

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|-----------------------------|---|-----------------------|
| ROBERT F. KASSELLA JR. and |) | |
| KELLIE R. KASSELLA, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | PCB No. 06-001 |
| |) | (Enforcement – Noise) |
| TNT LOGISTICS NORTH AMERICA |) | |
| INC., |) | |
| |) | |
| Respondent. |) | |

NOTICE OF FILING

| | |
|----------------------------------|----------------------------------|
| TO: Ms. Dorothy M. Gunn | Bradley P. Halloran, Esq. |
| Clerk of the Board | Hearing Officer |
| Illinois Pollution Control Board | Illinois Pollution Control Board |
| 100 West Randolph Street | 100 West Randolph Street |
| Suite 11-500 | Suite 11-500 |
| Chicago, Illinois 60601 | Chicago, Illinois 60601 |
| (VIA ELECTRONIC MAIL) | (VIA FIRST CLASS MAIL) |

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board Respondent, TNT Logistics North America, Inc.'s **RESPONSE TO COMPLAINANTS' MOTION FOR LEAVE TO AMEND COMPLAINT, INSTANTER**, a copy of which is herewith served upon you.

Respectfully submitted,

TNT LOGISTICS NORTH AMERICA INC.,
Respondent,

By: /s/Thomas G. Safley
One of Its Attorneys

Dated: December 20, 2005

Edward W. Dwyer
Thomas G. Safley
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

THIS FILING SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, hereby certify that I have served the
attached RESPONSE TO COMPLAINANTS' MOTION FOR LEAVE TO AMEND
COMPLAINT, INSTANTER upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on December 20, 2005; and upon:

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Timothy M. Nolan, Esq.
Mary Ann Sullivan, Esq.
53 West Jackson Boulevard
Suite 1137
Chicago, Illinois 60604-3702

by depositing said documents in the United States Mail, postage prepaid, in Springfield,
Illinois on December 20, 2005.

/s/Thomas G. Safley
Thomas G. Safley

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**RESPONSE TO COMPLAINANTS' MOTION
FOR LEAVE TO AMEND COMPLAINT, INSTANTER**

NOW COMES Respondent, TNT LOGISTICS NORTH AMERICA INC.

("TNT"), by its attorneys HODGE DWYER ZEMAN, and for its Response to
Complaints' Motion for Leave to Amend Complaint, Instanter, states as follows:

I. INTRODUCTION

On July 5, 2005, Complainants filed their Complaint with the Illinois Pollution Control Board ("Board"). The Complaint, as filed, alleges that TNT's facility in Monee, Illinois, has violated the numeric noise standards contained in 35 Ill. Admin. Code §§ 901.102, 901.103, 901.104, and 901.106. TNT filed its Answer and affirmative defense to the Complaint on August 26, 2005. The Complaint was accepted for hearing by the Board's Order dated September 1, 2005. On October 19, 2005, counsel for Complainants filed their appearance with the Board. Complainants moved the Hearing Officer for leave to amend their Complaint on December 5, 2005.

II. RESPONSE TO MOTION FOR LEAVE TO AMEND COMPLAINT, INSTANTER

Complainants' Motion for Leave to Amend Complaint, Instanter ("Motion to Amend") states: "Complainants, by and through their attorneys, seek leave to amend their Complaint by pleading a violation of 35 Ill. Adm. Code 900.102." Complainants further assert that "this action will not cause delay or prejudice."

The Board's procedural rules provide in relevant part as follows:

- d) If a party wishes to file a counter-complaint, cross-complaint, or third-party complaint, the party must move the Board for leave to file the pleading. If a party wishes to file an amendment to a complaint, counter-complaint, cross-complaint, or third-party complaint that sets forth a new or modified claim against another person, the party who wishes to file the pleading must move the Board for leave to file the pleading.
- e) The pleading sought to be filed pursuant to subsection (d) of this Section must:
 - 1) Set forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding; and
 - 2) Meet the requirements of Section 103.204 of this Subpart.

35 Ill. Admin. Code §§ 103.206(d)-(e). (Emphasis added.)

Section 103.204 provides in relevant part that a complaint must set forth:

- 2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and
- 3) A concise statement of the relief that the complainant seeks.

35 Ill. Admin. Code §§ 103.204(c)(2)-(3). (Emphasis added.)

Complainants' Motion to Amend did not include a copy of the Amended Complaint which Complainants seek leave to file. Further, Complainants' Motion

provides no information regarding the specifics of the proposed Amended Complaint.

Accordingly, neither the Board nor TNT has any information on which to rely to evaluate whether the proposed Amended Complainant meets the requirements of Sections 103.206 and 103.204 of the Board's procedural rules.

Further, when deciding a motion for leave to amend a pleading, the Board considers four factors: 1. whether the amendment cures a defect; 2. whether the other parties would be prejudiced or sustain surprise; 3. is the filing timely; and 4. whether previous opportunities for amendments existed. *People of the State of Illinois v. Community Landfill Company, Inc.*, PCB 97-193, 2004 Ill. Env. LEXIS 166 at *7-11 (Ill.Pol.Control.Bd. March 18, 2004). As stated above, Complainants have provided no basis for their Motion to Amend. Without sufficient information, as outlined *supra*, neither TNT nor the Board can adequately assess whether the proposed additional claim will cause prejudice to TNT.

In light of the above, TNT has no information on which it can agree to or oppose Complainant's Motion to Amend.

Finally, as noted above, Complainants moved the Hearing Officer, not the Board, for leave to amend their Complaint. It appears to TNT that the Hearing Officer does not have authority to rule on Complainants' motion, but rather, that the Board must rule on that motion. See 35 Ill. Admin. Code §§ 103.206(d) ("If a party wishes to file an amendment to a complaint ... that sets forth a new or modified claim against another person, the party ... must move the Board for leave ...") (emphasis added), 101.502.

III. CONCLUSION

WHEREFORE, the Respondent, TNT LOGISTICS NORTH AMERICA INC., respectfully prays that the Illinois Pollution Control Board consider the foregoing when ruling upon Complainants' Motion for Leave to Amend Complaint, Instanter and award such relief as the Illinois Pollution Control Board deems just and proper in the premises.

Respectfully submitted,

TNT LOGISTICS NORTH
AMERICA INC.
Respondent,

By: /s/ Thomas G. Safley
One of Its Attorneys

Dated: December 20, 2005

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TNTL:002/Fil/Kassela/Response to Motion to Amend Complaint