

ILLINOIS POLLUTION CONTROL BOARD
November 17, 1988

MODINE MANUFACTURING COMPANY,)
)
 Petitioner,)
)
 v.) PCB 87-124
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board upon a November 1, 1988 motion for sanctions filed by respondent the Illinois Environmental Protection Agency (Agency), and a motion for leave to file instanter filed November 2, 1988 by petitioner Modine Manufacturing Company (Modine). On November 16, 1988 Modine filed a response to the Agency's motion for sanctions, and the same day the Agency filed a reply to that response.

The Agency's motion is premised upon Modine's repeated failure to timely file its initial brief in support of its petition for review of a permit denial. The Agency moves that pursuant to 35 Ill. Adm. Code 107.101(c), the Board, in the alternative: (1) enter a judgment by default against Modine and in favor of the Agency; (2) dismiss this proceeding with prejudice; or (3) in the event that Modine's initial brief is filed prior to a Board ruling on the motion for sanctions, strike Modine's brief as not being timely filed.

Hearings were held in this matter on March 9 and 10, 1988, and the hearing officer by order of March 14, 1988 set a briefing schedule with Modine's initial brief due May 2, 1988. That brief was not filed, and on July 15, 1988 the Agency advised Modine that its brief was eleven weeks overdue. (See Exh. B to Agency motion for sanctions.) Counsel for Modine stated that the briefing schedule had been misdocketed, and told the Agency that Modine would file its brief by August 29, 1988. No brief was filed by that date. Modine subsequently advised the Agency and the hearing officer that the delay was due to the serious illness of a close relative of the senior attorney in this proceeding, and stated that the brief would be forthcoming. Again, no brief was filed.

On October 6, 1988 the Board on its own motion entered an order resetting the briefing schedule, with Modine's brief due on

October 27, 1988. Modine's brief was not filed by that date, and on November 1 the Agency filed its motion for sanctions. Modine's brief was filed the next day, accompanied by a motion for leave to file instanter. In that motion for leave to file instanter, and in its response to the motion for sanctions, Modine states that its failure to meet the October 27 deadline was due to the press of other business, the absence of the senior attorney because of a response to a spill, and word processing malfunction. Modine contends that it kept the Agency fully apprised of these developments. The Agency denies that it received any word from counsel for Modine until after the motion for sanctions was filed with the Board.

After careful consideration of the circumstances of this case, the Board will grant the Agency's motion for sanctions and dismiss this proceeding with prejudice. Section 107.101(c) of the Board's procedural rules (35 Ill. Adm. Code 107.101(c)) clearly provides that the Board may dismiss a proceeding where a party unreasonably fails to comply with a hearing officer or Board order. Modine repeatedly failed to file its brief, although it often told the Agency that the brief would be filed soon. A period of 22 weeks passed between the original due date set by the hearing officer (May 2) and the date that the Board issued its order resetting the briefing schedule (October 6). Although there are indications that the parties and (at least once) the hearing officer communicated orally, it is undisputed that there was absolutely no contact with the Board itself during this period, nor were there any motions filed with the hearing officer. The Board recognizes Modine's statements that the briefing schedule had been "misdocketed" and that the senior attorney's relative was ill, but believes that these excuses do not justify Modine's failure to, at the least, file a motion for extension of time. Indeed, the fact that Modine is represented by a law firm and not a sole practitioner gives rise to a question as to whether these excuses justify a brief that was filed a total of 26 1/2 weeks after the original due date. Even after the Board issued its October 6 order, Modine failed to file its brief until after the Agency filed its motion for sanctions.

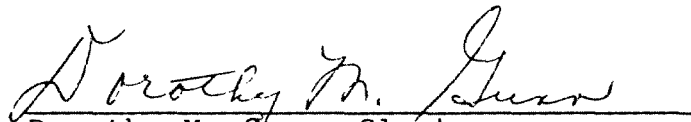
Given these circumstances, the Board believes that Modine's repeated failure to file its brief in a timely manner was unreasonable. The Board has been the object of criticism from many observers for its perceived failure to resolve cases quickly, and has itself recognized the need to tighten its procedures. The Board needs to control its docket, and will not tolerate the delay of a petitioner who files its brief 26 1/2 weeks after the original due date without ever moving the Board for an extension of time, or even contacting the Board.

Modine's motion for leave to file instanter is denied, and the Agency's motion for sanctions is granted. This proceeding is dismissed with prejudice.

IT IS SO ORDERED.

R. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 17th day of November, 1988, by a vote of 6-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board