

ILLINOIS POLLUTION CONTROL BOARD

September 21, 2000

UNION OIL COMPANY OF CALIFORNIA d/b/a)
UNOCAL, a California corporation,)
)
Complainant,)
)
v.) PCB 98-169
) (Enforcement – UST, Citizens)
BARGE-WAY OIL COMPANY, INC., JOSEPH)
KELLOGG, NIELSEN'S BARGE-WAY, and ROBERT)
NIELSEN,)
)
Respondents.)

ORDER OF THE BOARD (by E.Z. Kezelis):

This matter is before the Board on a number of various motions and pleadings. However, before addressing all of those motions, it is important to review the history of this case.

BACKGROUND

On June 18, 1998, UNOCAL filed a six-count complaint (Comp.) in this action. UNOCAL alleges that since 1982, it has owned property located in Glendale Heights, DuPage County, Illinois (site). Comp. at 1. Prior to 1982, the site was used as a gasoline service station. Comp. at 2. However, since UNOCAL purchased the site in 1982, it has never been used as a gasoline service station. Comp. at 14. In 1991, UNOCAL reported a release of petroleum products from two existing underground storage tanks. *Id.* As directed by the Illinois Environmental Protection Agency (Agency) and the Office of the State Fire Marshal, UNOCAL performed investigative and corrective action at the site, including removal of approximately 4,300 tons of contaminated soil. Comp. at 4-5. UNOCAL alleges that it incurred response and remediation costs totaling approximately \$600,000. Comp. at 5.

On July 6, 1998, one of the originally named respondents, Mobil Oil Company (Mobil), filed a motion to dismiss. A number of the other originally named respondents, Barge-Way, Robert Nielsen, Bargeway Systems, Inc., and Robert Atkins, moved to join in Mobil's motion to dismiss.

On January 7, 1999, the Board entered an order dismissing five of the six counts in the complaint. Count three, in which UNOCAL alleged violations of Section 12(a) and (d) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (d) (1996)), is the only remaining count currently pending before the Board.

Finally, on April 24, 2000, UNOCAL filed a motion to voluntarily dismiss Robert F. Atkins, Barge Way Systems, Inc., and Mobil. No responses or objections to this motion were filed. On May 18, 2000, the Board granted UNOCAL's motion and dismissed the three aforementioned respondents from this action.¹

MATTERS CURRENTLY BEFORE THE BOARD

¹ It should be noted that on August 17, 2000, Dalise Enterprises, Inc. d/b/a Barge-Way Company, filed a complaint for declaratory judgment, an emergency motion for temporary restraining order and preliminary injunction, and memorandums of law in support thereof, in the Cook County Circuit Court. With these filings Barge-Way sought to enjoin the Board from further action in this matter, on the basis that the Board allegedly lacked jurisdiction over private cost recovery actions. The Board moved to dismiss with prejudice. Following the filing of briefs and an oral argument on September 12, 2000, the Cook County Circuit Court granted the Board's motion to dismiss with prejudice and held that the Board does have jurisdiction over the matters currently pending in PCB 98-169.

A motion for summary judgment was filed by Robert Nielsen (Nielsen) on June 9, 2000. Responses to the motion were filed by Barge-Way Oil Company, Inc. (Barge-Way), on June 19, 2000, and by Union Oil Company of California d/b/a UNOCAL (UNOCAL), on June 20, 2000. On June 19, 2000, Barge-Way also filed a motion to strike portions of Nielsen's affidavit. On July 21, 2000, Nielsen filed two motions to dismiss the complaint, one for lack of jurisdiction and one for failure to state a claim, and one motion to dismiss Barge-Way's counterclaim, which was filed on June 19, 2000. Barge-Way filed its response to the motion to dismiss the counterclaim on August 1, 2000. No other responses to Nielsen's motions to dismiss were filed. On August 7, 2000, Nielsen filed three documents, including a notice of violations of Professional Rule 4.2, a Rule 137 motion for attorney fees, and a motion in support of "late" filings. Finally, on August 10, 2000, Nielsen also filed a supplement to notice of violations of Professional Rule 4.2, a motion for sanctions against Barge-Way for filing a baseless claim, and a request for production of information directed to Barge-Way. On August 30, 2000, UNOCAL filed a response to the notice of violations of Professional Rule 4.2.

The counterclaim filed by Barge-Way on June 19, 2000, named Robert F. Atkins, Barge Way Systems, Inc., Robert Nielsen, and Tom Biggers as counter-respondents. On August 21, 2000, Barge Way Systems, Inc. and Robert F. Atkins filed a motion to dismiss the counterclaim for lack of jurisdiction. On August 31, 2000, Barge-Way filed its response to Barge Way Systems, Inc. and Robert F. Atkins' motion to dismiss.

Finally, on August 30, 2000, UNOCAL filed a second motion to voluntarily dismiss certain respondents.

Nielsen Motions

All of Nielsen's filings were made by A. Berger, an attorney purportedly acting on Nielsen's behalf. On August 14, 2000, however, Nielsen personally filed a handwritten letter in which he stated, among other things, that Berger no longer represented him or Nielsen's Bargeway, and was no longer authorized to pursue any relief of any kind on his behalf. Additionally, Nielsen also withdrew all motions and other requests filed on his behalf by Berger. Accordingly, all of the motions referenced above as having been filed by Berger are hereby withdrawn and the Board will not address the merits of those motions.

Motion to Dismiss Counterclaim

The pleading filed by Barge-Way on June 19, 2000, was captioned as a "counterclaim." With the counterclaim, Barge-Way seeks to obtain relief against the counter-respondents to the extent that Barge-Way is found liable to UNOCAL under the pending complaint. As to counter-respondent Robert F. Atkins, Barge-Way also seeks to assert an indemnification agreement that it alleges was entered into by Barge-Way and Atkins, and in which Atkins allegedly agreed to indemnify Barge-Way from all suits or claims arising out of Atkins' use, occupancy, or operation of the site which is the subject of this dispute.

Attorneys for Barge Way Systems, Inc. (BWSI) and Atkins entered special and limited appearances for the purpose of challenging jurisdiction of the Board over the counterclaim filed by Barge-Way. In their motion to dismiss the counterclaim (motion), BWSI and Atkins argue that because they were dismissed from this action by the Board on May 18, 2000, the Board no longer has jurisdiction over them and that the "counterclaim" does not give the Board jurisdiction. Basically, BWSI and Atkins argue that, pursuant to Section 5/2-608 of the Rules of Civil Procedure, a "counterclaim," by definition, may only lie against another party to the action. See 735 ILCS 5/2-608 (1998). BWSI and Atkins suggest that this deficiency could be remedied by the filing of a third-party complaint by Barge-Way.

In response, although Barge-Way argues that it should be permitted to join non-parties in its counterclaim, Barge-Way also seeks, in lieu of dismissal, leave of the Board to cure any defects in the filing of its counterclaim. BWSI and Atkins seem to indicate that they would have no objection to the Board's jurisdiction if the counterclaim had been captioned a "third- party complaint. " The Board does not consider this "misnomer" to be a fatal flaw to the claims asserted by Barge-Way. Accordingly, the motion to dismiss filed by BWSI and Atkins is denied and Barge-Way is hereby granted leave to amend its counterclaim pursuant to the directives of this order.

UNOCAL'S Motion for Voluntary Dismissal

On August 30, 2000, UNOCAL filed a motion to voluntarily dismiss the following respondents: Robert R. Nielsen and Nielsen's Bargeway. No response to this motion has been received by the Board. The Board grants UNOCAL's motion and hereby dismisses Robert Nielsen and Nielsen's Bargeway from this UNOCAL's complaint. The Board notes that Robert Nielsen is a named counter-respondent in Barge-Way's June 19, 2000 counterclaim. This dismissal by UNOCAL does not impact the status or merits of the pending counterclaim.

CONCLUSION

For the reasons stated herein, the Board grants Nielsen's request to withdraw all motions pending on his behalf. Second, the Board denies BWSI and Atkins' motion to dismiss and grants Barge-Way leave to file a third-party complaint. Finally, the Board grants UNOCAL's motion to voluntarily dismiss Robert Nielsen and Nielsen's Bargeway from the complaint. All future Board and hearing officer orders should reflect this dismissal.

In light of the foregoing, those matters and parties currently pending before the Board are as follows: count three of UNOCAL's complaint, in which violations of Section 12(a) and (d) of the Act (415 ILCS 5/12(a), (d) (1996)) are alleged, remains pending as to respondents Barge-Way and Joseph Kellogg; and the counterclaim filed by Barge-

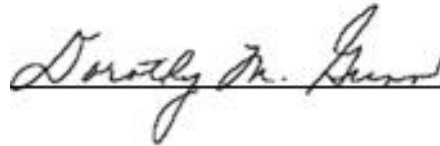
Way against counter-respondents Robert F. Atkins, Barge Way Systems, Inc., Robert Nielsen, and Tom Biggers, remains before the Board, pending amendment by Barge-Way consistent with this order.

In accordance with hearing officer orders issued in this case, the remaining parties are directed to proceed to hearing as expeditiously as possible.

IT IS SO ORDERED.

Board Member R.C. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 21st day of September 2000 by a vote of 6-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board