

ILLINOIS POLLUTION CONTROL BOARD
July 13, 1989

LEFTON IRON AND METAL COMPANY,)
INC., a Missouri Corporaton, and)
LEFTON LAND AND DEVELOPMENT)
COMPANY, INC., a Missouri)
Corporation,)
)
Complainants,)
)
v.)
)
MOSS-AMERICAN CORPORATION,)
a Delaware Corporation, and)
KERR-MCGEE CHEMICAL CORPORATION,)
a Delaware Corporation,)
)
Respondents) PCB 87-191
)
)
)
KERR-MCGEE CHEMICAL CORPORATION)
a Delaware Corporation,)
)
Counterclaimant,)
)
v.)
)
)
LEFTON IRON AND METAL COMPANY,)
INC., a Missouri Corporation, and)
LEFTON LAND AND DEVELOPMENT)
COMPANY, INC., a Missouri)
Corporation,)
)
Counterrespondent.)

ORDER OF THE BOARD (by J. Marlin):

On June 14, 1989 Lefton Iron and Metal Company Inc., and Lefton Land and Development Company, Inc. (hereafter referred to collectively as Lefton) filed a Motion for Summary Judgment. On June 16, 1989 Moss-American Corporation (Moss) and Kerr-McGee Chemical Corporation (Kerr-McGee) filed a Motion for Extension of time to file a response to Lefton's motion. On June 21, 1989 Kerr-McGee and Moss filed a Response to the motion for summary judgment. Respondents' June 16th motion is granted in so far as the June 21, 1989 response is accepted.

Lefton filed a Motion for Leave to File Reply Memorandum and its Reply Memorandum on June 28, 1989. On June 30, 1989, the respondents filed an objection and motion to strike Lefton's Reply. Generally, the Board does not allow the moving party an

opportunity to reply to a response, unless the Board or hearing officer expressly provides for such a reply. As a result, the Board has not considered Lefton's June 28th Reply. To that extent, the respondents' June 30, 1989 motion is granted.

Lefton contends that the respondents' August 1, 1988 Response to Lefton's Request for Admissions, the respondents' answers to Lefton's First Set of Interrogatories, and the respondents' Counterclaim (filed December 29, 1988) indicate that there is no genuine issue as to material fact. Lefton concludes, then, that it is entitled to summary judgment in its favor, based upon its original Complaint.

The respondents assert that the Board has no authority to grant summary judgment motions since the Board currently has no procedural rules governing such motions. Additionally, the respondents claim that Lefton misstates the contents of the respondents' Response to Lefton's Request to Admit. In particular, the respondents quote from their Response to Lefton's request to Admit (which was filed August 1, 1988):

Kerr-McGee Chemical Corporation has no knowledge of wastes entering groundwater underlying the facility and denies that creosote and associated wastes were ever spilled or dumped indiscriminately upon the land.

(Respondents' Response to
Lefton's Request to
Admit, p.3)

The respondents also state that Lefton's attempt at receiving a favorable summary judgment improperly bypasses the considerations mandated by Section 33(c) of the Environmental Protection Act (Act). Finally, the respondents request in the alternative that the Board not rule upon Lefton's motion until Lefton fully complies with the respondents' own outstanding discovery requests, thereby giving the respondents opportunity to seek summary judgment against Lefton.

It is the Board's position that it has the authority to grant motions for summary judgment notwithstanding the fact that detailed procedural rules for such motions do not currently exist. 35 Ill. Adm. Code 101.244.

In its November 30, 1987 complaint Lefton alleges that the respondents have violated Section 21(a) and 21(e) of the Act. Specifically, the complaint alleges:

During the period that Respondents operated the facility, creosote and waste products of creosote were managed in such a way that the creosote and associated wastes were spilled

or dumped upon the land at the facility, into surface impoundments and possibly into the groundwater underlying the facility.

After creosote treating operations terminated at the facility, the Respondents continued to store creosote and other associated wastes at the facility in surface impoundments, storage tanks and in various piles. All of the aforesaid actions on the part of the Respondents constitute a violation of Section 21(a) of the Environmental Protection Act in that the Respondents caused or allowed the open dumping of wastes.

* * *

The Illinois Environmental Protection Agency, after conducting an investigation of the facility, has identified some of the hazardous constituents left behind by Respondents to include creosote, benzene, carbon disulfide, toluene, pentachlorophenol, naphthalene, various chlorinated solvents, all of which were disposed of at the facility by Respondents without any permit from the Environmental Protection Agency and in violation of Section 21(e) of the Environmental Protection Act.

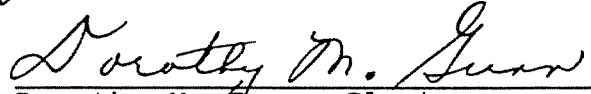
(Complaint p.2,3).

While it has been held that the Illinois Code of Civil Procedure does not apply to Board proceedings, (Village of South Elgin v. Waste Management of Illinois, 64 Ill. App. 3d 365, 381 N.E. 2d 778 (wnd Dist. 1978), the Code may provide guidance for the Board in the absence of specific Board regulations. 35 Ill. Adm. 101.100. (Adopted in R88-5(A) on June 8, 1989, effective July 10, 1989). Section 2-1005 of the Code of Civil Procedure addresses the issue of summary judgment. Specifically, it states summary judgment should be granted to the moving party if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". Ill. Rev. Stat. 1987, ch. 110, par. 2-1005(c).

After reviewing the filings in this matter, the Board is not convinced that there is no genuine issue as to any material fact. The respondents' Response to Lefton's Request to Admit, as quote above, certainly appears inconsistent with the conclusions drawn by Lefton that the respondents have admitted to activities which require findings of violation of Section 21(a) and (e), as a matter of law. Consequently, the Board hereby denies Lefton's motion for summary judgment.

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 13th day of July, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board