

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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NOV 15 2006

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
Complainant,)

PCB 96-98

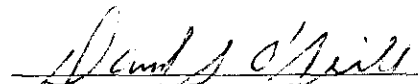
v.)

Enforcement

SKOKIE VALLEY ASPHALT, CO., INC.,)
EDWIN L. FREDERICK, JR., individually and as)
owner and President of Skokie Valley Asphalt)
Co., Inc., and RICHARD J. FREDERICK,)
individually and as owner and Vice President of)
Skokie Valley Asphalt Co., Inc.,)
Respondent)

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the RESPONDENTS' SECOND MOTION FOR SANCTIONS AGAINST COMPLAINANT, a copy of which is hereby served upon you.


David S. O'Neill

November 15, 2006

David S. O'Neill, Attorney at Law
5487 N. Milwaukee Avenue
Chicago, IL 60630-1249
(773) 792-1333

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**RESPONDENTS' SECOND MOTION FOR
SANCTIONS AGAINST COMPLAINANT**

The Respondents, SKOKIE VALLEY ASPHALT, CO., INC., EDWIN L. FREDERICK, JR., individually and as owner and President of Skokie Valley Asphalt Co., Inc., and RICHARD J. FREDERICK, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc., by and through its attorney, David S. O'Neill, herein move this Board to impose sanctions on the Respondents' and in support thereof states as follows:

PROCEDURAL HISTORY

1. On April 7, 2005, the Board issued an Order in the above-captioned matter. In this Order, the Board granted the Respondents' motion for extension of time to allow for discovery.
2. The Order states that "the Board will grant the respondents additional time in order to conduct discovery..." Order of April 7, 2005 at 3. In the Conclusion of the Order, the Board "grants respondents' motion for extension of time and authorizes respondents to conduct discovery on the attorney fees issue". Id at 4.
3. On April 25, 2005, the Respondents filed with the Board the "Respondents' First Set of Interrogatories Regarding Attorneys' Fees, Costs and Expenses", Respondents' First Set

of Document Requests Regarding Attorneys' Fees, Costs and Expenses", "Respondents' First Request for Admission of Facts Regarding Attorneys' Fees, Costs and Expenses" and "Notice of Deposition Regarding Attorneys' Fees, Costs and Expenses".

4. On April 19, 2005, Mr. Michael Partee, Esq. filed an appearance in this matter on behalf of the Complainant. As such, Mr. Partee's costs and fees became potentially eligible for recovery under the Complainant's petition for fees and costs and therefore subject to discovery.
5. In its Notice of Deposition, the Respondents requested that the Complainant produce Mr. Mitchell Cohen and Mr. Bernard Murphy for deposition on June 24, 2005 pursuant to the provisions of Section 2-1003 of the Illinois Code of Civil Procedure.
6. The Complainant failed to produce either Mr. Cohen or Mr. Murphy for deposition on June 24, 2005 as required under Section 2-1003 of the Illinois Code of Civil Procedure.
7. On July 6, 2005, the Respondents filed a Motion to Strike Complainant's Objections to Discovery and Motion to Compel Complainant's Response to Discovery Request in which the Respondents requested the Board to strike Complainant's objections to discovery and compel Complainant's responses to discovery and cooperation in scheduling depositions.
8. On July 20, 2005, the Complainant filed a Complainant's Response to Respondents' Motion to Strike Complainant's Letters of May 24, 2005 and June 14, 2005 Regarding Discovery and Complainant's Motion for Protective Order and Response to Motion to Compel Complainant's Response to Discovery Request.
9. In its Order of November 11, 2005, the Board refused to uphold the People's objection to discovery. Order at 9. The Board allowed the Respondents thirty days from the date of the Order to further respond to each objection. The Board also stated that it would direct the hearing officer to reserve ruling on the Respondents' Motion to Compel until the time for additional response is lapsed. *Id.*
10. Consequent to the Respondent's filing of its further responses of December 19, 2005, the Complainant field a barrage of trivial motions in an attempt to avoid responding to the Respondents' discovery request.
11. In its order of September 7, 2006, the Board addressed the outstanding motions and

established a detailed pre-hearing schedule to complete discovery in this matter. Order of September 7, 2006 at 8. In the Order, the Board stated that Notices of Depositions needed to be filed by October 31, 2006. Id.

12. On October 18, 2006, the Respondents filed a Deposition Notice to Complainant Regarding Complainant's Fee Petition. In the Notice, Respondents requested to take the discovery deposition of Mr. Michael C. Partee commencing at 2:00 p.m. on Friday November 10, 2006.
13. In the Order of September 7, 2006, the Board stated that Objections to Notices must be filed and served by November 8, 2006. Id.
14. The Complainant did not file an Objection to the Respondents' Notice to Deposition with the Board prior to November 8, 2006.
15. The Complainant failed to produce Mr. Partee for deposition on November 10, 2006 as required under Section 2-1003 of the Illinois Code of Civil Procedure.
16. In the Order of September 7, 2006, the Board clearly stated its intent to strictly enforce the established timetable to complete discovery by stating:

"All discovery activities must be completed on or before the dates provided above."

and

"The parties are notified that any failure to abide by the schedule set forth will result in sanctions that may include the barring of testimony of the striking of pleadings pursuant to Section 101.800 of the Board's procedural rules."

MOTION FOR SANCTIONS

17. The Complainant failed to produce a witness for deposition as required under the Board's discovery schedule of September 7, 2006.
18. The Respondents are materially prejudiced by the failure of the Complainant to comply with the Board's Order and to produce a witness for deposition.
19. The Respondents do not have the materials it desires to properly depose another witness.
20. The Respondents' opinion witness does not have the information she requires to form her opinion and prepare her expert report.
21. The Respondents do not have the information they require to prepare for hearing.

22. In accordance with the language in the Board's Order of September 7, 2006, the Board is required to impose sanctions against the Complainant. By stating that sanctions "will" be imposed against a party that fails to abide by the schedule, the Board eliminated any discretion with respect to whether or not sanctions would be imposed.
23. Respondents' argue that their ability to properly prepare and argue its position against the Complainant's Request for Attorneys' Fees and Costs has been so greatly compromised by the Complainant's blatant disregard of the Board's Order that the sanctions imposed need to protect the Respondents from being required to do so.
24. The issue of the responses to the Respondents' requests for deposition is material to the claims and defenses asserted by the Respondents and the Complainant.
25. Illinois Supreme Court Rule 219 (c) states in relevant part:
- If a party, or any person at the instance of, or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Request for Admission, and Pretrial Procedure) or fails to comply with any order entered into under these rules, the court, on motion, may enter, in addition to remedies, elsewhere specifically provided, such orders as are just, including among others, the following:
- ...
- (v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the defending party's action be dismissed with or without prejudice...
26. In the matter before the Board, the Complainant unreasonably failed to comply with a Board Order entered into under Supreme Court Rules controlling discovery and the issue is material to the claims and defenses asserted. Therefore, S. Ct. 219 (c) (v) can be applied.
27. In order to protect the Respondents against undue prejudice in the disposition of this matter, this Board should apply S. Ct. Rule 219 (c)(v) to dismiss this action with prejudice.
28. In the alternative, to protect the Respondents against undue prejudice in the disposition of this matter, the Board should bar any and all testimony and strike and all pleadings involving issues addressed by the discovery requests of the Respondents in accordance with Section 101.800 of the Board's procedural rules.

Wherefore, the Respondents respectfully request this Board to apply S. Ct. Rule 219 (c)(v) to dismiss this action with prejudice of in the alternative, the Respondents respectfully request the Board to bar any and all testimony and strike and all pleadings involving issues addressed by the discovery requests of the Respondents in accordance with Section 101.800 of the Board's procedural rules.



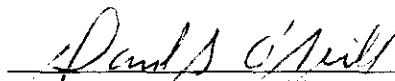
David S. O'Neill

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached RESPONDENTS' SECOND MOTION FOR SANCTIONS AGAINST COMPLAINANT by hand delivery on November 15, 2006, upon the following party:

Mitchell Cohen, Esq
and Mr. Michael Partee, Esq.
Environmental Bureau
Assistant Attorney General
Illinois Attorney General's Office
188 W. Randolph, 20th Floor
Chicago, IL 60601


David S. O'Neill

NOTARY SEAL

SUBSCRIBED AND SWORN TO ME this 15th

day of November, 20 06


Notary Public

