

ILLINOIS POLLUTION CONTROL BOARD
July 22, 1993

RON'S INTERSTATE SUNOCO,)
)
 Petitioner,)
)
 v.) PCB 92-200
) (UST Fund)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on Ron's Interstate Sunoco's (Ron's) December 4, 1992 petition for review. Ron's seeks review of a November 2, 1992 Illinois Environmental Protection Agency (Agency) decision denying Ron's claim for reimbursement from the Underground Storage Tank Fund (Fund).

This case was originally scheduled for hearing on February 16, 1993. However, that hearing was cancelled due to weather conditions. On March 8, 1993, Ron's filed a waiver of the decision deadline in this case. Hearing was rescheduled for April 7, 1993, at 10:00 a.m. However, Ron's did not appear at that hearing. (Tr. at 3-5.) The Agency then made an oral motion for default and affirmation of the Agency's November 2, 1992 decision.

On June 29, 1993, Ron's filed a "motion in opposition of motion for default and request for rehearing date."¹ In its motion, Ron's states: that in reviewing the file, it found a February 17, 1993 notice of hearing entered by the hearing officer; that "through inadvertence" the notice of hearing was not entered into Ron's attorney's calendar and thus Ron's failed to appear at hearing; that Ron's did not receive notice of "the default"; and that on June 28, 1993, Ron's attorney discovered that the motion for default was pending and that Ron's had failed to appear at the April 7, 1993 hearing. Ron's contends that it would suffer irreversible and prejudicial harm if the motion for default is granted. Thus, Ron's asks that the motion for default be denied, and this matter reset for hearing. Ron's motion is not supported by affidavit.

On July 8, 1993, the Agency filed its "response to petitioner's motion in opposition of motion for default and request for rehearing date". The Agency states that it made a

¹ Ron's also filed an open waiver of the Board's decision deadline on June 29, 1993.

proper oral motion for default at hearing in light of the circumstances of that date. The Agency further states that "it takes no position as to whether the motion should be granted or denied". (response at 2.)

The Board denies Ron's request for a new hearing. In addition to the failure to attend a properly noticed hearing and failure to contact the Board for two months after the scheduled hearing date, we are disturbed by Ron's additional failure to inquire into the status of this case until four days before the decision deadline of July 2. Additionally, Ron's motion should have been supported by affidavit, since it contains facts outside the record. A petitioner appealing an Agency determination on a request for reimbursement from the Fund bears the burden of proof. (415 ILCS 5/22.18b(g), 40(a)(1) (1992).) (35 Ill. Adm. Code 101.242.) The Agency's motion for default is granted. (See Sangamon County v. Pennington (March 25, 1993), AC 92-78.) This case is dismissed.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

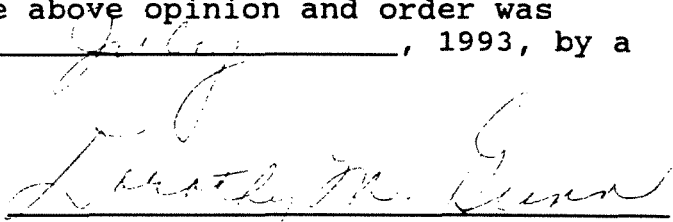
The Agency's motion for default is granted. This case is dismissed.

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of service. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 22nd day of July, 1993, by a vote of 6-1.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board