

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KENNETH E. MEDEMA JR.)	
)	
Complainant,)	
)	
v.)	PCB No. 05-220
)	(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)

(SEE 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 **RESPONSE TO COMPLAINANT'S MOTION FOR EXPEDITED RULING ON MOTION FOR LEAVE TO AMEND COMPLAINT, INSTANTER, AND TNT LOGISTICS NORTH AMERICA, INC.'S MOTION TO INCLUDE COMMUNICATIONS IN RECORD**, a copy of which is herewith served upon you.

Respectfully submitted,

TNT LOGISTICS NORTH AMERICA INC.,
Respondent,

Dated: February 28, 2006

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

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

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, hereby certify that I have served the attached RESPONSE TO COMPLAINANT'S MOTION FOR EXPEDITED RULING ON MOTION FOR LEAVE TO AMEND COMPLAINT, *INSTANTER*, AND TNT LOGISTICS NORTH AMERICA, INC.'S MOTION TO INCLUDE COMMUNICATIONS IN RECORD 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 February 28, 2006; 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 February 28, 2006.

/s/Thomas G. Safley
Thomas G. Safley

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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**RESPONSE TO COMPLAINANT’S MOTION FOR
EXPEDITED RULING ON MOTION FOR LEAVE
TO AMEND COMPLAINT, *INSTANTER*, AND TNT LOGISTICS NORTH
AMERICA, INC.’S MOTION TO INCLUDE COMMUNICATIONS IN RECORD**

NOW COMES Respondent, TNT LOGISTICS NORTH AMERICA, INC.

(“Respondent” or “TNT”), by and through its attorneys, HODGE DWYER ZEMAN, and for its Response to Complainant’s Motion for Expedited Ruling on Motion for Leave to Amend Complaint, *Instanter* (“Motion for Expedited Ruling”), and TNT’S Motion to Include Communications in Record, states as follows:

I. RESPONSE TO MOTION FOR EXPEDITED RULING

1. On February 14, 2006, Complainant served on the undersigned Complainant’s Motion for Expedited Ruling.
2. That Motion asks the Illinois Pollution Control Board (“Board”) to expedite its ruling on Complainant’s earlier-filed Motion for Leave to Amend Complaint, *Instanter* (“Motion for Leave to Amend”).
3. TNT has no objection to the Board expediting its ruling on Complainant’s Motion for Leave to Amend.

II. TNT'S MOTION TO INCLUDE COMMUNICATIONS IN RECORD

4. Despite the foregoing, one statement made in Complainant's Motion for Expedited Ruling has caused TNT some concern.

5. Specifically, the third paragraph of Complainant's Motion for Expedited Ruling states:

Complainants sought, received and relied upon guidance of IPCB in drafting and filing its Complaint and were dissuaded from retaining counsel, having been advised that IPCB would fulfill that role.

Motion for Expedited Ruling at 1.

6. Thus, Complainant's Motion for Expedited Ruling alleges that:

- (a) some person(s) at the Board gave Complainant "guidance . . . in drafting . . . its Complaint" against TNT;
- (b) some person(s) at the Board gave Complainant "guidance . . . in . . . filing its Complaint" against TNT;
- (c) some person(s) at the Board or elsewhere (the allegation is unclear) "dissuaded" Complainant "from retaining counsel" to represent him in his action against TNT; and,
- (d) some person(s) at the Board or elsewhere "advised" Complainant "that IPCB would fulfill that role," i.e., that the Board would act as counsel for Complainant in his action against TNT.

Id.

7. Complainant filed no affidavit or other proof in support of these allegations.

8. The Board was created by Section 5 of the Illinois Environmental Protection Act to fulfill several rolls, including, but not limited to, "conduct[ing]

proceedings upon complaints charging violations of [the] Act [or] any rule or regulation adopted under [the] Act.” 415 ILCS 5/5(d).

9. It is axiomatic that, in conducting adjudicatory proceedings, the Board must serve as an impartial decision-maker, in effect, a court. See, e.g., Brown v. Air Pollution Control Board, 37 Ill. 2d 450, 227 N.E.2d 754 (Ill. 1967) (holding that an adjudicatory proceeding before an administrative agency in Illinois must be “fair and impartial.”) See also Illinois Administrative Procedures Act, 5 ILCS 100/1-1, et seq.

10. Consistent with this requirement, the Board’s rules specifically provide that “[n]o Board Member or Board employee may represent any other person in any Board proceeding.” 35 Ill. Admin. Code § 101.112(a).

11. The Board’s rules further provide for the disqualification of a hearing officer “for bias or conflict of interest” (35 Ill. Admin. Code § 101.112(c)) and prohibit ex parte communications between Board members and employees and litigants before the Board once a case is filed.

12. The paragraph of Complainant’s Motion for Expedited Ruling quoted above can be read as alleging that some employee of the Board has made statements to Complainant to the effect that the Board does not intend to act as a “fair and impartial” decision maker in this matter.

13. Such allegation is inconsistent with the undersigned’s experience in practicing before the Board.

14. However, in light of this allegation, TNT has no option but to move the Board to include in the record in this matter all details regarding any communications between any Board employee(s) and Complainant, including, but not limited to:

- (a) any "guidance" given by such Board employee(s) to Complainant "in drafting . . . its Complaint" against TNT;
- (b) any "guidance" given by such Board employee(s) to Complainant "in . . . filing its Complaint" against TNT;
- (c) any action by such Board employee(s) to "dissuade[]" Complainant "from retaining counsel" to represent him in his action against TNT;
- (d) any statements by which such Board employee(s) "advised" Complainant "that IPCB would fulfill that role," i.e., that the Board would act as counsel for Complainant in his action against TNT;
- (e) the identity of any Board employee(s) involved in such communication(s) with Complainant; and,
- (f) the dates on which such communication(s) took place.

Id.

15. TNT further must move the Board to order Complainant to provide affidavits setting forth the same information for inclusion in the Record in this matter.

III. CONCLUSION

WHEREFORE, for the above and foregoing reasons, Respondent, TNT LOGISTICS NORTH AMERICA, INC., respectfully moves the Board to place the information requested above in the Record in this matter, to order Complainant to

provide an affidavit setting forth this same information for inclusion in the Record in this matter, and to grant TNT all other relief just and proper in the premises.

Respectfully submitted,

TNT LOGISTICS NORTH AMERICA INC.,
Respondent,

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

Dated: February 28, 2006

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Thomas G. Safley
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TNTL:002/Fil/Medema/Response to Motion for Expedited Ruling