

ILLINOIS POLLUTION CONTROL BOARD
August 4, 1988

ALTON PACKAGING CORPORATION,)
)
 Petitioner,)
)
 v.) PCB 83-55
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter comes before the Board on a July 25, 1988 motion by the Illinois Environmental Protection Agency ("Agency") to overrule certain Orders of the Hearing Officer and to appoint a new Hearing Officer in this proceeding. The Board will first address the Agency's motion as it relates to the appeal of the Hearing Officer's Orders. Specifically, the Agency appeals the July 18, 1988 Hearing Officer Order scheduling hearing on August 22, 1988, the Order denying the Agency motion for continuance, and the Order compelling the Agency to produce persons and documents for deposition. The Agency does not contest the Order allowing the filing of only three copies of an exhibit. On August 1, 1988, Alton Packaging Corporation ("Alton") filed its response in opposition to the Agency's motion.

This proceeding is currently before the Board on a petition filed by Alton pursuant to Section 28.1 of the Environmental Protection Act ("Act") and 35 Ill. Adm. Code 214.201 to establish an adjusted sulfur dioxide emission rate as an alternative to the 1.8 pounds per million British Thermal Units standard of 35 Ill. Adm. Code 214.141. Although the original petition in this matter was filed on April 13, 1983, the matter as it now stands is based on an Second Amended Petition filed July 13, 1988.

Hearings to determine the merits of such petitions are conducted according to the procedures contained in 35 Ill. Adm. Code 106, Subpart C. As the Agency points out, inter alia, 35 Adm. Code 106.304 allows the Agency 90 days for review of the petition and filing of a recommendation. Although the Agency did file a recommendation after review of the original petition, it now requests that it be allowed to file a supplemental recommendation based upon the Second Amended Petition. Pursuant to Section 106.304, the filing of the Second Amended Petition, whether or not previously reviewed by the Agency, necessitates that the Agency be allowed 90 days from the date of the filing of the Second Amended Petition for filing of an amended recommendation. The Board will accordingly accept the Agency's

amended recommendation, which is due on October 11, 1988. Any hardship which this request may impose upon Alton is arguably self-imposed since, although Alton apparently has had the materials contained in the Second Amended Petition since March 1988, it failed to file them with the Board (and hence trigger the Agency's 90-day review period) until July 13, 1988. The Board notes that if this scenario, or other matters related to the disposition of this proceeding, should warrant additional hearing(s), the parties are free to petition the hearing officer to that end.

The Board cautions that in so ruling, it is not receding from its expressed desire, as manifest in the rulings of its Hearing Officer, that there should be no unnecessary delay in this already protracted proceeding. For this reason, and for the following reasons, the Board denies the Agency's motion and sustains the Hearing Officer's Orders setting the hearing for August 22, 1988 and denying the Agency motion to continue. The Agency claims that an additional time is necessary for review of the recently filed Second Amended Petition. Alton contends that the Agency has already had four months to review Alton's Atmospheric Dispersion Modeling Study, which was submitted to the Agency as part of a permit application involving the Alton facility. The Board notes that the permit application was denied and is currently on appeal before the Board in PCB 88-112.

The Board finds that an additional review period would be necessary had the Agency not sufficiently reviewed the material submitted in the Second Amended Petition. But as Alton has shown, the Agency has reviewed the material submitted by Alton which was filed with the Agency prior to its June 17, 1988 determination on the permit appeal. As the permit denial letters indicate, the Agency reviewed Alton's model and noted its findings of deficiencies* (Exhibits A and B to Alton's response to Motion to Continue).

Moreover, noting that many motions have been filed in the instant proceeding, the Board finds that it would be in the best interests of a resolution to this matter to have the parties address the issues at hearing.

As to the appeal of the Order to compel production of documents and for depositions, the Agency's principal concern is the timing of the discovery events in light of their concern for review of recently filed documents. Again, the Board disagees and finds that additional time is unnecessary. The Agency further objected to the location of the depositions which was ordered to be in Chicago. The Board further notes that the

* The Board in so noting, does not intend to make any finding on the merits of the pending permit appeal.

Agency failed to appear at the depositions which were scheduled for July 27 and 28, 1988, dates which are now passed. Alton asks that the Board sanction the Agency for defying the Hearing Officer Order. While the affect of the Agency's action was contrary to the Hearing Officer's Order, the Board believes it was the Agency's intent to appeal that Order and not to openly defy it. Although it is arguable that to first appeal to the Hearing Officer might have been the better course, the Agency was not required to do so. This, together with the fact that, due to the timing of the scheduled depositions and the motions, the Board was unable to rule on the motion until this date, indicates that sanctions are unwarranted in this instance. If the parties are unable to schedule other depositions at a mutually agreeable date, time, and location, pursuant to Illinois Supreme Court Rule 203, within the short time prior to hearing, the parties may present at the hearing matters which would have been addressed in the depositions. The portion of the Agency's motion which appeals the Hearing Officer Order compelling the depositions by July 27 and 28, 1988 is now moot.

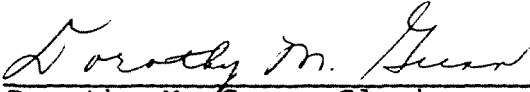
Based on the foregoing, the Board denies that portion of the Agency's motion which requests that the Board overrule the Hearing Officer's Order compelling production of documents and for depositions.

The Board now turns to the Agency's Motion to Appoint a New Hearing Officer in this proceeding. The Agency claims that the Hearing Officer "abused his authority to the benefit of one party and detriment of the other". The Board cannot accept that the Hearing Officer abused his authority simply by ruling on the motions in favor of Alton. In every ruling on a contested issue one of the parties will not prevail. A mere failure to prevail, therefore, by itself provides no support for a finding of abuse of authority. The Agency does allude that some oral conversation "may have been responsible" for the Hearing Officer's rulings. Aside from the unsubstantiated nature of this allegation, the Board notes that it has been standard Board practice for hearing officers, in many instances due to time constraints, to telephone parties when setting hearing dates, times, and locations. The Board therefore denies the Agency's Motion to Appoint a New Hearing Officer in this proceeding. The Hearing Officer is directed to continue to conduct this proceeding in a manner consistent with this Order.

IT IS SO ORDERED.

Board Member John Marlin dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 4th day of August, 1988, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board