement Concerning Phone Conference Placed At Issue As *Ex Parte*," filed with the Board and served on the parties on January 12, 1996.) Illinois law clearly establishes that matters of procedure and practice are not considered *ex parte* communications. (See 5 ILCS 100/60(d).

We next address Amoco's contention that the hearing officer improperly granted Oberweis an extension of time to respond to Amoco's request to admit. Amoco contends that the Board's procedural rule at 35 Ill. Adm. Code 103.162(c) does not allow the hearing officer discretion to extend the 20-day response time for parties receiving a request to admit. As stated above, the Board's procedural rule regarding requests to admit found at 35 Ill. Code 103.126 is based on Supreme Court Rule 216. We therefore find it instructive to analyze recent caselaw regarding the Supreme Court Rule.

The Illinois Supreme Court has held that a court has the discretion to allow an untimely response to a request to admit to be served on the opposing party where the delinquent party has shown good cause for the delay. (Bright v. Dicke, 166 Ill.2d 204, 205 (1995).). The Supreme Court also emphasized that requests to admit are essentially a discovery tool, and that circuit courts must be allowed to exercise discretion over the conduct of pretrial discovery. (Id.)

However, the Supreme Court held that a court's discretion to allow a late response to a request to admit is not unlimited. The Supreme Court stated this discretion "does not

come into play unless the responding party can first show good cause for the extension." (Id. at 209, *citing* Hernandez .v. Power Construction Co., 73 Ill.2d 90, 95-97 (1978).). The Court further stated:

> [T]he mere absence of inconvenience or prejudice to the opposing party is not sufficient to establish good cause under Rule 183 and the companion provision of the Code of Civil Procedure. The moving party must assert some independent ground for why his untimely response should be allowed.
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> (Bright at 209 (citations omitted).)

Like the courts, the Board's hearing officers have wide discretion in controlling discovery. We find that the hearing officer did not abuse that discretion in granting Oberweis an extension of time to respond to Amoco's request to admit. While the Board declines to adopt the rationale used by the hearing officer in her ruling, i.e., that Section 103.200(c) allows her to determine that "deeming the facts admitted" would be an "oppressive" requirement under the circumstances, her ruling is within the general authority of the hearing officer to regulate discovery. Based upon the above, the Board declines to grant the emergency request for interlocutory appeal of the hearing officer ruling filed by Amoco.

Amoco's January 11, 1996 Motion.

Amoco's January 11, 1996 motion to strike Oberweis' response to Amoco's Request to Admit was referred to the Board by the January 22, 1996 Chief Hearing Officer order. Oberweis filed its response to the motion on January 19, 1996. Amoco argues in its motion that Oberweis' response was not timely, was not sworn, was not certified as being submitted on recycled paper, and was not accompanied by a proper notice of filing or proof of service. Amoco therefore requests that the response be stricken, and that no further response be allowed.

In Oberweis' response to Amoco's January 11, 1996 motion, Oberweis asserts their response the Request to Admit was timely under the "mailbox rule," and that the hearing officer did not order that the mailbox rule would not apply. Oberweis further asserts that no prejudice resulted to Amoco, since 30 days were to pass before the next hearing date. Oberweis further cites the short time frame over the Christmas holiday allowed for its response.

The Board finds that Oberweis' response should be stricken. The copy of the response served on Amoco was not properly verified pursuant to Section 103.162(c). The fact that Oberweis timely filed a properly verified response with the Board does not overcome the deficiency that Amoco did not receive a properly verified copy. Oberweis' failure to serve Amoco with a sworn statement causes service in this case to have been improperly effectuated. Oberweis therefore failed to timely serve a properly signed and verified copy of its response on Amoco. Accordingly, Amoco's motion to strike Oberweis' response is granted.

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 1st day of February, 1996, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board