

ILLINOIS POLLUTION CONTROL BOARD
February 1, 2001

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 99-191
) (Enforcement - Air)
PANHANDLE EASTERN PIPE LINE)
COMPANY,)
)
Respondent.)

ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on two motions and responses. First, on December 21, 2000, respondent Panhandle Eastern Pipe Line Company (Panhandle) filed a motion for reconsideration of the Board's November 16, 2000 order denying respondent's motion for judgment. See People v. Panhandle Eastern Pipe Line Company, (November 16, 2000), PCB 99-191. Complainant responded to this motion on January 4, 2001. Next, is complainant's motion to reverse hearing officer's ruling, filed on December 26, 2000. Panhandle filed its response to this motion on January 5, 2001. For the reasons expressed below, both motions are denied.

PANHANDLE'S MOTION FOR RECONSIDERATION

Motion To File Response *Instante*. Complainant filed its response to Panhandle's motion for reconsideration on January 4, 2001. Complainant also filed a motion for leave to file *instante* its response to motion for reconsideration. In this motion, complainant stated that the assigned Assistant Attorney General was out of the office from December 21, 2000, until January 2, 2001, and did not receive Panhandle's motion until January 2, 2001. Complainant further stated that the Special Assistant Attorney General at the Illinois Environmental Protection Agency (Agency) did receive Panhandle's motion on December 21, 2000, but had to devote his time to other pressing matters. Complainant states that it diligently attempted to respond to Panhandle's motion within seven days of receipt, but found it impossible because of the above mentioned difficulties. Panhandle did not respond to complainant's motion for leave to file *instante*. Complainant's motion to file *instante* is granted.

In support of its motion for reconsideration of the Board's November 16, 2000 order, Panhandle argues that: (1) the Board incorrectly held that Panhandle should have brought its motion for judgment in its favor as a motion to dismiss within the time limits set forth in the Board's procedural rules; and (2) as a result, the Board did not consider the factual support for

the Attorney General to bring this action either based on a referral from the Agency or on its own motion. Resp. Mot. at 1.¹

Panhandle filed its motion under Section 101.246(d) of the Board's rules which provided that "the Board will consider factors including, but not limited to error in the decisions and facts in the record which are overlooked."² In Citizens Against Regional Landfill v. County Board of Whiteside County (March 11, 1993), PCB 92-156, the Board stated that "[t]he intended purpose of a motion for reconsideration is to bring to the court's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of the existing law." See also Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 572 N.E.2d 1154 (1st Dist. 1991).

Panhandle's motion does not present any new evidence or changes in the law. The Board finds nothing in Panhandle's motion for reconsideration that persuades the Board that its decision of November 16, 2000 was in error, or that facts were overlooked. Panhandle's motion for reconsideration is denied.

PEOPLE'S MOTION TO REVERSE HEARING OFFICER'S RULINGS

Complainant requests that the Board reverse three rulings made by the hearing officer during the hearing held in this matter from September 18-22, 2000, and November 28-29, 2000. Specifically, complainant requests that the Board reverse the hearing officer's rulings regarding: (1) the inadmissibility of an August 1998 letter from the United States Environmental Protection Agency (USEPA) to the Agency; (2) the admissibility of the USEPA BEN User's Manual; and (3) the admissibility of testimony pertaining to Section 31 of the Environmental Protection Act (Act), (415 ILCS 5/31 (1998)). Comp. Mot. at 1-2.

USEPA's August 1998 Letter

At hearing, complainant moved to admit People's Exhibit 5, an August 1998 letter from USEPA to the Agency. Tr. at 119.³ This letter provided a response to People's Exhibit 4, an Agency letter requesting guidance from USEPA regarding the prevention of significant deterioration (PSD) program. Panhandle objected to People's Exhibit 5 being admitted based upon a lack of foundation, as hearsay and containing legal conclusions. Tr. at 119-121.

¹ Complainant's Motion in this matter will be referred to as "Comp. Mot. at ____," Respondent's Motion will be referred to as "Resp. Mot. at ____," Agency's Response will be referred to as "Ag. Resp. at ____," and Panhandle's Response will be referred to as "Panhandle Resp. at ____."

² On January 1, 2001, the procedural rules adopted by the Board in In the Matter of Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-139 (December 21, 2000), R00-20 became effective. The citations in this order are to the Board's procedural rules in effect prior to January 1, 2001.

³ The transcript of the hearing in this matter will be referred to as "Tr. at ____."

Complainant responded that the letter should be admitted as a business record. Tr. 120-121. The hearing officer denied admission of People's Exhibit 5 finding that proper foundation had not been provided, and that the letter was not "a record in that it was not made as a memorandum or record of an act, transaction occurrence or event." Tr. at 121 and 223.

At the close of its case-in-chief, complainant sought again to have this exhibit admitted. Complainant offered the alternative argument that the letter should be admitted to explain the Agency's conduct following receipt of the letter. Tr. at 466. The hearing officer reserved his ruling at hearing, but later rejected complainant's argument that the letter could be admitted as bearing upon the Agency's subsequent conduct. Tr. at 469; Hearing Officer Report at 3. In affirming his ruling upon further review as promised at hearing, the hearing officer concluded that without the letter's author present for cross-examination, some minimal foundation was necessary for People's Exhibit 5 to be admitted. Hearing Officer Report at 3.

People's Exhibit 5 as a Business Record

In its motion to the Board, complainant reiterates its claim that People's Exhibit 5 is a business record, and adds that business record exception is applicable even though the document was not created by the Agency and no USEPA representative testified. Comp. Mot. at 5. Complainant cites to Birch v. The Township of Drummer, 139 Ill. App. 3d 397, 407 N.E.2d 798, 806 to support its agreement. In Birch, the court admitted a safety study prepared by a third party engineering firm under the Supreme Court's business record exception even though the witness producing it was not the original entrant.

Section 103.208 of the Board's rules governed the admission of business records in hearing before the Board. That rule states:

Any writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event. To be admissible the writing or record shall have been made in the regular course of any business, provided it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business", as used in this rule, includes business, profession, occupation, and calling of every kind. 35 Ill. Adm. Code 103.208.

In its response to complainant's motion, Panhandle makes several arguments. First, it argues that People's Exhibit 5 is not a record of an act, transaction, occurrence, or event. Panhandle states that the only reason complainant sought to introduce it in this case is that the letter purports to represent USEPA guidance on the PSD program. Panhandle Resp. at 3. Second, Panhandle further argues that complainant presented no testimony at the hearing to establish that this type of letter is "proper USEPA guidance." Panhandle Resp. at 3-4. Third,

Panhandle argues that complainant failed to prove People's Exhibit 5 was made in the ordinary course of business because the testimony by Mike Davidson that the Agency routinely seeks guidance on PSD issues from USEPA is insufficient to establish that the letter was made in the ordinary course of the USEPA's business. Finally, Panhandle argues that the Agency also failed to lay the proper foundation to overcome the inadmissibility of the letter as hearsay since there was no proof that its author signed the letter or had authority to write such a letter. Panhandle's Resp. at 4.

The Board finds that complainant has not demonstrated that People's Exhibit 5 is admissible under the business record exception rule. It is not a memorandum or record of any act, transaction, occurrence, or event. We affirm the hearing officer's ruling on this point. We note that Birch is not applicable in this case because the USEPA's letter is not otherwise admissible under the business record exception.

People's Exhibit 5 to Demonstrate Agency Conduct

As an alternative, complainant asserts that People's Exhibit 5 may be admissible as relevant to "show its effect" on the Agency. Tr. at 466; Comp. Mot. at 8. Complainant argues that statements which otherwise would be hearsay, if offered for the truth of the matter, may nonetheless be admissible if the offered for the limited purpose of explaining conduct. People v. Garcia, 195 Ill. App. 3d 621, 552 N.E.2d 1171,1174 (1st Dist. 1990). Complainant argues that USEPA's letter can be considered to offer a rationale for actions taken by the Agency after receiving it.

In response, Panhandle agrees that Garcia provides that "admissibility of an out-of-court statement for the limited purpose of explaining another's conduct is only appropriate where such statement is not being offered for the truth of the matter asserted." Panhandle's Resp. at 4-5. However, Panhandle then argues that such statement must be only admitted to the extent necessary to provide an explanation of another's conduct and must not be admitted if it reveals unnecessary and prejudicial information. People v. O'Toole, 226 Ill. App.3d 974, 590 N.E.2d 950, 960 (4th Dist.1992). Finally, Panhandle argues that the Agency's conduct after August 1998 is neither necessary nor at issue in this case. Panhandle's Resp. at 4-5.

At hearing, the hearing officer reserved ruling on complainant's alternative argument. In his Hearing Officer Report, the hearing officer ruled that "[t]he risks associated with hearsay evidence are not alleviated by offering this exhibit for its impact on the Agency's subsequent conduct." Hearing Officer Report at 3.

The Board finds persuasive Panhandle's argument that the Agency's conduct subsequent to the USEPA's letter is not at issue in this case. The Board also agrees with the hearing officer that the risks associated with hearsay evidence are not alleviated by this offer by complainant. We affirm the hearing officer's ruling that People's Exhibit 5 is not admissible as evidence of the Agency's conduct.

People's Exhibit 5 Admissible as Material or Relevant

As its final argument, complainant raises a new argument. In its written motion, complainant now argues that the hearing officer could have admitted People's Exhibit 5 under Section 103.204(a), which states that:

The Hearing Officer may revise evidence which is material, relevant, and would be relied upon by reasonably prudent persons in the conduct of serious affairs provided that the rules relating to privileged communications and privileged topics shall be observed. 35 Ill. Adm. Code 103.204(a).

Complainant argues that Section 103.204(a) is applicable, and has been liberally construed by the Board in the past to admit out-of-court statements notwithstanding hearsay concerns. Comp. Mot. at 9-10. Complainant contends that People's Exhibit 5 is both material and relevant because it "addresses the applicability of the federal PSD program to the underlying facts in this case, as well as permitting issues relating to at least one of Panhandle's affirmative defenses." Comp. Mot. at 10. Complainant states that "it is also reasonable to conclude that USEPA's views regarding the underlying facts and applicable law in this case would be relied upon by reasonably prudent persons in the conduct of serious affairs." *Id.* Finally, complainant cites several Board cases in support of its position. *Id.*

The Board examined those cases. Generally, the evidence the Board has admitted in those cases under Section 103.204(a) are reports and laboratory analyses prepared by third parties. Greenland v. City of Lake Forest (June 13, 1985), PCB 84-155 (Department of Energy and Natural Resources study); City of Sycamore v. IEPA (July 11, 1985), PCB 83-172 (a study about sewer overflow prepared by City's engineering consultants); Boyer v. Harris and Chicago and Mortgage Corporation (September 4, 1997), PCB 96-151 (laboratory analytical results of paint samples); General Tire, Inc. v. IEPA (December 17, 1987), PCB 86-224 (testimony).

The Agency seeks to have its exhibit admitted under Section 103.204(a), the "more liberal" evidentiary rule. Yet, the cases cited do not support the Agency's request. People's Exhibit 5 is not a report or laboratory analytical results; it is not testimony. The only similarity is that People's Exhibit 5 is hearsay. Unlike the cases cited, the hearing officer and the Board have also considered and concluded that People's Exhibit 5 is not admissible under the business record exception or because it is offered to explain the Agency's conduct rather than the truth of the matter asserted. Now, the Agency offers only the general statement that it is material and relevant because it addresses the applicability of the PSD program to the underlying facts in this case, and that reasonably prudent persons would rely on it. Comp. Mot. at 10. This generalized claim is not sufficient for the Board to find People's Exhibit 5 material.

The Board agrees with the hearing officer's initial ruling that complainant did not lay an adequate foundation to admit People's Exhibit 5 before the Board. Tr. at 121. Absent

some minimal foundation, the Board cannot agree that prudent persons would rely upon it, and cannot admit this evidence even under its more liberal rule at Section 101.626(a). The Board affirms the hearing officer's order denying its admission into the record.

USEPA BEN User's Manual

Complainant moves the Board to reverse the hearing officer's ruling regarding Panhandle Exhibit 25A, deem it inadmissible, and strike the related testimony of Jasbinder Singh. Panhandle Exhibit 25A is a complete copy of the September 1999 version of the BEN User's Manual. The BEN User's Manual deals with the USEPA's computer model for analyzing a violator's economic benefit from not complying with the law. In addition to the arguments made at hearing, complainant now contends that it is not convinced that experts would rely on the BEN User's Manual in dispute to support a "theory that is neither identified nor articulated in the manual itself." Comp. Mot. at 15.

Background. During its case-in-chief, Panhandle moved to admit Panhandle Exhibit 25, comprised of selected portions of the April 1999 BEN User's Manual for the limited purpose of showing what Panhandle's witness Jasbinder Singh relied upon in developing his testimony. Tr. at 968. Complainant objected that Panhandle Exhibit 25 did not represent the most accurate and up-to-date version of the BEN User's Manual. Tr. at 968-969. The hearing officer admitted the document for the limited purpose stated above. Tr. at 976-977. The hearing officer further granted Panhandle leave to file a current version of the BEN User's Manual. Tr. at 989.

Later in the hearing, Panhandle moved to admit Panhandle Exhibit 25A, which is a complete copy of the September 1999 version of the BEN User's Manual. Tr. at 1288. Complainant objected on the grounds that the entire document was hearsay, and that the foundation had only been laid for the specific pages Singh relied upon. Tr. at 1289-1291. The hearing officer admitted Panhandle Exhibit 25A pursuant to Section 103.204(a) of the Board's procedural rules. Tr. at 1292-1294.

In its written motion, complainant makes several arguments, and acknowledges that the BEN User's Manual is a reliable source of information and that economists, auditors and other financial experts would reasonably rely upon it. Complainant also concedes that such experts might employ it as a resource for developing a "non-BEN methodology" or components thereof to estimate economic benefit. Still complainant wants it deemed inadmissible and Singh's testimony concerning it stricken. Comp. Mot. at 15.

In response, Panhandle argues that the BEN User's Manual is the type of document about which experts may testify, and in fact both parties' economic benefit witnesses consulted the BEN User's Manual. Finally, Panhandle claims that it laid the proper foundation for the introduction of this document. Lastly, Panhandle argues that even if it is hearsay, it is admissible, citing Greenland v. City of Lake Forest, which is discussed above.

The hearing officer ruled that Panhandle Exhibit 25A “clearly falls within the Board’s admissible evidence provision at 103.204(a) . . . I think this is what a reasonably prudent person would rely upon in pursuit of serious affairs. I don’t see that there is any privilege concerns with this.” Tr. at 1295.

The Board affirms the hearing officer’s ruling regarding the admissibility of Panhandle Exhibit 25A. Not only did Panhandle’s witness consult the BEN User’s Manual (Tr. at 952-953), complainant’s own economic benefit witness, Gary Styzens, also testified that he reviewed the April and September 1999 versions of the BEN User’s Manual during his work for the case. Tr. at 1347-1348. The Board agrees with the hearing officer that a prudent person in the conduct of serious affairs would rely upon the September 1999 BEN User’s Manual. Complainant’s motion to exclude Panhandle’s Exhibit 25A and to strike the associated testimony of Singh is denied.

Testimony Pertaining to Section 31 of the Act

Lastly, complainant moves the Board to overturn the hearing officer’s ruling allowing testimony pertaining to Section 31 of the Act, and to strike such testimony. Section 31(a) requires the Agency to serve, within 180 days of its becoming aware of an alleged violation, a written notice upon the person complained against informing that person of the alleged violation. 415 ILCS 5/31(a) (1998). Complainant renews its objection made at hearing that the testimony was not relevant because of a Board order on the same subject, and that Panhandle has waived its opportunity to raise Section 31 as an affirmative defense. Comp. Mot. at 18-20.

Background. The hearing in this case began on September 18, 2000. On September 20, 2000, at the close of complainant’s case-in-chief, Panhandle filed a motion for judgment in its favor at the close of complainant’s evidence. The crux of Panhandle’s argument was that complainant had failed to present sufficient evidence as to the necessary elements to pursue a claim under Section 31(e) of the Act. The Board held that Section 31(a) of the Act does not provide an evidentiary requirement for complainant’s *prima facie* case, and denied Panhandle’s motion. People v. Panhandle Eastern Pipe Line Company (November 16, 2000), PCB 99-191. (This order is the subject of Panhandle’s motion for reconsideration addressed in this order.)

The hearing reconvened on November 28, 2000. Panhandle sought to elicit testimony from John Stefan, an Agency environmental protection engineer, regarding his personal understanding as to whether the Agency sent the violation notice letter more than 180 days from the date of the Agency’s inspection of Panhandle’s facility. Tr. at 1243-1251. The Agency objected on the grounds that this issue was resolved by the Board’s November 16, 2000 order, and that the testimony was not relevant to any of the affirmative defenses Panhandle raised in its answer. *Id.* The hearing officer allowed the questioning of Stefan to continue, finding that the testimony “could conceivably be included in [Panhandle’s] fourth affirmative defense and maybe even in the fifth affirmative defense.” Tr. at 1247-1248.

Panhandle's fourth and fifth affirmative defenses are:

Fourth Affirmative Defense

Complainant unreasonably delayed in bringing the claims asserted against Panhandle in failing to exercise due diligence in its permit application review and its regular inspections of Panhandle over a period of approximately eight years, and as a result Panhandle is prejudiced. The Complaint is barred by the doctrine of laches. As described elsewhere in these affirmative defenses, compelling circumstances exist that prevent the complainant from asserting the alleged violations set forth in the Complaint.

Fifth Affirmative Defense

Complainant delayed in bringing the action for the alleged violations. The alleged violations accrued more than five years ago. The Complaint, therefore, is barred by the statute of limitations set forth at 735 ILCS 5/13-205. Ans. at 18-19.⁴

Complainant argues that the "language in the fourth affirmative defense is clear and unmistakable" and that it makes no mention "of the [Agency's] date of awareness of Panhandle's violations or any other aspect of Section 31." Comp. Mot. at 19. Complainant asserts that the fourth affirmative defense does not relate to complainants' failure to comply with Section 31. *Id* Complainant also states that the doctrine of laches, raised by Panhandle, is an equitable defense, and cannot be reconciled with the jurisdictional argument brought forth by Stefan's testimony regarding Section 31. Complainant states that the fifth affirmative defense raises the five-year statute of limitations, but does not address the 180-day time period found in Section 31(a) of the Act. See 415 ILCS 5/31(a) (1998).

Panhandle urges the Board to take a more liberal view of its fourth and fifth affirmative defenses, stating that they "address the Agency's delay in enforcing this matter." Panhandle Resp. at 11. Panhandle further states:

Complainant wrongly attempts to narrow Panhandle's use of Mr. Stefan's testimony to the issue of the [Agency's] non-compliance with Section 31(a) of the Act and on that basis argues it is inadmissible. Mr. Stefan's testimony is relevant regardless of whether the Board determines that the failure to issue the [notice of violation] within 180 days of the Agency's awareness of a violation is a violation of Section 31(a) of the Act. Panhandle Resp. at 11-12.

We note that in our order of November 16, 2000, we ruled that (1) the notice requirement of Section 31(a)(1) of the Act is not an evidentiary requirement under Section 31(e) of the Act as argued by Panhandle, and (2) Panhandle had not demonstrated material

⁴ Panhandle's answer, filed on July 27, 1999, shall be referred to as "Ans. at__."

prejudice as required under Section 101.243(a) of the Board's procedural rules for the Board to find that we should waive the applicable filing deadlines for challenging the sufficiency of a pleading or moving to dismiss a complaint, People v. Panhandle (November 16, 2000), PCB 99-191 at 3.

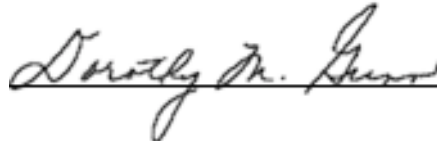
The Board agrees with the hearing officer's ruling to admit Stefan's testimony. The language in Panhandle's fourth affirmative defense is broad enough to include Stefan's testimony regarding when the Agency became aware of the violations at Panhandle's facility. The Board's order of November 16, 2000, does not preclude this type of cross-examination or testimony. The Board affirms the hearing officer's ruling.

CONCLUSION

First, the Board denies Panhandle's motion for reconsideration of our November 16, 2000 order in this case. Second, the Board affirms the hearing officer's rulings regarding (1) the inadmissibility of People's Exhibit 5; (2) the admissibility of the USEPA's BEN User's Manual; and (3) the admissibility of John Stefan's testimony concerning Section 31(a) of the Act. Consequently, People's Exhibit 5 is excluded from the record. The BEN User's Manual, and Singh's testimony concerning it, and Stefan's testimony concerning Section 31(a) of the Act remain part of the record.

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 1st day of February 2001 by a vote of 6-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn". The signature is written in dark ink and is positioned above the printed name and title.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board