

ILLINOIS POLLUTION CONTROL BOARD  
November 17, 1988

CONTAINER CORPORATION OF AMERICA,            )  
  )  
                  Petitioner,                    )  
  )  
                  v.                                )  
  )  
ILLINOIS ENVIRONMENTAL PROTECTION        )  
  AGENCY,                                        )  
  )  
                  Respondent.                 )

PCB 87-183

ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on the Motion for Sanctions filed by the Respondent, Illinois Environmental Protection Agency (Agency) on November 2, 1988. Petitioner, Container Corporation of America (CCA) filed its response on November 14, 1988.

The Agency's motion requests the Board essentially to debar CCA from arguing, introducing testimony, or producing evidence tending to show that purchase, installation, operation and maintenance of Volatile Organic Material (VOM) control equipment at its facility is economically unreasonable and/or would cause an economic hardship for CCA or its parent company. It also asks the Board to debar CCA from using any expert witness not previously identified to the Agency. The requested sanctions appear to be germane to the discovery requests served upon CCA by the Agency.

The Agency's motion and attachments, including the Hearing Officer's discovery Order of October 19, 1988, disclose that the Agency attempted three times to elicit responses from CCA to its informal discovery requests prior to filing with the Hearing Officer its October 17, 1988, Motion to Compel Answers to First Set of Interrogatories and to Compel Production of Documents. The first discovery request was served on CCA on or about July 26, 1988, and requested answers be provided within 28 days, pursuant to Supreme Court Rule 213 (Ill. Rev. Stat. 1987, ch. 110A, par. 213) and 35 Ill. Adm. Code 103.161. The companion Request for Production of Documents requested that the documents be provided to the Agency at its Maywood, Illinois, offices on August 29, 1988. No response was received to either request.

The second request was made by letter of September 6, 1988, from the Agency's attorney to counsel for CCA, repeating the original request. Noting that the hearings in this matter had been set for October 6 and 7, 1988, the Agency sought a response by September 19, 1988, to the First Set of Interrogatories and

production of documents by September 26, 1988. Again no response to either request was received by September 26. On September 29, however, Petitioner did provide at least a partial response to two of the twenty-four interrogatories.

Shortly after providing the partial response of September 29, counsel for CCA promised in a telephone conversation with the Agency's attorney that the Agency would be provided answers to the remainder of the discovery requests by October 11, 1988. This deadline also passed without a response to the discovery requests.

On October 17, 1988, the Agency filed with the Hearing Officer a Motion to Compel Answers to First Set of Interrogatories and to Compel Production of Documents. On October 19, after consulting with counsel for CCA, the Hearing Officer issued the requested Order, calling for submission of the requested materials by October 31, 1988. In his Order, the Hearing Officer specifically noted that Counsel for the Petitioner had advised him that "there were no objections to said motion". Once again, no response was received by the deadline. The Board did finally receive the CCA response to the discovery order on November 4, 1988, although the CCA response to the motion recites that the Agency's counsel evidently did not receive a complete response until November 8, 1988.

In its response to the motion, CCA states the issue before the Board as being "whether the Board should bar CCA from presenting any of its claims of economic hardship in this proceeding because CCA was four days late in responding to a Hearing Officer's discovery order" (pg. 1). Petitioner then stated that "since sanctions may only be imposed for failure to obey orders of the Board or Hearing Officer, CCA will restrict its response to the events surrounding CCA's response to the Hearing Officer's October 19, 1988 order" (pg. 1). CCA thereupon describes problems encountered by counsel for CCA in getting compiled information from key CCA personnel (noting the departure of the former General Manager of the facility in question, the resulting extra workload on the Plant Superintendent, schedule conflicts confronting the Project Engineer, competing demands for information from the USEPA in another matter, and the unexplained unavailability of the Day Shift Supervisor). This information was evidently not provided to counsel for CCA until November 1, 1988, the day after the deadline imposed by the Hearing Officer Order. CCA's counsel then describes the various schedule conflicts and coordination problems which prevented counsel from being able to assemble the data into a formal response until November 4, 1988.

CCA concludes (pg.5) that "there is no factual support" for the Agency's assertion that it had been prejudiced by the delay, which CCA characterized as "the four day late response to its discovery request". CCA states that its counsel contacted Agency counsel on November 10, 1988, and offered to agree to yet another

continuance if the Agency wanted one to avoid any resulting difficulty. The Agency's counsel declined the offer, leading CCA to suggest that "it cannot be said that the Agency has been in any way prejudiced by the extremely brief delay in receiving CCA's discovery responses" (pg. 5).

It must be understood from the outset that the Board does not accept the Petitioner's version of the facts of this matter. The facts as revealed by the Agency's motion and attachments are not materially contested by Petitioner, which has chosen instead to focus only on the time period following the Hearing Officer's Order of October 19, 1988. These facts disclose a pattern of delay and unresponsiveness stretching across at least two months, not merely four days. It is obvious that CCA made no substantial effort to comply, contest or communicate regarding the Agency's discovery requests until the Hearing Officer issued his Order of October 19. Hence, to the extent that Petitioner's personnel problems and schedule conflicts prevented a timely response to the Order, such difficulties seem largely self-inflicted. CCA does not explain when, why, or for what period of time the several key personnel were not available, nor does it explain whether such unavailability was known as of the date its counsel advised the Hearing Officer that there was no objection to the motion; it does not specify when the competing USEPA information request was received, when it was due, when it was actually submitted or what consequences would attend a tardy submittal to USEPA. CCA does not describe efforts to timely communicate with the Agency, the Hearing Officer, the Board or the USEPA regarding any time pressures or to attempt to seek relief from such pressures.

The Board also rejects the implicit assumption by Petitioner that, since sanctions may only issue for failure to obey orders of the Board or Hearing Officer, the Board cannot or need not consider the circumstances leading up to the issuance of such an order. To do so would strike at the heart of the normal discovery process, rendering informal discovery requests virtually worthless, rewarding dilatory tactics and necessitating increased and more immediate resort to the Board and its Hearing Officers. As the Petitioner would have it, discovery requests not embodied in a formal discovery order can be simply ignored without consideration for advancing the progress of the case or for conserving the resources of the Board.

Finally, the Board rejects the Petitioner's contention that the record before the Board does not support a finding that the Agency was prejudiced by the delay caused by Petitioner's failure to timely accomplish response to discovery requests. Taken as a whole, the record well illustrates that the Agency has been thwarted for almost two and one-half months in preparing for hearings in this proceeding. Insofar as further delay is not sought by the Agency and can only inure to the benefit of the Petitioner, the Board is reluctant to say that the Agency's refusal of a further continuance necessarily means it has not

been prejudiced. It may mean only that the prejudice in this case is not so great as to prevent it from being able to prepare for the hearings now scheduled for December 14, 1988.

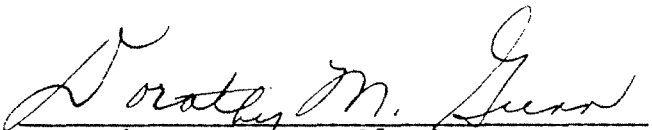
The Board construes the Agency's refusal of another continuance as manifesting its desire and ability to get on with the hearings. The Board shares that desire. In this case, grant of the Agency's Motion For Sanctions merely invites more delay in a proceeding that has already taken more than a year to reach the hearing stage. It would also appear to be unnecessary insofar as the Agency now has the requested discovery responses and is evidently prepared to proceed. Consequently, the Board will deny the Agency's Motion For Sanctions; however, in keeping with its foregoing conclusions, the Board will direct that further delaying actions not be allowed by the Hearing Officer.

For the foregoing reasons the Agency's Motion For Sanctions is denied. The Hearing Officer is directed to deny any request for continuance in this proceeding. Hearings are to be conducted as currently scheduled, except as otherwise directed by order of the Board.

IT IS SO ORDERED.

J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 17<sup>th</sup> day of November, 1988 by a vote of 6-1.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board