

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOHNS MANVILLE, a Delaware corporation,)	
)	
Complainant,)	
)	
v.)	PCB No. 14-3
)	(Citizen Suit)
ILLINOIS DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondent.)	

NOTICE OF FILING AND SERVICE

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, July 9, 2020, I have filed with the Clerk of the Pollution Control Board “Respondent’s Motion for Leave to File a Response to Johns Manville’s Motion to Exclude Witnesses from the Hearing Room”, and served on each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

By: s/ Ellen F. O’Laughlin
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CERTIFICATE OF SERVICE

Johns Manville v. Illinois Department of Transportation, PCB 14-3 (Citizens)

I, ELLEN F. O'LAUGHLIN, do hereby certify that, today, July 9, 2020, I caused to be served on each of the individuals listed below, by electronic mail, a true and correct copy of the attached Respondent's Motion for Leave to File a Response to Johns Manville's Motion to Exclude Witnesses from the Hearing Room.

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s/ Ellen F. O'Laughlin
Ellen F. O'Laughlin

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RESPONDENT’S MOTION FOR LEAVE TO FILE A RESPONSE TO JOHNS MANVILLE’S MOTION TO EXCLUDE WITNESSES FROM THE HEARING ROOM

NOW COMPEES RESPONDENT, the Illinois Department of Transportation (“IDOT”), through its attorney KWAME RAOUL, Attorney General of the State of Illinois, and moves the Hearing Officer, for leave to file its response to Johns Manville (“JM”) Motion to Exclude Witnesses from the Hearing Room. IDOT states the following in support of this motion.

1. On August 20, 2019, the Hearing Officer set the hearing date of November 19-22, 2019, for this matter.
2. On October 25, 2019, JM filed its Motion to Exclude Witnesses from the Hearing Room. (Also, on this same date the parties filed numerous other pleadings.)
3. On November 1, 2019, only 7 days after it moved to exclude witnesses from the hearing room, JM moved to cancel the hearing date of November 19-22, 2019, effectively rendering its Motion to Exclude Witnesses from the Hearing Room premature and moot. In its motion to cancel the hearing date, JM argued that it wanted to make an interlocutory appeal to the Hearing Officer’s October 31, 2019 order, and that one of its witnesses was not available for the November 2019 hearing. These explanations by JM rendered the Motion to Exclude Witnesses from the Hearing Room effectively premature and moot.

4. On November 5, 2019, the Hearing Officer cancelled the hearing date of November 19-22, 2019. Consequently, the issue of whether witnesses should be in the hearing room need not be addressed.

5. Since then, the hearing has been rescheduled to February 2020, April 2020, and now it is scheduled for the week of September 21, 2020.

6. This Motion to Exclude Witnesses from Hearing Room was not mentioned in any Hearing Officer order, nor discussed in any status prior to June 23, 2020, nor to the best of Respondent's knowledge was it discussed with JM's counsel at all before June 23, 2020.

7. Only recently have the parties begun to discuss logistics for the hearing. In this setting, for the first time during the June 23, 2020 status, JM brought up its Motion to Exclude Witnesses from the Hearing Room, in the context of wanting a large enough room to accommodate all the individuals that will be present for the hearing in consideration of concerns about Covid-19.

8. In its Motion, JM recognizes that this type of request is normally made just prior to hearing, "Though a request to exclude witnesses from a courtroom need only be made by the outset of trial/hearing..." (Complainant's Motion to Exclude Witnesses from the Hearing Room, paragraph 5).

9. The issues, facts and arguments to be heard in the September 2020 are complicated and highly technical and within the purview and expertise of certain individuals, like IDOT's expert, Mr. Gobelman. Preventing IDOT from allowing it to argue that it should be allowed to have its expert witness in the hearing room would unnecessarily prejudice IDOT by limiting expertise and analysis available to IDOT of this complicated and highly technical matter.

10. JM's only recently raised its Motion again, and IDOT would like the opportunity to respond. Allowing IDOT to file a response is well within the discretion of the Hearing Officer, and would serve to promote fairness and equity in this matter. IDOT's Response to the Motion to Exclude Witnesses from the Hearing Room is attached hereto as an Exhibit. Denying IDOT this opportunity, after all the document discovery, depositions, expert reports, expert depositions, hearing and activity in this matter, unnecessarily prejudices IDOT, and would undermine the fairness of the upcoming hearing.

11. JM is not prejudiced because its Motion can be heard. It should not be allowed to benefit when it was the party who chose to delay the hearing in November 2019, just after it has filed its Motion to exclude witnesses.

WHEREFORE, Respondent, IDOT, respectfully requests that the hearing officer grant IDOT leave to file its Response, attached hereto as an Exhibit, and for such other relief as the hearing officer deems to be appropriate and just.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

s/ Ellen F. O'Laughlin

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EXHIBIT

5. JM voiced that it had moved to limit the presence of witnesses, and conveying that it did wish to pursue its motion to exclude witnesses.

6. IDOT wants to have its expert witness present for the hearing. As the Hearing Officer knows, this matter is complicated, and as recognized by the Hearing Officer and the Illinois Pollution Control Board. “Mr. Gobelman has vast experience in dealing with remediation and economic considerations.” June 18, 2020 Board order and October 31, 2019 Hearing Officer Order, p. 7.

7. IDOT wants to have access to Mr. Gobelman’s knowledge and experience during the hearing. This is even more important as lead counsel for this matter has had to withdraw, and the expertise and consultation of its expert during the hearing is even more critical to IDOT. The subject matter of this hearing is complex, and the subject matter is a field in which Mr. Gobelman has had extensive experience and knowledge. For example, JM may present certain facts regarding construction and use photographs in support of certain arguments expanding areas of liability. IDOT wants Mr. Gobelman present to assist IDOT. Having Mr. Gobelman present is **essential** to IDOT.

8. Rule 615 of the Illinois Rules of Evidence, *Evid. Rule 615*, regarding exclusion of witnesses, “does not authorize exclusion of ... (3) a person is whose presence is shown by a party to be essential to the presentation of the party’s cause...” That is the precise situation here, as IDOT needs the expertise and experience of Mr. Gobelman when hearing testimony of JM witnesses.

9. The usual circumstance for excluding witnesses from a hearing is so that factual testimony is not influenced by other testifying witnesses. Here, there is no compelling reason, and the experts have already analyzed and arrived at their opinions. *Smith v. City of Chicago*,

299 Ill.App.3d 1048 (1st Dist. 1998) (“Trial court may, in appropriate circumstances, order the exclusion of expert witnesses, (see *Friedman*, 151 Ill.App.3d at 390, 104 Ill.Dec. 329, 502 N.E.2d 826), although the reasons for doing so are far less compelling than in the case of fact witnesses.”) The purpose of an order excluding non-party witnesses from the courtroom “is to prevent the shaping of testimony by one witness to match that of another and discourage fabrication.” *Friedman v. Park District of Highland Park*, 151 Ill.App.3d 374, 390, 104 Ill.Dec. 329, 502 N.E.2d 826 (1986). See also, *In re N.F.*, (1st Dist. 2020), --- N.E.3d ----, 1824272020 WL 2521438 (Excluding witnesses is not a matter of right, and within the court’s discretion.)

11. Mr. Gobelman has been recognized as having expertise, and JM uses its continued campaign of trying to undermine the credibility of Mr. Gobelman as a pretense to prevent IDOT from having all reasonable tools in its defense of JM’s claims against it. This should not be allowed.

WHEREFORE, Respondent, IDOT, respectfully requests that the hearing officer deny JM’s Motion to Exclude Witnesses, and for such other relief as the hearing officer deems to be appropriate and just.

Respectfully Submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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