

ILLINOIS POLLUTION CONTROL BOARD
October 16, 1997

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 93-191
)	(Enforcement - UST)
LLOYD WIEMANN, d/b/a WIEMANN ICE)	
AND FUEL,)	
)	
Respondent.)	

LLOYD WIEMANN, d/b/a WIEMANN ICE)	
AND FUEL,)	
)	
Cross-complainant,)	PCB 93-191
)	(Enforcement - UST)
v.)	(Cross-Claim)
)	
TEXACO REFINING and MARKETING,)	
INC., and EUGENE and CHERYL)	
HALBROOKS,)	
)	
Cross-respondents.)	

ORDER OF THE BOARD (by C.A. Manning):

This matter comes before the Board on a motion for sanctions, motion to strike appearance, motion to strike an objection to the motion for sanctions, and motion to clarify caption. On June 16, 1997, Texaco Refining and Marketing, Inc. (TRMI) filed a motion for sanctions against Lloyd Wiemann, d/b/a Wiemann Ice and Fuel, Inc. (Wiemann). On August 4, 1997, Wiemann objected to the motion for sanctions and concurrently requested that the Board stay the proceedings or allow Wiemann 14 days to respond to TRMI's discovery requests. On August 6, 1997, TRMI filed a motion to strike the appearance of Wiemann's counsel, and also filed a motion to strike or deny Wiemann's objection. On September 5, 1997, the Illinois Attorney General, representing the People of the State of Illinois on behalf of the Illinois Environmental Protection Agency (complainant), filed a motion to clarify caption.

For the following reasons, the Board denies the motion for sanctions and the motion to strike the appearance; the Board grants the motion to strike the objection to the motion for sanctions and the motion to clarify the caption.

ARGUMENTS

In its motion for sanctions (Mot. for Sanc.), TRMI states that pursuant to a February 18, 1997 hearing officer order for the schedule of discovery, written discovery must have been served before March 12, 1997, and all responses to such written discovery must have been served on or before April 11, 1997. TRMI argues that, on or about the date the responses were due, Wiemann's attorneys of record, from the law firm of Hodge & Dwyer, filed a notice of a withdrawal and a motion seeking an extension of time for Wiemann to respond to discovery. Mot. for Sanc. at 2. By hearing officer order entered on May 5, 1997, Wiemann was granted additional time to respond to the discovery through and including May 30, 1997. Wiemann did not respond to the discovery. Mot. for Sanc. at 2. TRMI asserts that sanctions should be entered against Wiemann because Wiemann has failed to respond to TRMI's discovery requests. Mot. for Sanc. at 2-3.

TRMI requests that Wiemann be barred from filing any further pleadings and barred from maintaining any claim or defense at hearing which would relate to TRMI as being the owner or operator responsible for any release at the site in question. Mot. for Sanc. at 3. TRMI further requests that appropriate fees be assessed against Wiemann for causing TRMI to bring the motion for sanctions and asks that the Board impose any further just and appropriate sanctions against Wiemann. Mot. for Sanc. at 3.

On August 4, 1997, Wiemann filed an objection (Obj.) to the motion for sanctions and also requested an extension of time to respond to TRMI's discovery requests. In the objection, Wiemann asserts that the law firm of Hodge & Dwyer has re-entered its appearance as his counsel of record. Obj. at 3. Wiemann's counsel insists that it has received full assurance from Wiemann that he will comply with any of TRMI's discovery requests. Obj. at 3. Wiemann argues that a reasonable sanction in this matter would be to stay the proceedings until Wiemann satisfies any of TRMI's outstanding discovery requests, or, alternatively, to allow Wiemann 14 days from the date of the Board's ruling on the motion for sanctions to respond to TRMI's discovery requests. Obj. at 3. Wiemann argues that TRMI has not been prejudiced in its defense since it has not yet answered Wiemann's discovery requests, nor advanced the litigation any further.¹

TRMI subsequently filed a motion to strike Wiemann's objection (Mot. to Str.) because it was not timely filed in accordance with Sections 101.241 and 103.140 of the

¹ By hearing officer order of June 30, 1997, TRMI was given an extension of time to respond to Wiemann's discovery requests until the Board ruled on the motion for sanctions. Additionally, by hearing officer order of July 23, 1997, Eugene and Cheryl Halbrooks were given an extension to respond to any discovery requests until after the Board ruled on the motion for sanctions.

Board's procedural rules (35 Ill. Adm. Code 101.241, 103.140). Mot. to Str. at 1. TRMI argues that Wiemann never sought leave to file a response, but merely filed an objection on July 31, 1997, which was over one month late. Mot. to Str. at 2. TRMI asserts that, according to the Board's procedural rules, Wiemann's failure to respond to the motion for sanctions within the requisite time period constitutes a waiver of any objection to the granting of the motion. See 35 Ill. Adm. Code 101.241, 103.140.

TRMI has also filed a motion to strike the appearance of Wiemann's counsel, Hodge & Dwyer (Mot. to Str. App.). Specifically, TRMI argues that because Hodge & Dwyer has withdrawn its appearance twice and refiled its appearance three times, the proceedings in this matter have been delayed. TRMI asserts that Wiemann should not be allowed to manipulate the discovery and trial process of a case by hiring and firing its counsel. Mot. to Str. App. at 2. TRMI therefore requests that the Board strike Hodge & Dwyer's appearance and order any other further just and reasonable relief. Hodge & Dwyer has not responded to TRMI's motion to strike the appearance.

Finally, complainant has requested that the caption be amended to reflect the cross-claim pursued by Wiemann against TRMI and Eugene and Cheryl Halbrooks. TRMI has no objection to this motion. The Board accordingly grants the motion. The caption in this order has been changed to properly reflect the proceedings in this matter. All future pleadings should likewise reflect this revised caption.

DISCUSSION

Prior to addressing the sanctions issue, the Board must first determine whether the pleadings were timely filed in accordance with the timeframe prescribed by the Board's procedural rules. Sections 101.241 and 103.140 provide that within seven days after service of a written motion, a party may file a response to the motion. If no response is filed, the party is deemed to have waived objection to the granting of the motion. 35 Ill. Adm. Code 101.241 and 103.140. However, such waiver of objection does not bind the Board in the decision of the motion. 35 Ill. Adm. Code 101.241 and 103.140.

As previously discussed, TRMI filed its motion for sanctions on June 16, 1997; Wiemann did not respond to the motion for sanctions until it objected to such motion on August 4, 1997. Wiemann did not request leave to file instant its objection and apparently presumed that such objection could be filed without the Board's permission several weeks after the response time had elapsed. As a result of this untimely filing and failure to request leave to file an objection instant, the Board grants TRMI's motion to strike Wiemann's objection to the motion for sanctions from the record.

As to the issue of sanctions, the Board must determine whether awarding sanctions under the circumstances of this case is appropriate. The Board has sanction authority pursuant to Section 101.280. Section 101.280(a) provides that "[i]f a party or any person unreasonably refuses to comply with any provision of 35 Ill. Adm. Code

101 through 120 or fails to comply with any order entered by the Board or the hearing officer, . . . the Board will order sanctions.” 35 Ill. Adm. Code 101.280(a); see also 35 Ill. Adm. Code 101.281 (sanctions for abuse of discovery procedures). In deciding what sanctions are appropriate, the Board may consider factors including, but not limited to, the relative severity of the refusal or failure to comply, the past history of the proceeding, and the degree to which the proceeding has been delayed or prejudiced by the alleged abuses. 35 Ill. Adm. Code 101.280(b).

The Board does not agree with TRMI that Wiemann’s failure to respond to the discovery is sanctionable behavior. As the Board stated in International Union, et al. v. Caterpillar, Inc. (August 1, 1996), PCB 94-240, slip op. at 5, aff. (International Union, et al. v. IPCB, No. 3-96-0931 (3rd Dist. 1997) (unpublished order under Illinois Supreme Court Rule 23)):

In determining whether sanctions are warranted, we are to consider whether a hearing officer order or Board order was violated and we also may consider whether the complained-of actions demonstrate a deliberate and pronounced disregard for our jurisdiction’s rules. (See Modine Manufacturing Company v. Pollution Control Board (2nd Dist. 1989) 192 Ill. App. 3d 511, 548 N.E. 2d 1145 and Valdivia v. Chicago and North Western Transportation Company, (1st Dist. 1980) 87 Ill. App. 3d 1123, 409 N.E. 2d 457.) While we certainly look to the severity of the conduct, we note that the goal of the discovery sanction is to promote discovery, and not necessarily to punish. (IEPA v. Celotex Corp. (3rd Dist. 1988) 168 Ill. App. 3d 592, 522 N.E. 2d 888.) In the past we have weighed all of these factors and upon appellate court remand, we monetarily sanctioned a party for refusal to comply with the two Board orders. (Grigoleit Company v. Illinois Pollution Control Board (4th Dist. 1993) 245 Ill. App. 3d 337, 613 N.E. 2d 371.)

When Wiemann’s counsel withdrew its appearance on April 11, 1997, it requested an extension for Wiemann to respond to the discovery up through and including May 30, 1997. Among other things, Wiemann apparently failed to comply with the discovery due date as a result of his search for new counsel (see Mot. to Str. App. at 3, fn 1); however, there is no evidence in this record of any bad faith in this noncompliance. Further, Wiemann has re-hired counsel who is familiar with the facts and circumstances of the case. The motion for sanctions is denied and the Board directs that this matter expeditiously proceed to hearing without any further interruptions or complications.

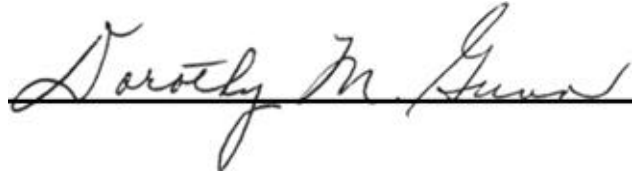
Next, we address the issue of whether the Board should strike the re-entry of appearance of Wiemann’s counsel, Hodge & Dwyer. TRMI argues that the firm of Hodge & Dwyer has, on numerous occasions, withdrawn and refiled its appearance causing undue delay in these proceedings. Mot. to Str. App. at 2. This record does not contain reasons for these actions and the Board will not impute any bad faith intention on the part of Hodge & Dwyer or Wiemann to disrupt the instant proceedings.

The Board notes, however, that the effect of these actions has been a delay of the proceeding. The Board will not tolerate any further delays in this proceeding. The motion to strike the appearance of Hodge & Dwyer is denied. If necessary in the future, the Board will use its sanctioning authority to ensure that this matter proceeds in an expeditious manner.

To ensure that discovery proceeds in a timely manner, the Board orders Wiemann to file its responses to TRMI's discovery requests within 14 days of the date of this order, on or before October 31, 1997. If Wiemann fails to comply with this timeframe, the Board will, on its own motion, dismiss the cross-claim against TRMI and the Halbrooks'. Any additional discovery orders will be issued as necessary by the hearing officer.

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 16th day of October 1997, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board