

ILLINOIS POLLUTION CONTROL BOARD
March 3, 2016

JOHNS MANVILLE,)
)
Complainant,)
)
v.) PCB 14-3
) (Enforcement)
ILLINOIS DEPARTMENT OF)
TRANSPORTATION,)
)
Respondent.)

ORDER OF THE BOARD (by J.A. Burke):

Pursuant to Section 31(d) of the Illinois Environmental Protection Act (Act), Johns Manville (JM) initiated this action against the Illinois Department of Transportation (IDOT) alleging that IDOT violated Section 21 of the Act by disposing asbestos waste at a site in Waukegan, Lake County. 415 ILCS 5/21 (2014). JM seeks to amend its complaint (Mot.) to add allegations relating to the State of Illinois's ownership interest in a right-of-way at the site. IDOT requests that the Board deny the motion (Resp.). The Board finds the second amended complaint (2nd Am. Compl.) neither duplicative nor frivolous and accepts the second amended complaint for hearing. IDOT may file an answer to the second amended complaint by April 12, 2016. The hearing officer is directed to set discovery deadlines and a new hearing date consistent with this order.

PROCEDURAL HISTORY

The Board described the procedural history of this matter in its September 4, 2014 order accepting JM's first amended complaint for hearing. Since that time, IDOT answered the first amended complaint and the parties have been engaged in discovery including the exchange of written discovery as well as depositions. The Board set a hearing scheduled to begin on March 15, 2016.

DISCUSSION

According to JM's proposed second amended complaint, as well as prior versions of the complaint, JM owned and operated a facility that manufactured construction materials, some containing asbestos. 2nd Am. Compl. at ¶ 6. In 1971, IDOT began construction involving the intersection of Pershing Road and Greenwood Avenue. *Id.* at ¶ 22. IDOT constructed detour or bypass roads used during the construction. *Id.* at ¶ 24. IDOT completed construction in 1976. *Id.* at ¶ 28.

Asbestos was found on property adjacent to JM's facility. 2nd Am. Compl. at ¶ 9. On June 11, 2007, JM entered into an administrative order on consent with the United States

Environmental Protection Agency requiring JM to conduct environmental response actions including two areas identified as Site 3 and Site 6. *Id.* at ¶10. Two of the detour roads used during the IDOT construction ran through Site 3 and Site 6. *Id.* at ¶¶ 25-28. JM alleges that IDOT violated Sections 21(a) and 21(e) of the Act by disposing asbestos waste on Site 3 and Site 6. *Id.* at ¶¶ 56, 57, 69, 70.

JM now seeks to add a factual allegation that, since 1971, the State of Illinois owned a right-of-way on the south side of Greenwood Avenue that is within Site 6. 2nd Am. Compl. at ¶ 12. JM adds that IDOT violated Section 21(d) of the Act and that IDOT caused or allowed disposal of asbestos waste in violation of Section 21(e). *Id.* at ¶¶ 58, 70, 71. Throughout the proposed second amended complaint, JM adds the phrase “including the ROW” when discussing the right-of-way through Site 6. See, e.g., *id.* at ¶ 67.

In its motion seeking leave to amend the complaint, JM asserts that it initially understood that the City of Waukegan owned the right-of-way. Mot. at 3. JM claims that it began to question ownership of the right-of-way after the deposition of Steven Gobelman, an expert for IDOT. *Id.* at 4. According to the transcript attached to the motion, this deposition occurred on July 10, 2015. *Id.* Ex. C. JM then undertook to research the title history of the right-of-way. *Id.* at 4. JM explains that it asked Chicago Title to do the research, who in turn hired Property Insight to complete the research. *Id.* JM received a report of the title search on January 14, 2016. *Id.* at 4-5. JM states that it produced this report to IDOT on January 27, 2016. *Id.* at 5. JM also filed a reply in support of its motion, a supplement motion for leave to file the reply, and a notice to correct a statement in its reply. IDOT filed a response opposing these three filings on March 1, 2016. The Board considers these filings to the extent they apply to the Board’s discussion on the second amended complaint below. See 35 Ill. Adm. Code 101.500(e).

IDOT argues that it would be prejudiced if the Board denies IDOT an opportunity to respond to the new allegations. Resp. at 5. IDOT notes that fact discovery has been closed for over a year and needs to be reopened for IDOT to investigate the new allegations. *Id.* IDOT further contends that the amendments are untimely. *Id.* at 6. Further, IDOT only became aware of a potential JM witness on the ownership issue when JM produced its January 27, 2016 report to IDOT. *Id.*

The Board’s procedural rules do not directly address amending complaints. Therefore, the Board looks to Illinois civil practice law for guidance when the Board’s procedural rules are silent. 35 Ill. Adm. Code 101.100(b). The Illinois Code of Civil Procedure provides that “the court may permit amendments on just and reasonable terms to enable the plaintiff to sustain the claim brought in the suit.” 735 ILCS 5/2-616(a) (2014). The Illinois Supreme Court defines “just and reasonable” as “requiring the trial court to permit amendment if it will further the ends of justice.” Loyola Academy v. S & S Roof Maintenance, Inc. 146 Ill. 2d 263, 272-273 (1992).

JM’s new allegations relating to ownership of the right-of-way relate to the same matter the Board has already set for hearing. JM’s pending complaint alleges violations of Sections 21(a) and (e) of the Act by disposing asbestos waste including on Site 6. The right-of-way is a portion of Site 6. Accordingly, the question of ownership of that portion arises from the same matter already before the Board. Furthermore, the allegations relate to IDOT’s own

ownership interest in the right-of-way. Considering these factors, IDOT is not prejudiced by the proposed amendments.

The Board notes that the extent of the amendments is limited. JM's amendment to paragraph 12 replaces an allegation JM now believes is incorrect. Mot. at 6. JM's proposed amendments are confined to paragraphs 12, 58, 70, and 71 of the second amended complaint, aside from the additions of the phrase "including the ROW."

JM's amendments to the complaint are timely. The Board has not yet held a hearing in this matter and has not issued final judgment. JM states that it understood that the City of Waukegan owned the right-of-way but does not explain whether it conducted discovery on ownership prior to the Gobelman deposition. IDOT identifies a document produced during discovery titled "Grant for a Public Highway." Resp. at 3. JM explains that the length of time between the Gobelman deposition and receiving the title research on January 14, 2016 was attributable to those doing the title research. JM then produced the title research to IDOT on January 27, 2016 and moved to amend the complaint on February 16, 2016.

The Board views the right-of-way ownership allegations as integral to JM's complaint. The parties appear to dispute who owned the right-of-way since 1971 and are unable to stipulate as to the ownership history. Considering this, as well as the narrow scope of the amendments and that the Board has not yet held a hearing, the Board grants JM's motion to amend the complaint.

DUPLICATIVE OR FRIVOLOUS

Section 31(d)(1) of the Act requires the Board to schedule a hearing on a complaint unless the Board determines that the complaint is duplicative or frivolous. 415 ILCS 5/31(d)(1) (2014); see also 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is identical or substantially similar to another complaint. 35 Ill. Adm. Code 101.202. A complaint is frivolous if it seeks relief that the Board is not authorized to grant or fails to state a cause of action. *Id.* The Board previously found the original and first amended complaints not to be duplicative or frivolous. The changes to this complaint relate to allegations that the State of Illinois owned a right-of-way at the site. These additions do not involve duplicative or frivolous claims.

CONCLUSION

The Board grants JM's motion for leave to file a second amended complaint. The Board finds that the second amended complaint is neither duplicative nor frivolous, and accepts the second amended complaint for hearing. The Board grants IDOT until April 12, 2016 to file an answer. The Board directs its hearing officer to set discovery deadlines and a new hearing date consistent with this order.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 3, 2016, by a vote of 5-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Assistant Clerk
Illinois Pollution Control Board