

ILLINOIS POLLUTION CONTROL BOARD  
December 5, 1986

ILLINOIS ENVIRONMENTAL PROTECTION )  
AGENCY, )  
 )  
Complainant, )  
 )  
v. ) PCB 79-145  
 )  
THE CELOTEX CORPORATION AND )  
PHILIP CAREY COMPANY, )  
 )  
Respondents. )

ORDER OF THE BOARD (by J. D. Dumelle):

The Board sua sponte has determined that the most appropriate action to be taken at this juncture in the proceeding is to dismiss with prejudice Counts I, II, III and V of the Complaint as they relate to the Celotex Corporation (Celotex). The reasons for the Board's action at this time can best be explained by a summary of the course this proceeding has taken since its filing in July, 1979.

The complaint was filed on July 24, 1979 by the Attorney General William J. Scott on behalf of the Illinois Environmental Protection Agency (Agency) against Celotex and the Philip Carey Company. The Agency alleged that respondents had violated various provisions of the Act, Board regulations and other environmental regulations then in effect at respondents' Will County landfill.

Discovery was initiated by respondent Celotex on August 30, 1979 which continued through the end of 1979 and into the beginning of 1980. During this time, the Agency and Celotex filed various discovery motions. In addition, the Hearing Officer issued orders and set a pre-hearing conference. The Board by Order dated April 3, 1980 imposed sanctions against Celotex for failure to comply with the Hearing Officer's Order which directed Celotex to answer specific interrogatories filed by the Agency. The Board barred Celotex from introducing evidence, including witnesses and documents, at hearing regarding facts relevant to any paragraph of the complaint to which answers of the specific interrogatories were material. Illinois Environmental Protection Agency v. Celotex Corporation and Philip Carey Company, 38 PCB 29, (sanctions affirmed by the Board on May 1, 1980, 38 PCB 149). Later, the Board admonished Celotex to proceed expeditiously according to the Board's May 1, 1980 Order. Celotex, 38 PCB 371.

Discovery continued with additional motions being filed. The Board issued an Order on July 10, 1980 which ordered the parties to present the Hearing Officer and the Board with statements listing what discovery each party needs to obtain in order to proceed with hearing. The Board noted that this action was necessary at least in part because it appeared to the Board that the discovery process had degenerated to bickering and uncooperative attitudes between the parties. Celotex, 39 PCB 23.

By Order dated October 14, 1982, the Board noted no activity in this proceeding since late 1980. In response to the Clerk's inquiry concerning a hearing date, Celotex stated that further discovery was needed in order to prepare for hearing. The Board ordered the parties to submit final discovery requests to the Hearing Officer within thirty days of the date of the Order. In addition, the Board stated, "[a]fter reviewing the history of this action the Board finds it necessary to caution the parties that purposeful delay for its own sake of resolution of this matter will subject the responsible party to sanctions." Celotex, 49 PCB 129.

On July 19, 1984, the Board issued another order which noted no activity in this proceeding since late 1982. The Board stated that if no hearing was scheduled within thirty days and held within sixty days of the date of that Order, this case would be subject to dismissal. Celotex, 59 PCB 11. This Order was modified on August 22, 1984 pursuant to a joint motion by the parties. The Board noted that this case was filed in 1979 and that it was now 1984 and no hearing had been scheduled. Again, the Board ordered that hearing be scheduled within thirty days and held within sixty days or this matter would be subject to dismissal. Celotex, 59 PCB 365.

By Order dated October 12, 1984, the Board granted Celotex's motion to continue hearing. In that Order, the Board commented that this case has proceeded at an inexcusably slow pace. Celotex, 60 PCB 227. Two weeks later, the Board denied Celotex's motion to set aside the sanction order issued by the Board on April 3, 1980. This motion was filed four years after that Order was issued.

In an Order dated February 7, 1985, the Board, after denying a Celotex motion for continuance of hearing, noted that this case was six years old and the Board intended that it proceed expeditiously. Celotex, 62 PCB 493. Later, in an Order disposing of various discovery motions, the Board observed that this proceeding was filed in 1979 and that the intervening six years had provided ample opportunity for the parties to diligently pursue discovery. Celotex, PCB 79-145, October 24, 1985.

In early 1986, Celotex filed a motion for sanctions against the Agency, the basis for which was that the Agency had not supplied Celotex with the information required by a Hearing Officer Order. The Board granted Celotex's motion on April 24, 1986 and ordered the parties to file briefs on the appropriate sanctions to impose. By Order dated May 9, 1986, the Board postponed ruling on the nature of the sanctions to be imposed pending a recommendation by the Hearing Officer. In that Order, the Board expressed its frustration concerning the parties actions during discovery by stating, "[t]his pattern of sluggish response to, and/or disregarding of, Hearing Officer Orders and repeated and sometimes abrupt cancellation of, or non-attendance at, deposition sessions is unacceptable . . ." Celotex, PCB 79-145, May 9, 1986.

The Board imposed sanctions on the Agency by Order dated July 2, 1986. The Board determined that the appropriate sanctions were to strike Count IV of the Complaint and bar assertions of any and all groundwater claims in conjunction with any of the remaining counts in the complaint. Celotex, PCB 79-145, July 2, 1986.

On September 5, 1986, the Agency filed an application for substitution of attorney which the Board granted. However, the Board stated that it has repeatedly expressed to both parties throughout this long proceeding its desire to see this case concluded. Celotex, PCB 79-145, September 11, 1986.

In response to the imposition of sanctions, the Agency filed a Motion to Dismiss with Leave to Reinstate Counts I, II, III and V on September 24, 1986 which the Board denied as inappropriate given the circumstances, including the fact that 21 hearings had been held. Celotex, PCB 79-145, October 9, 1986.

This summary aptly demonstrates the dilatory action of both parties to this proceeding. Discovery in this action has not been completed although 21 hearings have been held. It is evident to the Board and to anyone who examines the twenty-five page Board docket sheet that an end to this proceeding is difficult, if not impossible, to predict. The Board has been frustrated in its attempts to move this case along by the incessant stream of motions being filed, and on several occasions has cautioned the parties about delay in this proceeding.

Recent examples of delay include an Agency motion to amend the complaint, filed on October 14, 1986, and an Agency motion to replace the Hearing Officer, filed on October 21, 1986. The Board notes that if it were to grant the Agency motion to amend the complaint which seeks to remove the remaining counts, then the Board would be effectively dismissing the remaining counts of the complaint without prejudice. The Board denied such a motion by Order dated October 9, 1986. The Agency's motion to replace

the Hearing Officer misconstrues the role of hearing officers in Board proceedings. Hearing officers neither decide the case nor make any findings of fact or conclusions of law. Rather, Hearing Officers ensure that the case proceeds expeditiously and that an orderly record is developed throughout the proceeding for eventual decision by the Board. A request to change Hearing Officers this late in the proceeding after twenty-one hearings have been held would only result in more delay in this proceeding which the Board cannot condone. The Board also notes that the Agency requests that if the Board does not replace the Hearing Officer in this proceeding, then it dismiss this proceeding without prejudice as it relates to Celotex. Again, the Board would like to point out that it denied such a motion on October 9, 1986.

The Board concludes that the appropriate action for the Board to take at this juncture in the proceeding is to dismiss with prejudice Counts I, II, III and V of the complaint. This action, however, applies only to Respondent Celotex and does not apply to respondent, Philip Carey Company. The Board notes that this action should not be inconsistent with the Agency's expectations in this proceeding as evidenced by the Agency's October 14, 1986, motion to the Hearing Officer for a finding that the Agency did not comply with a Hearing Officer Order of September 19, 1986. In that motion, the Agency, along with other similar statements, indicated that it "held a reasonable expectation that Counts I, II, III and V of the complaint would be dismissed either with or without prejudice."

The Board would like to address two other motions currently pending in this proceeding. On October 17, 1986, the Agency filed a motion with the Board to clarify the sanctions imposed in the Board's July 2, 1986 Order as they relate to the other respondent in this proceeding, Philip Carey Company. Celotex filed a response in opposition to this motion on October 22, 1986 and the Agency filed a motion to strike Celotex's response on October 27, 1986. The Agency's motion to clarify sanctions as they relate to Philip Carey Company is granted. Also, the Agency's motion to strike Celotex's response in opposition to the Agency's motion to clarify sanctions is granted in part. Counsel for Celotex has stated that he is not representing the Philip Carey Company. Moreover, he has not filed an appearance on behalf of the Philip Carey Company. Therefore, to the extent that Celotex's response in opposition to the Agency's motion for clarification argues the position of Philip Carey Company it is hereby struck. Counsel for Celotex cannot argue the position of Philip Carey Company.

Regarding the Agency's motion for clarification of sanctions, the Board notes that the sanctions were imposed against the Agency for failure to comply with a Hearing Officer Discovery Order. Celotex requested that sanctions be imposed

because the Agency had hampered Celotex's ability to complete various discovery matters. The Board intended that the sanctions be imposed against the Agency for the benefit of Celotex. The Board did not intend that these sanctions benefit the Philip Carey Company. The Board concluded that Celotex had been prejudiced by the Agency's actions and, therefore, imposed sanctions. No such prejudicial effect has been asserted on behalf of the Philip Carey Company. In fact, Philip Carey Company has not initiated nor participated in any discovery in this proceeding. In addition, the Board is not aware of any reliance Philip Carey Company has placed on Celotex's discovery requests. Therefore, the Board's July 2, 1986 sanction order which struck Count IV of the complaint and barred the Agency from asserting any and all groundwater claims in conjunction with any of the remaining counts of the complaint was intended to resolve any prejudice Celotex experienced by the Agency's actions and in no way affects the posture of the Agency's case against the Philip Carey Company.

The second motion to be addressed is the Agency's motion to the Hearing Officer for a finding that the Philip Carey Company is in default filed on October 17, 1986. Celotex filed its response in opposition on October 28, 1986. On November 3, 1986 the Agency filed a motion to strike Celotex's response in opposition which is hereby granted. Again, counsel for Celotex has stated that he does not represent the Philip Carey Company; he has not filed an appearance on behalf of the Philip Carey Company; and therefore, he cannot argue the position of Philip Carey Company.

Section 103.220 of the Board's Procedural Rules provides two bases for which a party can be found in default. One of the bases is failure to appear on a date set for hearing, and the other basis is failure to proceed as ordered by the Board. As Philip Carey Company has failed to appear at any of the twenty-one hearings held in this matter, the Board finds the Philip Carey Company in default. However, the Agency filed a "Motion to the Hearing Officer to Admit Self-Authenticating Documents as Evidence and to Amend the Complaint" on October 20, 1986. The motion to amend the complaint will be addressed later; the motion to admit self-authenticating documents is granted. The Board notes that these documents cast serious doubt on the existence of the Philip Carey Company at anytime during the time frames alleged in the complaint as well as at the time the complaint was filed. However, the Board does not have enough information before it to enable it to make a decision on this issue. Therefore, the Board requests that the Agency submit a brief to the Board on the issue of the existence of the Philip Carey Company and the authority of the Board to enter a judgment against the Philip Carey Company. In addition, the brief should include arguments concerning the appropriate relief to be entered against Philip Carey with relevant citations to the record. The

Agency's brief shall be due within thirty days of the date of this Order and may include a request by the Agency for a hearing to present additional evidence regarding the allegations in the complaint against the Philip Carey Company.

The Agency's motion to amend the complaint seeks to change the name of respondent Philip Carey Company to the Jim Walter Corporation. However, the Board notes that this issue is intertwined with the issue of the existence of the Philip Carey Company and should be addressed by the Agency in its brief.

The Board hereby dismisses with prejudice Counts I, II, III and V of the complaint as they relate to Respondent Celotex.

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 5th day of December, 1986 by a vote of 6-0.

Dorothy M. Gunn  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board