

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KCBX TERMINALS COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 14-110
)	(Air Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Mr. John Therriault	Mr. Bradley P. Halloran
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 West Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board PETITIONER'S MOTION FOR PROTECTIVE ORDER REGARDING RESPONDENT'S WITNESS DISCLOSURE, a copy of which are herewith served upon you.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 8, 2014

By: /s/ Matthew C. Read
Matthew C. Read

Katherine D. Hodge
Edward W. Dwyer
Matthew C. Read
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Matthew C. Read, the undersigned, hereby certify that I have served the attached PETITIONER'S MOTION FOR PROTECTIVE ORDER REGARDING RESPONDENT'S WITNESS DISCLOSURE THE RECORD upon:

Mr. John Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on April 8, 2014 and upon:

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Division of Legal Counsel
Illinois Environmental Protection
Agency
1021 North Grand Avenue
Post Office Box 19276
Springfield, Illinois 62794-9276

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on April 8, 2014 and upon:

Kathryn A. Pamenter, Esq.
Christopher J. Grant, Esq.
Assistant Attorney General
Office of the Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602

via facsimile and by depositing said document in the United States Mail, postage prepaid, in Springfield, Illinois on April 8, 2014.

/s/ Matthew C. Read
Matthew C. Read

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**PETITIONER'S MOTION FOR PROTECTIVE ORDER
REGARDING RESPONDENT'S WITNESS DISCLOSURE**

NOW COMES Petitioner, KCBX TERMINALS COMPANY ("KCBX"), a North Dakota corporation, by and through its attorneys, HODGE DWYER & DRIVER, and, pursuant to 35 Ill. Admin. Code §§ 101.100, 101.500, 101.502(a), 101.610 and 101.614, hereby moves the Hearing Officer for a protective order regarding Respondent's Witness Disclosure, stating as follows:

1. On April 4, 2014, Respondent, Illinois Environmental Protection Agency ("Illinois EPA") filed Respondent's Witness Disclosure with the Illinois Pollution Control Board ("Board"), as required by the Hearing Officer Order entered on March 25, 2014.
2. Respondent's Witness Disclosure lists Katherine D. Hodge, counsel of record for KCBX in this proceeding, as a witness that Illinois EPA may call at the hearing scheduled for April 29, 2014.
3. As discussed further below, the Board has recognized the concerns that are raised when one party seeks to call the other party's counsel as a witness. *See*

Citizens Against Regional Landfill v. Whiteside County, PCB No. 92-156, 1993 Ill. ENV LEXIS 187 (February 25, 1993).

4. In *Citizens Against Regional Landfill*, the Board cites to *Shelton v. American Motors Corp.*, 805 F.2d 1323(8th Cir. 1986), in which the Federal Court of Appeals for the 8th Circuit addressed the limited circumstances under which a court should order the deposition of opposing counsel to the following:

... [W]here the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel [citation]; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Shelton, 805 F.2d at 1327.

5. The *Shelton* decision has been cited by Illinois state and federal courts that have addressed the propriety of allowing opposing counsel to be deposed and/or called as a witness at trial. In *Kilpatrick v. First Church of the Nazarene*, 182 Ill. App. 3d 461, 538 N.E.2d 136 (4th Dist. 1989), the Fourth District Appellate Court noted:

In *Shelton v. American Motors Corp.* (8th Cir. 1986), 805 F.2d 1323, the court addressed the difficulties of having counsel testify. While that case involved a deposition, it is illustrative of the general problem:

"The practice of forcing trial counsel to testify as a witness, however, has long been discouraged, see *Hickman v. Taylor*, 329 U.S. 495, 513, 67 S. Ct. 385, 394, 91 L. Ed. 451 (1947) * * * and recognized as disrupting the adversarial nature of our judicial system [citation]. Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. * * * Finally, the practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent. Moreover, the 'chilling effect' that such practice will

have on the truthful communications from the client to the attorney is obvious.

* * *

* * * The harassing practice of deposing opposing counsel (unless that counsel's testimony is crucial and unique) appears to be an adversary trial tactic that does nothing for the administration of justice but rather prolongs and increases the cost of litigation, demeans the profession, and constitutes an abuse of the discovery process." (Shelton, 805 F.2d at 1327-30.)

These similar difficulties occur with the trial testimony of counsel. It is for these reasons the courts have recognized that the trial courts may refuse to allow counsel be called as a witness. *People v. Gendron* (1968), 41 Ill. 2d 351, 358, 243 N.E.2d 208, 213, cert. denied (1969), 396 U.S. 889, 24 L. Ed. 2d 164, 90 S. Ct. 179.

Kilpatrick, 538 N.E.2d at 140-142 (deposition of opposing counsel was improper attempt to obtain protected work product); see also *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 890 N.E. 2d 1256, 1279-81 (subpoenaing opposing counsel was done with the purpose of seeking their disqualification or harassment and was sanctionable); *Vazquez v. Central States Joint Board*, 2009 U.S. Dist. LEXIS 46373, **4-8 (N.D. Ill. 2009) (applied *Shelton* factors and granted motion to quash subpoena issued to counsel of record for defendant unions).

6. The Board recognized and applied the *Shelton* factors in its Opinion in *Citizens Against Regional Landfill v. Whiteside County*, PCB No. 92-156, 1993 Ill. ENV LEXIS 187 (February 25, 1993). In *Citizens Against Regional Landfill*, the Board upheld a hearing officer order which refused to allow petitioner to call an attorney for the Respondent as a witness at hearing. In addressing *Shelton* and similar federal decisions, the Board noted that:

... [T]he above cases rely on *Federal Rule of Civil Procedure 26(a)*, which does not specifically apply to proceedings before the Board. However, the Board finds the standard to be consistent with the Board's

procedural rules on the production of information (35 Ill. Adm. Code 101.261) and limitations concerning testimony from attorneys.

Requiring an attorney to testify is not strictly prohibited but is strongly discouraged. [Footnote omitted.] Testimony from counsel should rarely be resorted to and done only when circumstances so necessitate. [Cite omitted.] . . . The Illinois Supreme Court has held that the trial court has wide discretion in refusing to permit attorneys to testify, especially so where, as here, another witness was available to testify. [Cite omitted.] CARL sought to depose Mr. Barrett concerning the fees paid to him. Information on Mr. Barrett's fees could also have been obtained from Whiteside County or WMII. The record does not disclose any attempt by petitioner to secure this information from Whiteside County or WMII.

The attorney-client relationship makes it ethically improper for an attorney to testify in most matters. [Cite omitted.] Ethical standards require an attorney to withdraw from the case if he is required to testify. (*Illinois Rules of Professional Conduct, Rule 3.7.*) Ethical considerations may have compelled Mr. Barrett's withdrawal if he had been required to testify.

Citizens Against Regional Landfill, 1993 Ill. ENV LEXIS at **17-20 (emphasis added).

7. The April 4, 2014 Illinois EPA Witness Disclosure provides no legitimate basis for the identification of Katherine D. Hodge as a witness that Illinois EPA may call at the April 29, 2014 hearing. In response to a letter from KCBX's counsel, the only explanation provided by Illinois EPA via e-mail (attached as Exhibit 1) for the inclusion of Ms. Hodge on the Witness Disclosure is that she was the signatory of a letter dated January 13, 2014, which responded to a letter from Illinois EPA dated December 10, 2013 (which letter indicated that Illinois EPA intended to consider information outside the administrative record). Both the December 10, 2013, and January 13, 2014 letters are included in the administrative record. Illinois EPA's email response provides no support for the proposition that Ms. Hodge signing the January 13 letter justifies Illinois EPA designating her as a witness.

8. Especially in light of the limited scope of review which applies to the Board's review of permit appeals, Illinois EPA's inclusion of Ms. Hodge as a witness does not meet any of the factors set forth in *Shelton* and should be prohibited for the reasons articulated by the Board in *Citizens Against Regional Landfill*.

9. 35 Ill. Admin. Code § 101.614 provides:

The hearing officer may, on his or her own motion or on the motion of any party, order the production of information that is relevant to the matter under consideration. The hearing officer will deny, limit or condition the production of information when necessary to prevent undue delay, undue expense, or harassment, or to protect materials from disclosure consistent with Sections 7 and 7.1 of the Act and 35 Ill. Adm. Code 130.

Ill. Admin. Code § 101.614.

10. For the reasons set forth above, KCBX respectfully requests that the Hearing Officer grant a Protective Order prohibiting Illinois EPA from calling Katherine D. Hodge as a witness at the April 29, 2014 hearing.

WHEREFORE Petitioner, KCBX TERMINALS COMPANY, respectfully prays that the Hearing Officer grant a Protective Order which prohibits Illinois EPA from calling Katherine D. Hodge as a witness at the April 29, 2014 hearing.

Respectfully submitted,

KCBX TERMINALS COMPANY,
Petitioner,

Dated: April 8, 2014

By: /s/ Matthew C. Read
One of Its Attorneys

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KCBX:004/Filings Permit Appeal/Petitioner's Motion for Protective Order Regarding Respondent's Witness Disclosure

EXHIBIT 1

Katie J. Ginest

From: Pamenter, Kathryn <KPamenter@atg.state.il.us>
Sent: Monday, April 07, 2014 2:48 PM
To: Edward W. Dwyer
Cc: Katherine D. Hodge; Matthew C. Read; Grant, Christopher J.
Subject: KCBX Terminals Company v. Illinois EPA Correspondence

Ed

Reference is made to your letter dated April 7, 2014 regarding Respondent's Witness Disclosure. We dispute that a basis for listing a fact witness was required to be included in Respondent's Witness Disclosure. Without waiving the foregoing, Katherine D. Hodge was included because she signed the January 13, 2014 letter in response to the Illinois EPA's December 10, 2013 letter. Similarly, Michael Estadt was included as the signator to the July 23, 2013 construction permit application.

Sincerely,
Katie Pamenter

Kathryn A. Pamenter
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