

ILLINOIS POLLUTION CONTROL BOARD
May 20, 1999

UNIVERSAL SCRAP METALS, INC.,)	
)	
Complainant,)	
)	
v.)	PCB 99-149
)	(Enforcement - Citizens, UST)
FLEXI-VAN LEASING, INC.,)	
a Delaware corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by E.Z. Kezelis):

On April 19, 1999, Universal Scrap Metals, Inc. (Universal Scrap) filed a complaint against Flexi-Van Leasing, Inc. (Flexi-Van), a Delaware corporation. In the complaint, Universal Scrap alleges violations pertaining to past operations of a trucking business on property located in Chicago, Cook County, Illinois. Specifically, Universal Scrap alleges that Flexi-Van, violated Section 21(a) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(a) (1996)) by causing or allowing the open dumping of waste; Section 21(e) of the Act (415 ILCS 5/21(e) (1996)) by disposing, treating, or storing waste on property that does not meet the requirements of the Act and regulations; Section 21(f)(2) of the Act (415 ILCS 5/21(f)(2) (1996)) by conducting a hazardous waste storage or disposal operation in violation of the Act and regulations; and Section 57.1(a) of the Act (415 ILCS 5/57.1(a) (1996)) by failing to conduct tank removal, abandonment, repair, physical soil classification, groundwater investigation, site classification, or corrective action of its underground storage tanks.

As evidenced by the certificate of service filed on April 19, 1999, Flexi-Van was served with the complaint and notice of filing by hand delivery on April 19, 1999. On May 5, 1999, an entry of appearance was filed on behalf of Flexi-Van. No responsive pleadings have been filed.

Section 103.124(a) of the Board's procedural rules directs the Board to determine whether or not a citizen's complaint is duplicitous or frivolous. Except as discussed below, the Board finds that the complaint is not duplicitous or frivolous, and therefore accepts it for hearing.

BACKGROUND

Universal Scrap is an Illinois corporation with its principal place of business in Chicago, Cook County, Illinois. From August 1986 until July 1998, it was the owner of property located at 2201 West Fulton Street, Chicago, Cook County, Illinois (site). Universal Scrap alleges that Flexi-Van is the successor-in-interest to Gilbert Property Corporation (GPC), an Illinois corporation that from February 1963 until July 1985 owned the site. Universal Scrap alleges that during GPC's ownership of the site GPC operated four underground storage tanks containing

gasoline, diesel fuel, fuel oil, and waste oil. Universal Scrap further alleges that as the successor-in-interest to GPC, Flexi-Van is now liable for violations committed by GPC at the site.

Universal Scrap discovered the underground storage tanks in 1997. After determining that the petroleum-containing tanks had leaked and that the soil surrounding the tanks had been contaminated by the release, Universal Scrap performed remediation work. Universal Scrap received a “No Further Remediation” letter from the Illinois Environmental Protection Agency in September 1998. Universal Scrap alleges that it has expended \$66,877.02 as a result of the remediation at the site; that the release of petroleum occurred during GPC’s ownership and operation of the site; and that as the successor-in-interest, Flexi-Van is now responsible for those violations. Universal Scrap seeks to have the Board order Flexi-Van to reimburse it for all costs incurred in performing remedial action at the site and to pay its costs and attorney fees.

DUPlicitIOUS/FRIVOLOUS DETERMINATION

Section 103.124(a) of the Board’s procedural rules implements Section 31(b) of the Act. It provides:

The Clerk shall assign a docket number to each complaint filed
 *** the Chairman shall place the matter on the agenda for Board
 determination whether the complaint is duplicitous or frivolous. If
 the Board rules that the complaint is duplicitous or frivolous, it
 shall enter an order setting forth its reasons for so ruling and shall
 notify the parties of the decision. If the Board rules that the
 complaint is not duplicitous or frivolous, this does not preclude the
 filing of motions regarding the insufficiency of the pleadings. 35 Ill.
 Adm. Code 103.124 (a).

Duplicitous

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp (June 13, 1985), PCB 85-68.

The Board has not identified any other cases, identical or substantially similar to this, pending in other forums. Therefore, based on the record before us, this matter is not duplicitous.

Frivolous

An action before the Board is frivolous if it requests relief which the Board cannot grant. Lake County Forest Preserve Dist. v. Ostro (July 30, 1992), PCB 92-80.

In the present case, Universal Scrap alleges violations relating to the ownership and operation of leaking underground storage tanks. Specifically, it alleges that Flexi-Van, as the successor-in-interest to GPC, violated Sections 21(a), (e), (f)(2) and 57.1(a) of the Act (415 ILCS 5/21(a), (e), (f)(2) and 57.1(a) (1996)). With the exceptions discussed below, Universal Scrap alleges facts which, if proved at hearing, could result in a finding of violation for which the Board could grant relief.

Specifically, Universal Scrap seeks to have the Board order Flexi-Van to reimburse it for all remediation costs incurred during cleanup and removal activities at the site. The Board has consistently held that it has the authority to award cleanup costs to private parties for violation of the Act. See Lake County Forest Preserve Dist. v. Ostro (March 31, 1994), PCB 92-80; Herrin Security Bank v. Shell Oil Co. (September 1, 1994), PCB 94-178; Richey v. Texaco Refining and Marketing, Inc. (August 7, 1997), PCB 97-148; Dayton Hudson Corp. v. Cardinal Industries, Inc. (August 21, 1997), PCB 97-134; and Malina v. Day (January 22, 1998), PCB 98-54. As noted in Ostro, this holding is based on the broad language of Section 33(a) of the Act (415 ILCS 5/33(a) (1996)) as well as the Illinois Supreme Court decision in People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991). Therefore, the complaint, with the exceptions set forth below, is not frivolous and is accepted for hearing.

The first exception to this frivolous determination is the alleged violation of Section 57.1(a) of the Act. 415 ILCS 5/57.1(a) (1996). The Board has previously held that Section 57.1(a) does not require the removal of tanks, but rather, dictates the manner in which they are to be removed. Material Service Corp. v. J.W. Peters & Sons, Inc. (April 2, 1998), PCB 98-97, slip op. at 3. Since the tanks in questions have already been removed by Universal Scrap, there can be no finding of violation against Flexi-Van for failing to comply with the Leaking Underground Storage Tank Program when removing the tanks. Therefore, based on the Board's reasoning in Material Service, we conclude that the alleged violation of Section 57.1(a) of the Act fails to state a claim upon which relief may be granted. Accordingly, this portion of the complaint is frivolous and is stricken from the complaint.

The second exception deals with Universal Scrap's request for an award of attorney fees. The Board has previously held that Section 42(f) of the Act allows for the award of attorney fees only in cases in which the Attorney General or a State's Attorney prevails on behalf of the People of the State of Illinois. See 415 ILCS 5/42(f) (1996); see also Charter Hall Homeowner's Association v. Overland Transportation System, Inc. (January 22, 1998), PCB 98-81 and Dayton Hudson Corp. v. Cardinal Industries, Inc. (August 21, 1997), PCB 97-134. Accordingly, the Board strikes those portions of the complaint in which Universal Scrap seeks an award of attorney fees.

CONCLUSION

The Board finds that, pursuant to Section 103.124(a), the complaint, with the previously noted exceptions, is neither duplicitous nor frivolous and is accepted for hearing.

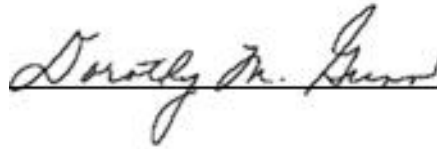
The hearing must be scheduled and completed in a timely manner consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and Section 103.125 of the Board's rules. 35 Ill. Adm. Code 103.125. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible. If, after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if, after an attempt, the hearing officer is unable to consult with all of the parties, the hearing officer shall unilaterally set a hearing date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

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 20th day of May 1999 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board