

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROBERT F. KASSELLA JR. and	)	
KELLIE R. KASSELLA,	)	
	)	
Complainants,	)	
	)	
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
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA FIRST CLASS MAIL)</b>

**(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 COMPLAINANTS' 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 COMPLAINANTS' 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

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

**RESPONSE TO COMPLAINANTS’ 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 Complainants’ 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, Complainants served on the undersigned Complainants’ Motion for Expedited Ruling.
2. That Motion asks the Illinois Pollution Control Board (“Board”) to expedite its ruling on Complainants’ 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 Complainants’ Motion for Leave to Amend.

**II. TNT'S MOTION TO INCLUDE COMMUNICATIONS IN RECORD**

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

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

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

Motion for Expedited Ruling at 1.

6. Thus, Complainants' Motion for Expedited Ruling alleges that:
- (a) some person(s) at the Board gave Complainants "guidance . . . in drafting . . . their Complaint" against TNT;
  - (b) some person(s) at the Board gave Complainants "guidance . . . in . . . filing their Complaint" against TNT;
  - (c) some person(s) at the Board or elsewhere (the allegation is unclear) "dissuaded" Complainants "from retaining counsel" to represent them in their action against TNT; and,
  - (d) some person(s) at the Board or elsewhere "advised" Complainants "that IPCB would fulfill that role," i.e., that the Board would act as counsel for Complainants in their action against TNT.

Id.

7. Complainants 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 Complainants’ Motion for Expedited Ruling quoted above can be read as alleging that some employee of the Board has made statements to Complainants 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 Complainants, including, but not limited to:

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

Id.

15. TNT further must move the Board to order Complainants 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 Complainants 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

Edward W. Dwyer  
Thomas G. Safley  
HODGE DWYER ZEMAN  
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TNTL:002/Fil/Kassela/Response to Motion for Expedited Ruling