

ILLINOIS POLLUTION CONTRCL BOARD
January 22, 1987

JOLIET SAND AND GRAVEL COMPANY,)
)
 Petitioner,)
)
 v.) PCB 86-159
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Anderson):

The evidentiary hearing in this matter commenced on January 13, 1987, the case being due for decision by the Board on or before January 28, 1987 in order to avoid issuance of the permit by operation of law. With this deadline in mind, the Hearing Officer directed that Joliet's case was to be completed by noon on January 14, and the Agency's case by 5:00 p.m. the same day. On the morning of January 14, Joliet made an oral motion for continuance of the hearing in order to afford it more time to present its case, and offered an eight day waiver of the decision period through February 5, 1987. The motion for continuance was denied by the Hearing Officer on the record, who at that time noted that his schedule did not permit him to conduct further hearings "within the next week" (R. 501). Pursuant to the Hearing Officer's suggestion that it might be expedient to reduce the motion to writing due to uncertainty as to when transcripts could be delivered to the Board, Joliet did so. Petitioner's Emergency Motion to Board to Permit Additional Hearings after January 14, 1987 was filed very shortly before close of business on Thursday, January 15, 1987.

On Friday morning, January 15, 1987, the Board was polled to determine whether a special meeting should be scheduled to handle the motion. It was determined that a fully informed decision could be made only after review of the transcripts, and that the Board's shorthand reporters, who had agreed to expedite delivery of these transcripts, could not guarantee delivery of both days' transcripts prior to Tuesday, January 20. As transcripts delivered Tuesday could not be delivered to downstate Board Members prior to Wednesday, January 21, the Board determined to place the motion on the agenda for decision at its regularly scheduled meeting today.

The hearing transcripts were delivered on Tuesday, January 20, at approximately 4:00 p.m. On the morning of January 21,

1987, the Agency filed a response in opposition to Joliet's motion.

Joliet's motion is premised on the grounds that it had no notice prior to January 13 that hearings would not continue "thereafter until Petitioner had been able to complete presentation of its case", that the eight day waiver provided an "ample" period for additional hearings, and that petitioner should be allotted an "additional two days or so of hearings" in order to "afford Petitioner its due process rights guaranteed by the Constitution" (Motion, Para. 5, 12, 14).

Based on Joliet's motion, the Agency's response, and a review of the transcript, the motion for additional hearing is denied.

Throughout this proceeding, Joliet has emphatically stood upon its statutory right to a 120 day decision period. At hearing it was explained that this is due to the pendency of an enforcement action alleging operation without a permit; as the complaint seeks money damages of \$1000 per day of violation. Joliet wishes to keep its potential monetary liability as low as possible (R. 242-243).

The Board's Orders in this case addressing the numerous "emergency" discovery motions have repeatedly discussed the inherent tension between Joliet's asserted due process rights to full discovery, witness selection and presentation of testimony, and Joliet's statutory right, as well as that of the Agency and the public, to a decision within 120 days of the filing of its petition.

The Board has made every effort to accommodate Joliet's discovery and hearing rights as well as its statutory decision deadline rights. The Board notes that in the scheduling Order of October 9, 1986, which was the first Order entered herein, that the Board had ordered completion of hearing and submittal of any final briefs within 70 days, which would have given the Board approximately 40 days in which to receive the transcript and deliberate and decide the case.

In order to accommodate Joliet's discovery demands in scheduling hearings on January 13-14, Board acquiesced to truncation of its review time to a bare 9 working days (three of which have been consumed in awaiting delivery of expedited transcripts). Additionally, the Agency and its counsel the Attorney General have been compelled by Orders of the Board and the Hearing officer to adhere to extremely tight document production, deposition, and hearing timetable.

On the other hand, the Board must observe that Joliet has tendered every theoretically conceivable objection to every

Agency discovery request, with seeming disregard of the legitimacy of the objection. Joliet has produced discovery only when ordered to do so, and only then at the last instant possible to avoid violation of Board or Hearing Officer Orders. The result of this tactical maneuvering has been denial of information to the Agency, which is bound, as well as the Board, by the statutory decision deadline and any necessary intermediate deadlines required to meet the decision deadline. This manipulation of the discovery process alone has nearly driven this proceeding into a default posture.

As to the issue of the waiver in relation to additional hearings, the proffered eight-day waiver is hardly ample time to conduct additional hearings under the circumstances of this case. The Board notes that counsel for Joliet has practiced before the Board for a number of years, and was formerly a Member of the Pollution Control Board; counsel is more than usually chargeable with knowledge of Board practice and procedures.

As counsel is aware, Board Hearing Officers are not full time Board staff members, but are instead outside attorneys who by contract handle Board hearings in addition to the various other components of their practice. The scheduling additional hearings cannot necessarily be arranged on twenty-four hours notice, as Joliet has requested here. As the Agency has suggested in its response, given the tight time frame for decision, it was unreasonable for Joliet to assume that hearing days could be continued indefinitely, beyond January 14; it was instead incumbent on Joliet before that time to make an appropriate motion for additional days. This unreasonableness is highlighted by the fact that counsel is well aware that all Board Members cannot attend hearings due to time and budget constraints, and must rely instead on hearing transcripts to formulate their decisions.

For the Board to attempt to render decision in a case where testimony has not either been witnessed or read by the Board Members would be obvious reversible error, error which the Board cannot allow to be engendered by a petitioner.

While it is true that the Board could hypothetically have assigned another Hearing Officer to this case to continue hearings, this poses two practical problems which also could lead to commission of reversible error. Given the history of this action, even the best substitute Hearing Officer assigned to the case with only twenty-four hours notice would likely make ill-advised evidentiary rulings, particularly where such rulings would necessarily be made in ignorance of the existence and basis for evidentiary rulings made on the two previous hearing days; it is easy to envision the colloquy between the parties as to what in fact the original Hearing Officer had said and why.

Even putting aside the issue of adequate time for the Board to review the testimonial record, once the Hearing Officer's personal availability during the time frame of the eight-day waiver was established, with the result that it was impossible to continue the hearing to a date certain before the hearing was recessed on January 14, counsel for Joliet should have known that no additional hearing could lawfully proceed prior to the 21-day notice required by Section 40(a)(1) of the Act. See Illinois Power Co. v. Illinois Pollution Control Board, 137 Ill. App. 3d 449, 484 N.E.2d 898 (1985) (proper notice of hearing is jurisdictional).

For all of the foregoing reasons, the Hearing Officer aptly noted at hearing "an 8-day (sic) waiver doesn't do anybody any good in this matter". What the Agency has characterized as "Petitioner's strategy of brinksmanship and procedural posturing" throughout the course of this proceeding has come perilously close to abuse of the Board's processes. The Board will not, in the name of "due process" for petitioner, allow either its ability to perform its statutory duties or the rights of the Agency and the public to be jeopardized.

Petitioner's oral waiver was "confirmed" in writing by January 22. While the wording of petitioner's waiver (R. 499) is capable of construction as an absolute waiver, rather than a hearing-contingent one, the Board will take the more conservative course and construe the waiver as a conditional one which has been extinguished by denial of Joliet's motion. The Board therefore presently anticipates rendering decision on or before January 28, and will schedule a special Board meeting on January 26. All pending motions, including the Agency's January 12 motion for dismissal with prejudice, will be handled in the Board's final disposition of the case.

IT IS SO ORDERED.

J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 23rd day of January, 1987 by a vote of 5-1.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board