

ILLINOIS POLLUTION CONTROL BOARD
August 7, 2003

GINA PATTERMANN,)	
)	
Complainant,)	
)	
v.)	
)	PCB 99-187
BOUGHTON TRUCKING AND)	(Citizens Enforcement - Noise, Air)
MATERIALS, INC.,)	
)	
Respondent.)	

ORDER OF THE BOARD (by N. J. Melas):

On May 23, 2003, respondent Boughton Trucking and Materials, Inc., (Boughton) filed a motion for discovery sanctions against the complainant in this proceeding, Ms. Gina Patterman (Mot.). Ms. Patterman filed this citizens' enforcement complaint against Boughton on June 17, 1999, alleging noise and air pollution violations. On June 10, 2003, Ms. Patterman filed a response to the motion for discovery sanctions (Resp.). Boughton replied to Ms. Patterman's response on June 20, 2003 (Reply). The Boughton facility is a stone quarry that produces crushed stone, located at 11746 South Naperville Plainfield Road in Plainfield, Will County.

For the following reasons, the Board grants Boughton's motion for discovery sanctions in part and denies the motion in part. The Board bars Mr. Zak from testifying at hearing regarding Boughton's noncompliance with Illinois Environmental Protection Agency (Agency) regulations and possible modifications to Boughton's facility. However, the Board does not bar any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony, nor does the Board award Boughton attorney fees.

BACKGROUND

Boughton alleges that Ms. Patterman represented she had retained Mr. Greg Zak as an expert witness to testify at hearing. Mot. at 2. Boughton issued Mr. Zak a subpoena and sent him a notice of deposition for April 23, 2003. *Id.* In response, Mr. Zak sent Boughton a contract stating the fee for his services. Boughton informed Ms. Patterman and Board hearing officer Brad Halloran of the alleged erroneous billing. Mot. at 2. Boughton alleges that in a telephonic status conference with all three parties on March 27, 2003, Ms. Patterman stated she understood her responsibility to retain her expert witness. *Id.*

Boughton deposed Ms. Patterman on April 8, 2003. Mot. at 2. At the deposition, Boughton claims that its attorney asked Ms. Patterman to confirm that Mr. Zak would attend his deposition and Ms. Patterman stated she thought Mr. Zak would be there. *Id.*

On April 23, 2003, Mr. Zak did not appear at his scheduled deposition with Boughton. Mot. at 3. Boughton contacted Mr. Zak by telephone who responded that he had not been

retained by Ms. Patterman. Boughton and Mr. Zak left a voice mail message to this effect for hearing officer Halloran. *Id.*

Ms. Patterman claims that she has retained Mr. Zak as a noise expert witness and that she is prepared to compensate him for his services. Resp. at 2. However, Ms. Patterman did not support these facts with a signed affidavit.

APPLICABLE REGULATIONS

Under Section 101.800(b), the Board will order sanctions when a party fails to comply with procedural rules, board orders or hearing officer orders. 35 Ill. Adm. Code 101.800(b). Sanctions can include barring the offender from filing pleadings or documents related to any issue to which the refusal or failure relates. 35 Ill. Adm. Code 101.800(b)(2). The Board may also bar a witness from testifying concerning that issue. 35 Ill. Adm. Code 101.800(b)(6).

In deciding what sanction to impose, the Board must consider four factors:

The relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person. 35 Ill. Adm. Code 101.800(c).

BOUGHTON'S ARGUMENTS

Boughton requests the Board to bar Mr. Zak as a witness and bar any additional witnesses, pleadings, or documents pertaining to the subject matter of his testimony. Mot. at 5, 9. Boughton also asks the Board to award Boughton attorney fees attributable to Ms. Patterman's abuse of discovery process in the amount of \$19,520.25. Mot. Exh. 4.

Boughton argues that Ms. Patterman's assertion that she has retained Mr. Zak was unsupported by an affidavit as required by Section 101.504 of the Board rules, and therefore, insufficient as a matter of law. Reply at 1; citing 35 Ill. Adm. Code 101.504.

Boughton further argues that Ms. Patterman's alleged retention is late. Reply at 2. Board hearing officer Brad Halloran ordered the parties to complete all depositions by May 2, 2003. Mr. Zak's deposition was scheduled for April 23, 2003. Ms. Patterman did not seek to remedy her failure to provide Mr. Zak for deposition until she filed the response on June 10, 2003. Reply at 5.

Boughton argues that in this instance sanctions are warranted due to Ms. Patterman's negligence and abuse of Board procedural rules. Boughton contends that Ms. Patterman's history of abuse of the discovery process in this proceeding warrants sanctions. Mot. at 5-6. Boughton argues that Ms. Patterman refused to produce a document identified in her interrogatory responses pertaining to property values in the subdivision allegedly impacted by Boughton's operations. Mot. at 6. Boughton filed a motion to compel production of the document and Ms. Patterman claimed her husband from whom she had recently separated possessed the document. Boughton subpoenaed Mr. Patterman for the document and he failed to

appear at the deposition and failed to provide the subpoenaed document. Boughton argues that Ms. Patterman has failed to appear at least six status conferences set by hearing officer order. Boughton further argues that Ms. Patterman failed to provide addresses or phone numbers for two of her four witnesses that has caused Boughton significant delay in proceeding with discovery.

Boughton argues that Ms. Patterman also exhibited bad faith. Mot. at 10. Boughton opines that Ms. Patterman knew she had not retained Mr. Zak at the time she identified him as her witness. If not intentional, Boughton argues that causing Boughton to incur the expenses associated with preparing for and traveling to a deposition where the deponent did not appear was clearly negligent. Mot. at 11. Boughton contends that Ms. Patterman knew she did not retain Mr. Zak and neglected to inform Boughton.

Boughton argues that for all of these reasons, sanctions against Ms. Patterman are warranted.

PATTERMAN'S RESPONSE

Ms. Patterman's responds that Boughton has not established prejudice resulting from the delay in discovery, has not shown any bad faith on the part of Ms. Patterman. Resp. at 3-4. Ms. Patterman admits that there was a lack of clarity surrounding Mr. Zak's attendance at the deposition scheduled for April 23, 2003. Ms. Patterman states she merely *thought* that Mr. Zak would attend the deposition and that Boughton should have confirmed Mr. Zak's attendance before preparing for a deposition that was not certain to occur. *Id.*

Ms. Patterman also contends that she has officially retained Mr. Zak. Resp. at 3. Ms. Patterman argues that Boughton's contentions of bad faith are merely "unsubstantiated speculation." Resp. at 4. Ms. Patterman argues the solution is to take Mr. Zak's deposition, not bar his testimony. *Id.*

Ms. Patterman also contends that the attorney fees Boughton seeks for the cancelled deposition are unreasonable. Resp. at 4. Ms. Patterman argues the Board procedural rules do not allow the Board to monetarily sanction the offending party. Resp. at 5; citing Revision of the Board's Procedural Rules: 35 Ill. Adm Code 101-130, R00-20, slip op. at 7 (Dec. 21, 2000). Ms. Patterman further asserts that Boughton provided no breakdown of costs or other method for determining the reasonableness of the amounts sought. Ms. Patterman does concede, however, that Boughton may be arguably entitled to costs for travel to and attendance at the cancelled deposition.

DISCUSSION

In assessing whether sanctions are warranted, the Board must determine if Ms. Patterman violated a hearing officer order, board order, or procedural rule, including any subpoena issued by the Board. 35 Ill. Adm. Code 101.800(a). The Board must also consider the relative severity of the refusal or failure to comply, the past history of the proceeding, the degree to which the proceeding has been delayed or prejudiced, and the existence or absence of bad faith on the part of the offending party. The goal of imposing discovery sanctions is to promote discovery, not

necessarily to punish. IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 522 N.E.2d 888 (3rd Dist. 1988).

The Board finds Ms. Patterman's conduct has amounted to an abuse of discovery and grants Boughton's motion for discovery sanctions in part. Under Section 101.616(f), failure to comply with any order regarding discovery may subject the offending persons to sanctions. 35 Ill. Adm. Code 101.616(f). Here, Mr. Zak did not appear at his scheduled deposition because Ms. Patterman had not retained him. Ms. Patterman does not dispute these facts. In addition, the hearing officer ordered that the parties complete all depositions by May 2, 2003. By not making Mr. Zak available at his scheduled deposition or any other time before May 2, 2003, Ms. Patterman did not comply with the hearing officer's order to complete all depositions by a time certain. In addition, Ms. Patterman prevented Boughton from completing any discovery deposition of her expert noise witness. Ms. Patterman has violated several hearing officer orders in the past by not appearing at status meetings and by not producing a document subpoenaed by Boughton. The Board finds that Ms. Patterman's conduct amounts to an abuse of the discovery process.

The Board will not grant Boughton's motion to bar the testimony of any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony. However, the Board notes that the current discovery schedule set by the parties together with the hearing officer ordered all depositions completed by May 2, 2003, and all dispositive motions filed on or before May 30, 2003.

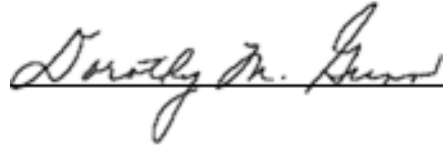
Regarding attorney fees, the appellate court has held that the Board has no authority to award attorney fees as a sanction. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 337-338, 676 N.E.2d 299, 307-08 (3d Dist. 1997); *see* Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 7 (Dec. 21, 2000). Accordingly, the Board denies Boughton's motion for attorney fees.

CONCLUSION

The Board grants Boughton's motion for discovery sanctions in part and denies the motion in part. The Board bars Mr. Greg Zak's testimony at hearing, but denies Boughton's motion to bar any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's proposed testimony. The Board also denies Boughton's motion for attorney fees. The Board finds the sanction it imposes today is appropriate to remedy the abuse of the discovery process the Board finds today and to promote timely discovery in the future.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 7, 2003, by a vote of 7-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn". The signature is written in black ink and is positioned above a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board