BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMANN,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 99-187
	)	(Citizens Enforcement - Noise, Air)
BOUGHTON TRUCKING AND MATERIALS, INC.,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on June 17, 2003, I filed with the Illinois Pollution Control Board this Notice of Filing, Reply to Plaintiff's Response to Motion for Discovery Sanctions, and Affidavit of Attorney, copies of which are attached and hereby served upon you.

Dated: June 17, 2003

BOUGHTON TRUCKING AND MATERIALS, INC.

By: _____
One of its Attorneys

Mark R. Ter Molen, Esq.
Patricia F. Sharkey, Esq.
Kevin G. Desharnais, Esq.
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ILLINOIS POLLUTION CONTROL BOARD

GINA PATTERMANN,	)	
	)	
Complainant,	)	PCB 99-187
v.	)	(Noise, Air)
	)	
BOUGHTON TRUCKING AND MATERIALS, INC.,	)	
	)	
Respondent.	)	

REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR DISCOVERY SANCTIONS

NOW COMES Respondent, Boughton Trucking and Material, Inc. ("Boughton"), by its attorneys, Mayer, Brown, Rowe & Maw, and replies to Plaintiff's Response to Boughton's Motion for Sanctions as follows:

1. The retaining of a new lawyer does not rewrite history. Nor does it restart the clock. The Plaintiff – herself a lawyer -- is now on her third lawyer in this case. At this time, discovery is closed and Plaintiff's lawyers must take this case as they find it. Plaintiff failed to retain her purported expert witness within the discovery deadlines and thus he could not be deposed. As such, Mr. Zak's testimony at trial must be barred even if the Board imposes no other sanction in this case.

2. While Plaintiff's new attorneys now represent that Plaintiff's expert, Mr. Greg Zak of Noise Solutions by Greg Zak, has been retained, they provide no evidence of that fact. "Facts asserted that are not of record in the proceeding must be supported by oath, affidavit or certification." 35 Ill. Adm. Code 101.504. Plaintiff's response was accompanied by neither a contract nor an oath, affidavit or certification As such, Plaintiff's allegation is insufficient as a matter of law and should be striken from the record.

3. Not only is this alleged retention of Mr. Zak unsupported, it is also very late. For the first time since Plaintiff failed to provide this witness on April 23, 2003 and a full forty-five days after the close of the oral discovery deadline, Plaintiff now asks that the Board remedy her failure to retain her own expert witness for a duly noticed deposition (or at any other time before the close of discovery) by allowing this witness to be deposed now. In addition to failing to provide evidence that she has *in fact* finally retained her purported expert witness, she has also failed to supply the Board with any other legitimate excuse or good cause for her failure to do so within the ordered discovery deadline -- one of numerous deadlines she has disregarded. (See discussion in Motion for Sanctions.)

Plaintiff blithely refers to her failure to provide her expert for deposition as "the evident result of confusion regarding payment..." and the result of a "lack of clarity." In fact, on the day of the deposition, Mr. Zak was not unclear -- he told both the Hearing Officer and Respondent's attorney that he had not been retained.[1] Confusion? Lack of clarity? If so, it was confusion and a lack of clarity created by Respondent. Most tellingly, Plaintiff provides no evidence that she took any affirmative steps to make sure that her witness wasn't confused, was retained, and would, in fact, attend his deposition.

4. Contrary to Plaintiff's argument, it is Plaintiff's responsibility to assure the attendance of her own witnesses at a deposition – not the Respondent's. Plaintiff now argues that

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[1] After waiting approximately one hour for Mr. Zak to appear and having called his attorney, Ms. Pattermann, three times and left messages without receiving a response, Respondent's attorney, Patricia Sharkey, called Mr. Zak's office to determine if he was on route. Mr. Zak answered the phone and explained that, although he received the deposition notice, he had not planned on attending because Ms. Pattermann had not retained him to do so. Ms. Sharkey asked Mr. Zak to stay on the line while she made an effort to get guidance on how to proceed with this from the Hearing Officer. Upon getting the Hearing Officer's message machine, Mr. Zak left a message for the Hearing Officer stating the same.

Respondent should have done more to assure Mr. Zak's attendance at the deposition. In fact, Respondent did more than is required by law and more than Plaintiff herself. Although she was cc'd on a letter from Mr. Zak dated March 26, 2003 (Exhibit 3 to the Motion for Sanctions), it was Respondent that brought the issue of Mr. Zak's retention before the Hearing Officer at the March 27, 2003 telephonic status conference and asked that the Hearing Officer make it clear that it was Plaintiff's duty to retain her expert witness – which he did. Two weeks before the deposition date, on April 8, 2003, Respondent's attorney also asked Plaintiff to confirm her expert's attendance at the deposition. Plaintiff stated she thought he would be there. Plaintiff doesn't deny any of these facts in her Response. Yet Plaintiff now suggests that Respondent should have done more – while she apparently did nothing.

The duty to retain her expert and assure his presence at his duly noticed deposition or otherwise inform the Respondent, was Plaintiff's duty, she knew it and she simply didn't take it seriously. This is both negligence and bad faith. In the March 27, 2003 telephonic status conference, Plaintiff told the Hearing Officer that she understood it was her responsibility to retain her expert witness. Yet, to read Plaintiff's response to this motion, it appears that Plaintiff *still* presumes it was the Respondent that was responsible for assuring Plaintiff's witness' attendance at his deposition.

5. The appropriate sanction for failure to provide a witness at a deposition within the oral discovery deadline is barring of the witness. This sanction is both clearly within the Board's authority and tailored to the harm. Section 101.800(b) states: "If any person unreasonably fails to comply with any provision of 35 Ill. Admin. code 101 –130 or any order entered by the Board or the Hearing Officer … the Board may order sanctions…b) Sanctions include the following …6)

the witness may be barred from testifying concerning that issue." Barring of Mr. Zak as a witness directly addresses the prejudice to the Respondent and the moves the case forward.

The only case that Plaintiff cites in its response does not support its argument. In Tinsey v. Chicago Transit Authority, (App. 1 Dist. 1986) 140 Ill. app. 3d 546, 488 NE 2d 1301, the Appellate Court found that the trial court erred in ordering a new trial as a sanction for failure to provide complete discovery responses. The Tinsey court found that the sanction of a new trial was "far out of proportion." Id. 1304. In contrast, the sanction requested in this case is tailored to the prejudice and is neither over-arching nor particularly severe. In other cases, Illinois Courts have found patterns of discovery abuse, as are present in this case, may be sanctioned far more severely. John Mathes & Associates, Inc. v. Noel, (App. 5 Dist. 1981) 94 Ill. App. 3d 588, 418 NE 2d 1104 (Default judgment was appropriate for severe pattern of discovery abuse, including failure to provide witness for deposition.) Absent the exercise of this appropriate sanction, the Board opens the door for the continuing abuse of the procedures in this case and future cases. Moreover, if, as Plaintiff argues, the Board lacks the authority to impose monetary sanctions, then the one sanction available for the pattern of discovery abuses and costly negligence Plaintiff has displayed in this case and the prejudice created for Respondent is to bar Mr. Zak's testimony and allow this case to proceed without further delay.

6. Pattermann's new attorneys misrepresent the Hearing Officer's April 2, 2003 ruling. The Hearing Officer definitely limited Plaintiff's witnesses after she filed a 100 person witness list. While other participants may make statements at the hearing, Plaintiff's witnesses are limited to those allowed by the Hearing Officer's Order and whose testimony has been subject to discovery in the established discovery period. The Hearing Officer Order of April 2, 2003 states:

> "By waiting over a year and a half to disclose 97 additional witnesses, the hearing officer found that complainant's disclosure was not reasonable or seasonable. The hearing officer also found that the subject of their testimony was vague... The hearing officer, however, allowed complainant to select one witness from the disclosure list to testify as complainant's witness at the hearing. Complainant represented that she intended to call Donald Boudreau as her additional witness. To that end, respondent's motion was granted in part and denied in part."

As a result of that ruling, Plaintiff was limited to the four previously disclosed witnesses (including Mr. Zak) and one new witness, Mr. Boudreau.

In that same Order, the Hearing Officer also ruled that "all depositions must be completed on or before May 2, 2003." Although Respondent's attorney left phone messages for Plaintiff at each of her three different phone numbers on April 23, 2003, trying to determine if Mr. Zak would appear, Plaintiff never called her back and never offered to make Mr. Zak available until now – 45 days after the close of the oral discovery period and after Respondent's have had to go to the expense of moving for sanctions. Plaintiff provided no evidence that Mr. Zak had been retained during the remainder of the oral discovery period, and, even now, we have no evidence that Mr. Zak has been retained.

7. Respondent has already been seriously prejudiced by the on-going pattern of negligence and harassing litigation tactics employed by Plaintiff in this case. The attorneys fees and cost information provided by Respondent with its Motion document just some of the costs Respondent has incurred due to Plaintiff's negligence and bad faith. Plaintiff's failure to assure her own expert witness' retention for his deposition, while telling both the Hearing Officer and Respondent that she had done so, is just one of the many abuses of the Board's rules that Respondent has endured. The sanction requested is a just and necessary response to Plaintiff's actions. This case is ready to proceed to judgment and any further delay and cost to Respondent is unwarranted. After two and a half years of delay in this occasionally prosecuted case, the

Respondent's should not be subjected to additional costs and delay to accommodate Plaintiff's negligent disregard of the rules of procedure and the Hearing Officer's orders.

WHEREFORE, Respondent reiterates its request that the Board bar the testimony of Greg Zak and also bar any other witnesses, pleadings, or documents pertaining to the subject matter of Mr. Zak's testimony, i.e. regulatory violations and possible modifications to Respondent's facility, and for such other sanctions, including the awarding of attorneys fees, as the Board deems appropriate.

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Respectfully submitted,

Boughton Trucking and Material, Inc.
By One of Its Attorneys

Patricia F. Sharkey
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190 South LaSalle Street
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312-782-0600
Attorney Registration No. 6181113

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF ATTORNEY

The undersigned, Patricia F. Sharkey, being first duly sworn upon oath states that she is one of the attorneys for the Respondents in this action, Gina Pattermann v. Boughton Trucking and Materials, Inc., PCB 99-187, and that based upon her personal knowledge and investigation of the facts stated in the attached Reply to Plaintiff's Response to Motion for Discovery Sanctions, certifies her knowledge and belief that the allegations contained in this Reply to Plaintiff's Response to Motion for Discovery Sanctions, are true in substance and in fact.

PATRICIA F. SHARKEY

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

Signed and sworn to by Patricia F. Sharkey, who is personally known to me and appeared before me, a Notary Public, in and for the County of Cook, State of Illinois, on this 17th day of June, 2003, in order to affix her signature as her free and voluntary act.

Annette Kaye Chatmon
Notary Public

"OFFICIAL SEAL"
Annette Kaye Chatmon
Notary Public, State of Illinois
My Commission Exp. 04/25/2006

Patricia F. Sharkey
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CERTIFICATE OF SERVICE

Patricia F. Sharkey, an attorney, hereby certifies that a copy of the attached Notice of Filing, Reply to Plaintiff's Response to Motion for Discovery Sanctions, and Affidavit of Attorney was served on the persons listed below by same Day Delivery or Overnight Delivery service, as indicated below on June 17, 2003.

Bradley Halloran
Illinois Pollution Control Board
100 West Randolph Street
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Gina Pattermann
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