

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

RECEIVED
CLERK'S OFFICE

MAY 27 2005

MORTON F. DOROTHY,)
)
Complainant,)
)
vs.)
)
FLEX-N-GATE CORPORATION,)
an Illinois Corporation,)
)
Respondent.)

STATE OF ILLINOIS
Pollution Control Board

No. PCB 05-049

**REPLY TO RESPONSE TO MOTION TO COMPEL RESPONSE TO
INTERROGATORIES**

Complainant, Morton F. Dorothy, makes the following reply to respondent, Flex-N-Gate Corporation's response to motion to compel response to interrogatories

AFFIDAVITS

1. Complainant has filed a separate affidavit in support of his motions to compel discovery.

ADDRESSES AND PHONE NUMBERS

2. The addresses and phone numbers of potential witnesses is a routine question relevant to establishing the identity of the person. Among other things, it allows the complainant to investigate the background of potential witnesses, without necessarily contacting the witnesses.
3. Complainant is not acting as a paid attorney in this matter, but rather is exercising his right and obligation as an Illinois citizen to act directly on behalf of the people of the State to enforce environmental laws, the violation of which complainant chanced to observe. Because complainant has not entered his appearance as an attorney in this case, the rules governing attorneys acting as such do not on their face apply to him.
4. Although the Illinois Rules on Professional Conduct may limit direct contact between an attorney and certain potential witnesses, those rules do not state that they limit the scope of discovery. The straightforward interpretation of the rule is that, while the names and addresses are discoverable, contact with the witnesses may be limited.

OSHA RELEVANCE IRRELEVANT

5. In its initial response to the interrogatories, respondent argued that certain requests were irrelevant simply because they were relevant to the OSHA proceeding. In pars. 21 and 22 (of the Response to Motion to Compel Admissions), Respondent appears to concede that there is no rule of law that limits discovery in a Board proceeding to that which is relevant to that proceeding and to no other proceeding. The question is simply whether the information is relevant to the Board proceeding or calculated to lead to relevant information.
6. Admissions made by respondent in a Board proceeding would not be admissible in another forum:

Effect of Admission. Any admission made by a party pursuant to a request under this Section is for the purpose of the pending proceeding only. It does not constitute an admission by the party for any other purpose and may not be used against him in any other proceeding. (Section 101.618(i))

RELEVANCE OF EMERGENCY RESPONSE PLAN

7. In response to Request for Production 1, respondent has produced a document entitled "Emergency Response and Contingency Plan".
8. Page 6-12 of the "Emergency Response and Contingency Plan" states that "This Contingency Plan has been prepared to fulfill the requirements of 40 CFR 265, Part D and 35 Illinois Administrative Code 725..."
9. 35 Ill. Adm. Code 725.Subpart D requires the preparation of a "contingency plan".
10. OSHA rules require the preparation of an "emergency response plan".
11. Complainant believes that, in light of the title, "Emergency Response and Contingency Plan", the document was intended to simultaneously meet the similar requirements of the Board and OSHA rules.
12. Complainant further believes that there is no separate OSHA Emergency Response Plan because Freedom of Information Act requests to public agencies have produced only the "Emergency Response and Contingency Plan".
13. Interrogatories 16 and 17 are directed at establishing for certain that respondent had no separate OSHA Emergency Response Plan.
14. Complainant is seeking that the Hearing Office order a response to

Interrogatories 16 and 17. If respondent fails to respond, complainant would request that the Hearing Officer bar respondent from producing such an Emergency Response plan at hearing, or from arguing that the August 5, 2004 emergency response was pursuant to that hypothetical plan, rather than the "Emergency Response and Contingency Plan" that has been produced.

RELEVANCE OF HAZWOPER TRAINING

15. Page 6-3 of the "Emergency Response and Contingency Plan" states that "The Department Associates are trained to provide response capabilities within their own department. Due to their experience and knowledge of the chemicals within the departments, they are able to respond appropriately to the threat."
16. Complainant, and certain other employees, received "24-hour Hazwoper" training, and no other significant training on how to deal with hazardous waste emergencies.
17. "24-hour Hazwoper" training appears to be designed to meet the 24-hour emergency response training required under OSHA rules.
18. Because the "Emergency Response and Contingency Plan" refers to "training", and the "24-hour Hazwoper" was the only relevant training received by the employees, complainant concludes that the "24-hour Hazwoper" training was provided to meet the training requirements under the "Emergency Response and Contingency Plan".
19. Interrogatory 15 asked that respondent list employees who had received "24-hour Hazwoper" training. This is relevant because it establishes which employees were the "Department Associates ... trained to provide response capabilities within their own department" referred to in the contingency plan.
20. The failure to provide employee training would itself be a violation of Board rules, as would operation of the plating line without trained employees present. If respondent wishes to pursue this line of argument, complainant is willing to amend the complaint to add a count alleging that respondent violated Board rules by failing to provide the training required in the contingency plan.

WHEREFORE complainant prays that the Hearing Officer grant his motion to compel response to interrogatories.

Morton F. Dorothy
Morton F. Dorothy, Complainant

Morton F. Dorothy
804 East Main
Urbana IL 61802
217/384-1010

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STATE OF ILLINOIS
Pollution Control Board

No. PCB 05-049

REPLY TO RESPONSE TO MOTION TO COMPEL RESPONDENT TO ADMIT THE TRUTH OF CERTAIN FACTS

Complainant, Morton F. Dorothy, makes the following reply to respondent, Flex-N-Gate Corporation's response to motion to compel respondent to admit the truth of certain facts:

AFFIDAVITS

1. Complainant has filed a separate affidavit in support of his motions to compel discovery.

OSHA RELEVANCE IRRELEVANT

2. In its initial response to the request to admit, respondent argued that certain requests were irrelevant simply because they were relevant to the OSHA proceeding. In pars. 21 and 22, Respondent appears to concede that there is no rule of law that limits discovery in a Board proceeding to that which is relevant to that proceeding and to no other proceeding. The question is simply whether the information is relevant to the Board proceeding or calculated to lead to relevant information.
3. Admissions made by respondent in a Board proceeding would not be admissible in another forum:

Effect of Admission. Any admission made by a party pursuant to a request under this Section is for the purpose of the pending proceeding only. It does not constitute an admission by the party for any other purpose and may not be used against him in any other proceeding. (Section 101.618(i))

RELEVANCE OF EMERGENCY RESPONSE PLAN

4. In response to Request for Production 1, respondent has produced a document entitled "Emergency Response and Contingency Plan".
5. Page 6-12 of the "Emergency Response and Contingency Plan" states that "This Contingency Plan has been prepared to fulfill the requirements of 40 CFR 265, Part D and 35 Illinois Administrative Code 725..."
6. 35 Ill. Adm. Code 725.Subpart D requires the preparation of a "contingency plan".
7. OSHA rules require the preparation of an "emergency response plan".
8. Complainant believes that, in light of the title, "Emergency Response and Contingency Plan", the document was intended to simultaneously meet the similar requirements of the Board and OSHA rules.
9. Because complainant chose to combine these plans, it is not possible for respondent to argue in general that "whatever is relevant to OSHA is irrelevant to Board rules".

RELEVANCE OF HAZWOPER TRAINING

10. Page 6-3 of the "Emergency Response and Contingency Plan" states that "The Department Associates are trained to provide response capabilities within their own department. Due to their experience and knowledge of the chemicals within the departments, they are able to respond appropriately to the threat."
11. Complainant, and certain other employees, received "24-hour Hazwoper" training, and no other significant training on how to deal with hazardous waste emergencies.
12. "24-hour Hazwoper" training appears to be designed to meet the 24-hour emergency response training required under OSHA rules.
13. Because the "Emergency Response and Contingency Plan" refers to "training", and the "24-hour Hazwoper" was the only relevant training received by the employees, complainant concludes that the "24-hour Hazwoper" training was provided to meet the training requirements under the "Emergency Response and Contingency Plan".
14. Requests to Admit 9 and 10 asked that respondent either admit or deny that two employees received "24-hour Hazwoper" training. This is relevant because it establishes that these two employees were the "Department Associates ...

trained to provide response capabilities within their own department" referred to in the contingency plan."

15. The failure to provide employee training would itself be a violation of Board rules, as would operation of the plating line without trained employees present. If respondent wishes to pursue this line of argument, complainant is willing to amend the complaint to add a count alleging that respondent violated Board rules by failing to provide the training required in the contingency plan.

WHEREFORE complainant prays that the Hearing Officer grant his motion to compel respondent to admit the truth of certain facts.

Morton F. Dorothy
Morton F. Dorothy, Complainant

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STATE OF ILLINOIS
Pollution Control Board

No. PCB 05-049

REPLY TO RESPONSE TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Complainant, Morton F. Dorothy, makes the following reply to respondent, Flex-N-Gate Corporation's response to motion to compel production of documents:

AFFIDAVITS

1. Complainant has filed a separate affidavit in support of his motions to compel discovery.

OSHA RELEVANCE IRRELEVANT

2. In its initial response to the request to admit, respondent argued that certain requests were irrelevant simply because they were relevant to the OSHA proceeding. In pars. 21 and 22 (of the Response to Motion to Compel Respondent to Admit the Truth of Certain Facts), Respondent appears to concede that there is no rule of law that limits discovery in a Board proceeding to that which is relevant to that proceeding and to no other proceeding. The question is simply whether the information is relevant to the Board proceeding or calculated to lead to relevant information.

RELEVANCE OF EMERGENCY RESPONSE PLAN

3. In response to Request for Production 1, respondent has produced a document entitled "Emergency Response and Contingency Plan".
4. Page 6-12 of the "Emergency Response and Contingency Plan" states that "This Contingency Plan has been prepared to fulfill the requirements of 40 CFR 265, Part D and 35 Illinois Administrative Code 725..."
5. 35 Ill. Adm. Code 725.Subpart D requires the preparation of a "contingency

plan".

6. OSHA rules require the preparation of an "emergency response plan".
7. Complainant believes that, in light of the title, "Emergency Response and Contingency Plan", the document was intended to simultaneously meet the similar requirements of the Board and OSHA rules.
8. Complainant further believes that there is no separate OSHA Emergency Response Plan because Freedom of Information Act requests to public agencies have produced only the "Emergency Response and Contingency Plan".
9. Requests to Produce 3 and 4 are directed at establishing for certain that respondent had no separate OSHA Emergency Response Plan.
10. Complainant is seeking that the Hearing Office order production of the plan. If respondent fails to produce the plan, complainant would request that the Hearing Officer bar respondent from producing such a plan at hearing, or from arguing that the August 5, 2004 emergency response was pursuant to some hypothetical plan, rather than the "Emergency Response and Contingency Plan" that has been produced.

RELEVANCE OF "HAZWOPER TRAINING"

11. Page 6-3 of the "Emergency Response and Contingency Plan" states that "The Department Associates are trained to provide response capabilities within their own department. Due to their experience and knowledge of the chemicals within the departments, they are able to respond appropriately to the threat."
12. Complainant, and certain other employees, received "24-hour Hazwoper" training, and no other significant training on how to deal with hazardous waste emergencies.
13. "24-hour Hazwoper" training appears to be designed to meet the 24-hour emergency response training required under OSHA rules.
14. Because the "Emergency Response and Contingency Plan" refers to "training", and the "24-hour Hazwoper" was the only relevant training received by the employees, complainant concludes that the "24-hour Hazwoper" training was provided to meet the training requirements under the "Emergency Response and Contingency Plan".
15. Request to Produce 16 requested the Hazwoper training certificate for complainant. This is relevant to establish that complainant was the "trained Department Associate" referred to in the "Emergency Response and

Contingency Plan".

16. The Hazwoper training certificate is the property of the complainant. Respondent has no legal right to it. If respondent persists in refusing to turn it over, respondent will initiate criminal or civil actions to recover it.
17. Request to Produce 17 asked for the Hazwoper training notebook and materials. These were used by respondent to communicate the requirements of the "Emergency Response and Contingency Plan" to the employees, who had no direct access to the plan itself. These are relevant to establish respondent's interpretation of the plan prior to the incident.
18. The failure to provide employee training would itself be a violation of Board rules, as would operation of the plating line without trained employees present. If respondent wishes to pursue this line of argument, complainant is willing to amend the complaint to add a count alleging that respondent violated Board rules by failing to provide the training required in the contingency plan.

"THREAT LETTERS"

19. In response to Request to Produce 12, respondent has provided a copy of a fax from Denny Corbett to OSHA dated 9/14/2004. That fax makes reference to "threat letters". Complainant believes that this statement was false, and that no such "threat letters" exist. Complainant has requested (No. 18) that respondent produce the "threat letters". The absence of "threat letters" would be used to impeach any testimony given by Denny Corbett.
20. In paragraphs 10 and 13, complainant seems to be arguing that, because Denny Corbett's false statements to OSHA were criminal, they are somehow protected from discovery. Respondent has not, however, asserted the constitutional right against self-incrimination with respect to either Denny Corbett or its own corporate identity.
21. Denny Corbett was a witness to portions of the incident. He has stated in the above cited memorandum, and another memorandum of the same date, that there was no release of hydrogen sulfide gas. Because respondent is denying in its answer that there was a hydrogen sulfide release, there is a material issue as to whether the release occurred. Denny Corbett appears to be the only person who was present and still employed by respondent who could (arguably) testify that no release occurred. Furthermore, Denny Corbett is the only person who has made this claim in the written documentation that has been produced. If respondent does not intend to call Denny Corbett as a witness to testify that no release occurred, Respondent needs to admit at this time that the release occurred.

22. Respondent appears to be arguing that, because they have not yet stated that they intend to call Denny Corbett as a witness, his credibility is not yet in issue. The problem with this argument is that it would require another round of discovery after respondent identified Denny Corbett as a witness.
23. At this time complainant is asking for an order compelling respondent to produce the "threat letters". If respondent is unable to produce the "threat letters", complainant will move for sanctions, which would include barring later production of the "threat letters", barring Denny Corbett's testimony and a finding that the statement to OSHA was false.

THIRD SHIFT WORK ORDERS

24. Request to Produce 7 asked for work orders for August 5 through 8, 2004. The documents produced begin with first shift on August 5, at 7:00 a.m. No work orders whatsoever were produced for third shift of August 4-5, which included the time period from 12:00 am to 7:00 am on August 5, during which time the incident occurred.
25. The statement of Afiba Martin, produced in discovery, makes reference to a work order he initiated during third shift, which work order has not been produced.
26. Complainant believes that, because the factory day began at 7 am on August 5, respondent has inadvertently failed to produce the August 4, third shift work orders.
27. Complainant is requesting that the Hearing Officer order that respondent produce these work orders.

WRITTEN ACCOUNT

28. Request to Produce 15 asked for the written account of the incident that was hand-delivered to Tony Rice on or about August 9, 2004.
29. The written account was also addressed to Larry Attard. Complainant is, however, uncertain as to whether he was able to deliver the copy to Larry Attard.
30. The written account of the incident was delivered to Tony Rice at about the same time as other documents addressing the sabotage of the Tank 17 CS pump, the falsification of rust inhibitor quality control data, as well as the Night in Which Everything Broke.
31. Complainant is requesting that the Hearing Officer order production of this document. In the event the document cannot be produced, complainant would request appropriate sanctions. Complainant would ask that his copy of the

written account be admitted into evidence as a contemporaneous written record produced in the ordinary course of business.

WHEREFORE complainant prays that the Hearing Officer grant his motion to compel production of documents.

Morton F. Dorothy
Morton F. Dorothy, Complainant

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Pollution Control Board

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**AFFIDAVIT IN SUPPORT OF REPLIES TO RESPONSES TO MOTIONS TO COMPEL
DISCOVERY**

Complainant, Morton F. Dorothy, makes the following affidavit in support of his Reply to Response to Motion to Compel Respondent to Admit The Truth of Certain Facts, Reply to Response to Motion to Compel Production of Documents, and Reply to Response to Motion to Compel Response to Interrogatories.

Morton F. Dorothy, Complainant

State of Illinois)
) ss
County of Champaign)

AFFIDAVIT

1. In response to Request for Production 1, respondent has produced a document entitled "Emergency Response and Contingency Plan".
2. Page 6-12 of the "Emergency Response and Contingency Plan" states that "This Contingency Plan has been prepared to fulfill the requirements of 40 CFR 265, Part D and 35 Illinois Administrative Code 725..."
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Response Plan because Freedom of Information Act requests to public agencies have produced only the "Emergency Response and Contingency Plan".

6. Page 6-3 of the "Emergency Response and Contingency Plan" states that "The Department Associates are trained to provide response capabilities within their own department. Due to their experience and knowledge of the chemicals within the departments, they are able to respond appropriately to the threat."
7. Complainant, and certain other employees, received "24-hour Hazwoper" training, and no other significant training on how to deal with hazardous waste emergencies.
8. "24-hour Hazwoper" training appears to be designed to meet the 24-hour emergency response training required under OSHA rules.
9. Because the "Emergency Response and Contingency Plan" refers to "training", and the "24-hour Hazwoper" was the only relevant training received by the employees, complainant concludes that the "24-hour Hazwoper" training was provided to meet the training requirements under the "Emergency Response and Contingency Plan".
10. The Hazwoper training certificate is the property of the complainant. Respondent has no legal right to it.
11. Request to Produce 17 asked for the Hazwoper training notebook and materials. These were used by respondent to communicate the requirements of the "Emergency Response and Contingency Plan" to the employees, who had no direct access to the plan itself.
12. Denny Corbett was a witness to portions of the incident. He has stated in the September 14, 2004, memorandum to OSHA, and another memorandum of the same date, that there was no release of hydrogen sulfide gas. Because respondent is denying in its answer that there was a hydrogen sulfide release, there is a material issue as to whether the release occurred. Denny Corbett appears to be the only person who was present and still employed by respondent who could (arguably) testify that no release occurred. Furthermore, Denny Corbett is the only person who has made this claim in the written documentation that has been produced.
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14. The statement of Afiba Martin, produced in discovery, makes reference to a work order he initiated during third shift, which work order has not been produced.
15. Complainant believes that, because the factory day began at 7 am on August 5, respondent has inadvertently failed to produce the August 4, third shift work orders.
16. The written account of the incident was delivered to Tony Rice at about the same time as other documents addressing the sabotage of the Tank 17 CS pump, the falsification of rust inhibitor quality control data, as well as the Night in Which Everything Broke.
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18. Complainant is not acting as a paid attorney in this matter, but rather is exercising his right and obligation as an Illinois citizen to act directly on behalf of the people of the State to enforce environmental laws, the violation of which complainant chanced to observe.

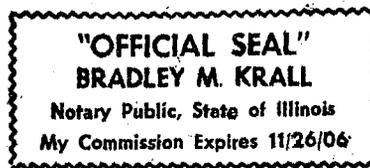
Morton F. Dorothy

Morton F. Dorothy, Complainant

The undersigned, a notary public in and for the aforesaid County and State, certifies that the above person appeared before me and signed the foregoing document on the 25th day of May, 2005,

Bradley M. Krall

Notary Public



Morton F. Dorothy
804 East Main
Urbana IL 61802
217/384-1010