

ILLINOIS POLLUTION CONTROL BOARD
August 7, 1997

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
) PCB 97-64
v.) (Enforcement - EPCRA)
)
UNIQUE MARBLE PRODUCTS, INC.,)
)
Respondent.)

JULIA M. GENTILE APPEARED ON BEHALF OF COMPLAINANT; and

WILLIAM W. AUSTIN, PARKER, SIEMER, AUSTIN & RESCH APPEARED ON
BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

This matter is before the Board on a one-count complaint filed October 2, 1996 by the Attorney General of the State of Illinois, on behalf of the Illinois Environmental Protection Agency (Agency) and the People of the State of Illinois, against Unique Marble Products, Inc. (Unique), an Illinois corporation located at 2600 South Raney, Effingham, Illinois. The complaint alleges that Unique violated Section 25b-2 of the Illinois Environmental Protection Act (Act) (415 ILCS 5/25b-2 (1996)) by failing to timely submit two toxic chemical release reports.

Hearing was held on April 29, 1997. Joe Goodner (Goodner), manager of the Agency's Emergency Planning Unit of the Office of Chemical Safety, and Leslie David Morrow (Morrow), environmental toxicologist for the Agency, appeared as witnesses for the complainant. Guy R. Gilmore, Jr., president of Unique, and Becky Monica Gilmore, secretary and treasurer of Unique, testified on behalf of Unique.¹

For the reasons set forth below the Board finds that complainant failed to properly serve notice to respondents; therefore, this matter is dismissed. This order will address several procedural issues first and then address the issue of proper notice.

PROCEDURAL MATTERS

On May 27, 1997 complainant filed its post-hearing brief, a motion in support of offer of proof and a motion to add exhibit. The Board finds that complainant's motion in support of offer of proof and motion to add exhibit are moot because it is dismissing this matter on jurisdictional grounds.

¹ The hearing transcript is cited as "Tr. at".

On May 29, 1997, complainant filed a motion for leave to file an amended brief and its amended brief. The Board grants complainant's motion and accepts its amended brief. On June 9, 1997, Unique filed its post-hearing brief and complainant filed a reply brief on June 17, 1997. On July 7, 1997, Unique filed a motion to strike complainant's reply brief and on July 11, 1997, complainant filed a motion for leave to file reply brief and complainant's reply brief. In its motion to strike Unique argues that the hearing officer did not allow a reply in the briefing schedule and therefore the Board should strike complainant's reply. The Board acknowledges that the briefing schedule in this matter did not provide complainant an opportunity to reply. However, pursuant to the Board's rules at 35 Ill. Adm. Code 101.241 the Board finds that in this case, a reply is necessary to prevent material prejudice. Therefore the Board denies Unique's motion to strike, grants complainant's motion for leave to file, and accepts its reply.²

STATUTORY BACKGROUND

Section 313 of the Federal Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), (42 U.S.C. 11023 (1994)), requires an owner or operator of specific industrial facilities to submit a Toxic Chemical Release Inventory Reporting Form, also known as a Form R report, to the United States Environmental Protection Agency and the Agency by July 1 of each year. EPCRA programs provide the public with information on the hazardous chemicals in their communities, and provide emergency planning and notification requirements that help protect the public in the event of a release. The Act charges the Agency with administering Section 313. 415 ILCS 5/25b-1 (1996). As such, the Agency enters all Form R report information into the Illinois Toxic Chemical Inventory data base. Brief at 2.

If a person fails to file a Form R report by July 1, the Agency must issue a notice of such failure to the person and allow the person 30 days to comply with the filing requirements. 415 ILCS 5/25b-6 (1996). If the person fails to file the Form R report within that 30-day period, the person is liable for a civil penalty of \$100 per day, beginning on the 31st day following the date the person received the Agency's notice and accruing through December 31 of that year. 415 ILCS 5/42b.5 (1996).

FACTS

In this case, complaint alleges that Unique was required to file two Form R reports for calendar year 1994, one for styrene and one for dichloromethane. Comp. at 2. The complaint further alleges that on September 5, 1995, Unique received a notice by certified mail from the Agency advising it of its failure to submit the Form R reports. The complaint charges that Unique failed to file the forms within 30 days; as a result, penalties began accruing on October 5, 1995 and ending on December 31, 1995 for a period of 86 days. The complaint charges

² The complaint is cited at "Comp. at"; complainant's amended brief is cited as "Brief at"; respondent's response is cited as "Response at"; and complainant's reply is cited as "Reply at".

that Unique has violated Section 25b-2 of the Act and is liable for a total statutory penalty of \$17,500. Comp. at 3, Brief at 2.

At hearing, complainant presented People's Exhibit No. 2 which Goodner identified as the notice of noncompliance letter sent by the Agency to Unique on September 1, 1995. The letter was directed to Mr. Guy R. Gilmore, Jr., President, Unique Marble Products, Inc., 2600 South Rainy, Effingham, Illinois 62401 because that was the name and address which appeared on the previous Form R reports received by the Agency from Unique. Tr. at 16. Attached to the letter was a copy of a certified mail return receipt which showed the date of delivery as September 5, 1995. In addition, People's Exhibits No. 3-7 are Unique's Form R reports for 1990, 1991, 1992 and 1993. Each exhibit indicated that Unique is located at the same address as on the notice letter, and that Mr. Guy R. Gilmore, Jr. is the contact person. Tr. at 17-22.

At hearing Guy Gilmore testified that he did not receive the notice letter until spring 1996, when he received a copy of it from his own counsel. Tr. at 49. Mr. Gilmore reviewed the certified mail return receipt and stated that Susan E. Wilson, a customer service representative for Unique, signed the certified mail receipt even though she had no authority to accept certified mail on behalf of Unique. Mr. Gilmore testified that only his wife, as office manager, and he received certified mail on behalf of Unique. Tr. at 46-47. As a result, Mr. Gilmore claims that he did not receive proper notice of the violation at issue.

In its post-hearing brief complainant argues that the statutory notice requirements of Section 25b-6 of the Act have been met. Complainant asserts that Mr. Gilmore, as president, was a managing agent of Unique and therefore the proper addressee for such notice. Brief at 6. Complainant further argues that the act of mailing the notice to the correct address constitutes proper service, and that the return receipt does not have to show that the addressee received the notice. Complainant concludes "that the domestic return receipt was not signed by Guy R. Gilmore, Jr., as addressee, does not render such notice defective." Brief at 7.

In its response Unique does not dispute that the Agency issued by certified mail a compliance inquiry letter dated September 1, 1995, or that Susan E. Wilson signed the certified mail receipt. However, Unique argues that the express language in Sections 42b.5, 31(d)(1) and 25b-6 require that respondent receive actual notice prior to the imposition of sanctions. Unique also argues that the notice sections of the Act require that actual notice be received by the corporation. Although Unique recognizes that administrative agency procedures are less formal than court proceedings, Unique states that the Illinois Code of Civil Procedure regulates the proper method of service upon a corporation which requires leaving a copy of the document with a corporation's registered agent or any officer of the corporation. 735 ILCS 5/2-204 (1996). Unique concludes that notice served upon a customer service representative is insufficient notice to a corporation. Response at 7-8.

In its reply complainant points out that 735 ILCS 5/2-204 provides that corporations may be served by leaving a copy of the process with its registered agent or any officer of the corporation, or in any other manner permitted by law. Complainant also asserted that the

Illinois Appellate Court has held that due process is satisfied if the manner effecting service gives reasonable assurance that notice will be given. Reply at 3-4, citing to Kazimierz Dobrowolski v. Frank LaPorte, 38 Ill. App. 3d 492, 348 N.E.2d 237 (1st Dist. 1976). Complainant argues that service by certified mail to respondent's last known address, whether signed by the addressee or not, gives reasonable assurance that notice was given to respondent and therefore, proper service was effected in this matter.

DISCUSSION

The parties agree that the Agency issued to Unique, by certified mail, a notice of failure to submit 1994 Form R reports. The parties also agree that on September 5, 1995, Susan E. Wilson, an employee of Unique, signed the certified mail return receipt. The issue in this case is whether these actions constitute proper notice in accordance with Section 25b-6 of the Act. Section 25b-6 states in pertinent part:

Prior to taking action pursuant to Title VII for a violation of Section 25b-2 of this Act, the Agency shall issue, no earlier than August 1 of each year, by certified mail or personal service upon the person complained against, a notice that the Agency has failed to receive from that person all required toxic release forms and provide a period of 30 days to submit the forms to the Agency.

415 ILCS 5/25b-6 (1996).

The Board previously has found that service of the Section 25b-6 notice of noncompliance upon the person complained against is "clearly a prerequisite to filing an enforcement action." People of the State of Illinois v. National Interchem Corp. (February 16, 1995), PCB 94-271 (case dismissed because the Agency failed to serve the notice of noncompliance at all). Evidence of the imperative nature of personally receiving the Agency's Section 25b-6 notice becomes apparent by examining the result when notice is not received: the intended recipient is unaware that a 30-day timeclock has begun by which he must submit the requisite Form R report or be subject to a \$100 per day penalty. This type of failure to notify is akin to the failure to properly serve notice and complaint upon a party: that party remains unaware that an action has been brought, that a timeclock has begun by which a response must be filed, and that failure to timely file a response may result in a default order against that party.

The similarity between personal service of the 25b-6 notice and personal service of notice and complaint is underscored by the similarity of language in Section 25b-6 and Section 31(a)(1) of the Act, which reads:

Within 180 days of becoming aware of an alleged violation of the Act or any rule adopted under the Act or of a permit granted by the Agency or condition of the permit, the Agency shall issue and serve, by

certified mail, upon the person complained against a written notice informing that person that the Agency has evidence of the alleged violation.

* * *

415 ILCS 5/31(a)(1) (1996). The Board finds that, in both instances, non-receipt of notice results in a lack of knowledge on the part of the recipient of an obligation to respond to the notice. Indeed, Illinois courts interpret the strict requirements of notice by examining how effectively a party did in fact notify the other side, rather than simply basing rights solely on whether every phrase of the statute was followed in exact detail. Matthews Roofing Co. v. Community Bank & Trust Co. 194 Ill. App. 3d 200, 550 N.E.2d 1189 (1st Dist. 1990). Therefore, the Board construes the service requirement in Section 25b-6 to be akin to the service requirement for notice and complaints in Section 31 of the Act. As a result, the certified mail return receipt is valid proof of actual notice only if signed by the person complained against. In the case of a corporation, the certified mail return receipt must be signed by the president, clerk or other authorized agent of the corporation. See f. Lionel P. Trepanier et. al v. The Board of Trustees of the University of Illinois at Chicago, Other Unknown Owners and Speedway Wrecking Co. (November 21, 1996), PCB 97-50.

In this case, the signature appearing on the certified mail return receipt was not that of the president, clerk or other authorized agent of Unique. Therefore, the Agency failed to provide proof that Unique received actual notice pursuant to Section 25b-6 of the Act. This case is dismissed.

This opinion constitutes the Board's finding of fact and conclusions of law in this matter.

ORDER

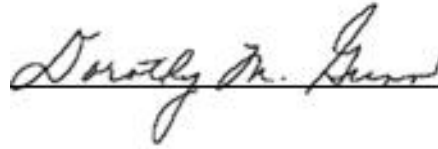
The Board finds that Section 25b-6 of the Act requires the Agency to serve notice upon the person complained against, and in the case of service by certified mail to a corporation, the certified mail return receipt must be signed by the president, clerk or other authorized agent of the corporation. The Agency failed to properly serve Unique because the certified mail return receipt was not signed by the president, clerk or other authorized agent of Unique; therefore, this case is dismissed.

IT IS SO ORDERED.

Chairman C. A. Manning dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 7th day of August 1997, by a vote of 5-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board