ILLINOIS POLLUTION CONTROL BOARD
March 11, 1993

BEVERLY MALKEY, AS EXECUTOR OF THE ESTATE OF ROGER MALKEY, d/b/a MALKEY'S MUFFLERS,	)	
Petitioner,	)	
v.	)	PCB 92-104 (UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

KYLE L. STEPHENS, CANTLIN LAW OFFICES, APPEARED ON BEHALF OF PETITIONER;

DANIEL P. MERRIMAN, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board on a petition for review filed July 16, 1992[1], by Roger Malkey pursuant to Section 22.18b(g) of the Environmental Protection Act (415 ILCS 5/22.18b(g))(Act)[2]. During the pendency of this matter, Roger Malkey died, and his wife, Beverly Malkey, as executor of the estate, and d/b/a Malkey's Mufflers (Beverly Malkey or petitioner), is now pursuing the action. (Tr. at 11.) The caption of the matter has been revised to reflect these changes. Beverly Malkey seeks review of the Illinois Environmental Protection Agency's (Agency) partial denial of reimbursement of corrective action costs from the Underground Storage Tank (UST) Fund. Hearing was held on December 4, 1992, in Earlville, Illinois. No members of the public attended.

Briefs in this matter were due from both parties on January 25, 1993, by hearing officer oral order. (Tr. at 198.) The petitioner filed her brief on February 4, 1993, (mailed January 27, 1993) accompanied by a motion to file instanter. Petitioner's attorney states that on January 24, 1993, he sustained an sprain injury to his hip, resulting in a delay in filing the brief. The Board grants the motion to file.

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[1] At hearing, discussion was had regarding the filing of an amended petition. (Tr. 5-7). No amended petition was ever filed in this matter.

[2] The Act was formerly codified at Ill.Rev.Stat. 1991, ch 111½, par. 1001 et seq.

The Agency filed its brief on February 18, 1993, accompanied by a motion to file instanter; no filing for extension of time had been filed. The Agency's reasons for not timely filing are stated as "due to the press of Agency business and other circumstances beyond the control of the undersigned [Agency attorney]". (Motion at par. 2.) The Agency also states that petitioner has no objection to the late filing, and that petitioner will not suffer any irreparable harm by this delayed filing.

The Board denies the Agency's motion to file. The Agency does not state sufficient reasons for the lateness of the filing, especially considering that the filing is three weeks late. The Board also points out that it is not only other parties that would be prejudiced by such late filing, but the Board is prejudiced through the hampering of its decision-making process caused by failure to have a matter briefed in a timely manner. This is especially true in cases, such as the instant matter, where a decision is due by a date certain.

The sole issue in this appeal is whether certain costs denied for reimbursement by the Agency are reasonable, and would be eligible for reimbursement under the Act.

BACKGROUND

This case involves the removal of two underground storage tanks located at Malkey's Mufflers owned by Roger Malkey in Earlville, Illinois. The tanks were 550 and 1000 gallon gasoline tanks that were taken out of service and removed on March 28, 1991. On that date, it was discovered that both tanks had released gasoline. (Rec. at 4-8.) Roger Malkey contracted with Dan Whittaker, a local excavator, and with P & P Consultants, Inc. (P&P), for tank removal and cleanup of the release. P & P submitted the reimbursement application to the Agency. (Tr. at 16-20; Rec at 3.)

On June 10, 1992, the Agency sent a letter to Roger Malkey. The letter states that various invoices were submitted covering the period of March 28, 1991, to December 27, 1991, and that the total amount requested for reimbursement is $34,263.48, and that the deductible is $10,000 for this claim. The letter further states that the Agency would be reimbursing $14,751.98 of the requested amount. An attachment to the letter contains four paragraphs indicating the cost figures denied for reimbursement, what activities the costs covered, and the reasons for denial of payment[3]. (Rec. at 25-27.) The petitioner contests three of the four denial paragraphs. The petitioner does not contest the $10,000 deductible determination.

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[3] The Board notes an $11.00 computational error that is not explained nor is it addressed at any point in this proceeding.

DISCUSSION

Paragraph 1, Handling Charges

The Agency deducted $5,556.66 of the costs submitted for handling charges. The Agency states that the owner or operator failed to demonstrate that the costs submitted for handling charges are reasonable, and reduced the amount of handling charges to 15% of the total cost of corrective action. (Rec. at 27).

Carney D. Miller, operations manager of P&P, testified on behalf of petitioner. He stated that he has been employed in the same position by P&P for three years and has had experience with approximately thirty UST cleanup sites. (Tr. at 33,35.) He testified that the charges P&P levees are fairly standard within the company and that their rates would be reflective of those in the industry. (Tr. at 36-7). He defined "handling charges" as a "percentage for mark-up and subcontractor costs" (Tr. at 46), but later clarified that the handling charges are the difference between the actual cost of the subcontractors to P&P and the rate billed to the customer. He stated that the handling charges did not include fixed operational costs. (Tr. at 61-2). When asked if he believed a 58% handling charge was reasonable, he stated that he could not give an opinion on that since that decision was an internal company decision of which he was not privy. (Tr. at 79.)

William Ziegler, chief operating and financial officer of P&P testified on behalf of petitioner. Regarding handling charges, he testified that the 58% handling charge rate was the negotiated rate, and that it would be reasonable "for our purposes". (Tr. at 103.) Mr. Ziegler stated that the handling charges were consistent with what other consultants in the industry are charging. (Tr. at 105). He also did not have any knowledge of how the rates are determined within the company. (Tr. at 91-2). When asked whether the charges in this cleanup were reasonable, Mr. Ziegler could not answer. (Tr. at 90.)

The Board affirms the Agency's reduction of $5,556.66 in handling charges. Although Mr. Ziegler testified that the handling charges were consistent with what other consultants in the industry are charging, he provided no documentation to support this claim. Petitioner never submitted actual handling charges by any others in the industry. (See, Enterprise Leasing v. IEPA (April 9, 1992), PCB 91-174, 132 PCB 79.) Moreover, none of petitioner's witnesses testified unequivocally that the charges were reasonable. The Board finds that petitioner did not carry its burden of demonstrating that the handling charges of 58% were reasonable.

Paragraph 2, Costs Lacking Supporting Documentation

The Agency deducted $1,751.84 for costs it states lack documentation to support reimbursement. The Agency states that the owner or operator failed to demonstrate that these costs were reasonable as submitted. (Rec. at 27.) The costs denied consist of $11.00 for a facsimile transmission and $1,740.84 for "fixed operational costs".

Kyle Rominger of the Agency testified that he deducted $11.00 for a facsimile transmitted document, stating that there was no evidence that the document was ever received by the Agency. (Tr. at 120). This fact was unrebutted in the record.

The "fixed operational costs" relate to "rent, heat, electricity, etc." (Rec. at 72). The record reveals that the Agency denied reimbursement because there was no documentation that indicated that these costs were related to corrective action[4], and that there was insufficient documentation to show the costs were reasonable. (Tr. at 141; Rec. at 27).

Petitioner argues that the Agency would have paid these rates if they were included in the loaded rate[5]. Petitioner further argues that additional information would have been provided to the Agency, if requested.

The record reveals that a loaded rate was charged for employees and that the fixed operational costs were charged in addition to this loaded rate. (Tr. at 62; 71-72). Although the Agency witness answered affirmatively when asked whether reimbursement would have been allowed if there were no fixed operational costs and a higher loaded rate, he also testified that in this case he believed the fixed operational expenses were already figured into the loaded rate. (Tr. at 177-8).

The Board finds that the Agency was correct in finding that these costs lacked sufficient documentation to conclude that the costs were reasonable. When requesting reimbursement from the fund, the owner or operator must provide an accounting of all costs, demonstrate the costs are reasonable, and provide either proof of payment or demonstrate financial need for joint payment. (Section 22.18b(d)(4)(C).) The sole document presented shows one line item for these "fixed operational costs" (Rec. at 72), and is not a sufficient accounting of all costs or a demonstration

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[4] The Board does not determine whether these costs were related to corrective action. The Agency's denial letter only states that these costs were undocumented and unreasonable, and mentions nothing about corrective action. (Rec. at 27).

[5] The loaded rate is the billing rate for an employee's time in contrast to the employee's actual pay rate.

that these costs are reasonable. Furthermore, petitioner did not present any testimony at hearing explaining why these costs should be considered reasonable. (See, Platolene 500 v. IEPA (May 7, 1992), PCB 92-9, 133 PCB 259; Southern Food Park v. IEPA (December 17, 1992), PCB 92-88, ___ PCB ___.)

The Board affirms the Agency's denial of reimbursement for $1,751.84 for "fixed operational costs" and $11.00 for a facsimile transmission. Petitioner failed to provide an accounting of all costs and failed to carry its burden of demonstrating that these costs were reasonable as submitted.

Paragraph 4, Equipment and Mileage Costs

The Agency deducted $744.00 for certain equipment and mileage charges. The Agency states that the owner or operator failed to demonstrate that these costs were reasonable as submitted.

The record indicates that P&P charged $310.00 per day for the use of a photoionization detector during cleanup of the site. (Rec. at 36). The Agency reduced reimbursement, finding that a $142.00 per day charge is considered reasonable for use of this machine. The Agency determined the reasonableness of the charge for the machine by comparison to market prices. (Tr. at 152; 144-149). P&P also charged a $1.00 per mile charge for mileage costs incurred during cleanup. (Rec. at 69). The Agency reduced reimbursement for the mileage charge based on comparisons which were similar to those performed for the photoionization machine (Tr. at 139; 152).

Petitioner argues that all P&P's charges were reflective of normal industry standards in a competitive business. Petitioner also alleges that the Agency's reimbursement procedures are conducted in an arbitrary manner. Petitioner does not directly address the photoionization machine or mileage charges in her brief.

Again, neither of petitioner's witnesses from P&P were able to testify unequivocally that the charges for the photoionization machine or mileage were reasonable. The fact that P&P now charges $150.00 per day for the machine, and that Mr. Miller testified that he has seen reimbursements for $150.00 per day, but never more than that (Tr. at 41-43), supports the inference that the $310.00 per day charge was unreasonable. Furthermore, neither witnesses testified regarding how the $310.00 machine or mileage charges were actually arrived at, nor did they present any documentation to support a claim that these charges were reasonable and consistent within the industry. (See, Tr. at 65-66; 85, 91, 96). (See, Enterprise Leasing v. IEPA (April 9, 1992), PCB 91-174, 132 PCB 79). The Board affirms the Agency's reduction of the charges for the photoionization machine and

mileage. Petitioner failed to carry its burden of demonstrating that the charges were reasonable.

In summary, it is petitioner who has the burden to demonstrate that the charges sought to be reimbursed are reasonable. Petitioner did not carry its burden of proof in this matter. The Board affirms the Agency's decision that a total of $8,052.50 is not reimbursable.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The Illinois Environmental Protection Agency's determination that $5,556.66 in handling charges, $1,751.84 in fixed operational and facsimile charges, and $744.00 in equipment and mileage charges, are not reimbursable is hereby affirmed.

IT IS SO ORDERED.

Board Member Bill Forcade concurred.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41 (1992), provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 11th day of March, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board