ILLINOIS POLLUTION CONTROL BOARD
November 21, 1996

LIONEL P. TREPANIER, DANIEL MILLER, WES WAGNER, MAUREEN COLE, LORENZ JOSEPH, MAXWORKS GARDEN COOPERATIVE and AVI PANDYA,	)	PCB 97-50 (Enforcement - Citizens, Air)
Petitioners,	)	
v.	)	
THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS AT CHICAGO, OTHER UNKNOWN OWNERS AND SPEEDWAY WRECKING COMPANY,	)	
Respondents.	)	

ORDER OF THE BOARD (by K.M. Hennessey):

This case involves the demolition of several buildings in the area of Halsted and Maxwell streets in the City of Chicago. The complaint alleges that the buildings have been or will be demolished by Speedway Wrecking Company (Speedway) and the Board of Trustees of the University of Illinois (University). Complainants, each of whom resides or works near the buildings at issue, allege that the demolitions have or will create air pollution and open dumping and that Speedway and the University have therefore violated, or will violate, various provisions of the Illinois Environmental Protection Act (Act).

The University's first pleading in this matter was a motion to dismiss on the grounds of improper service and on other grounds. These motions have been fully briefed. Specifically, the University filed a Motion for Leave to File and Motion to Dismiss on September 25, 1996. The University filed a special appearance on September 26, 1996. The complainants filed a response to the University's motion to dismiss on October 8, 1996 and an amendment to its response on October 11, 1996. The University filed a motion for leave to file and a reply to complainant's response on October 23, 1996. On November 6, 1996, the complainants filed a motion for extension of time to respond to the mootness issue raised in the University's filing.

The Board grants the University's motion to file its motion to dismiss instanter and leave to file a reply. The Board accepts the amendments to complainants' response filed on October 11, 1996. Given the Board's rulings, the complainants need not file any additional response regarding mootness, and therefore the Board denies complainants' motion for extension of time.

Respondent Speedway filed an answer to the complaint on September 18, 1996. Speedway asserts in its answer that the complaint is frivolous because the Board may not grant the relief requested.

By this order, the Board finds that the University properly raised an objection to personal jurisdiction. The Board also finds that service on the University was not proper and that the Board lacks personal jurisdiction over the University. Accordingly, the Board dismisses the University from this matter on that ground and does not find it necessary to rule on the other grounds for dismissal urged by the University. This ruling does not preclude complainants from making additional efforts to serve the University properly. The Board further finds that while the complaint is not frivolous, a portion of the relief sought is not available as a remedy. The Board therefore strikes a portion of the relief sought. The Board finds that the complaint is not duplicitous. Finally, the Board sets this matter for hearing on the complainants' case against the remaining respondent Speedway.

Personal Jurisdiction

As noted, the University filed a "Special Appearance" one day after it filed a motion challenging personal jurisdiction. Before addressing the merits of the objection, the Board must determine whether the University waived its objection to personal jurisdiction without filing a special appearance at the same time.[1] This is a question of first impression.

Under the Board's rules, a party challenging personal jurisdiction must file a motion presenting that challenge before any other document:

> All motions challenging the jurisdiction of the Board shall be filed prior to the filing of any other document by the moving participant or party, unless the Board determines that material prejudice will result. Such participant or party will be allowed to appear specially for the purpose of making such motion.

(35 Ill. Adm. Code 101.243(b).) This rule does not require that a separate special appearance be filed with the motion objecting to personal jurisdiction.

A requirement that a special appearance be filed with such a motion also cannot be found in the Board's general rules regarding appearances. Those rules do not specify when an appearance must be filed. (35 Ill. Adm. Code 101.107.) In the absence of a specific provision, the Board may look to the Illinois Code of Civil Procedure and the Illinois Supreme Court rules. (35 Ill. Adm. Code 101.100(b).) The Code of Civil Procedure does not specify when appearances must be filed, and the

---

[1] The University raised other grounds for dismissal in its motion. The University did not waive its jurisdictional objection by raising these other grounds; under the Board's rules, if a party files as its first document a motion challenging jurisdiction, it may participate in the case without waiving its jurisdictional objection. (35 Ill. Adm. Code 101.243(c).)

Supreme Court rules merely require that an attorney file "his written appearance or other pleading" before "addressing" the court. (S.Ct. Rule 13(c)(1).)

Our prior opinions also do not indicate that a special appearance must be filed to preserve an objection to personal jurisdiction. In previous cases in which a party was deemed to have waived such an objection, the party was held to have done so not because of a failure to file a special appearance, but because the party filed something other than a motion objecting to personal jurisdiction as its first document. (See, e.g., Sneed v. Farrar, PCB 91-183 (February 25, 1993) (respondents who filed letters with the Board before filing motion objecting to personal jurisdiction waived objection); Consolidated Distilled Products, Inc. v. OSFM, PCB 96-39 (December 7, 1995) (OSFM waived objection to personal jurisdiction by filing a general appearance several days before filing a motion to dismiss for lack of jurisdiction).) Other cases finding a waiver of an objection to personal jurisdiction were decided prior to the adoption of 101.243(b)[2] and in the absence of a similar provision in the Board's rules. (See, e.g., Environmental Protection Agency v. Minerals Management Corporation, PCB 79-58 (March 20, 1980)).

In summary, under the Board's rules an objection to jurisdiction is preserved if a party's first filing is a motion presenting such a challenge. The University met that requirement. The Board does not have authority to graft onto 101.243(b) the additional requirement that a party also must file a special appearance with the motion in order to preserve the objection.[3] Thus, while the University's failure to file a special appearance with its motion objecting to personal jurisdiction is not the recommended practice, it did not result in a waiver of the University's challenge to personal jurisdiction. Therefore, the Board finds that the University properly raised its objection to personal jurisdiction.

Having found that the University properly raised its objection to personal jurisdiction, the Board now considers the merits of that objection. Personal jurisdiction may be exercised only over those respondents served in accordance with the applicable statute or rule. (Miller v. Town of Cicero, 225 Ill. App. 3d 105, 590 N.E.2d 490, 168 Ill. Dec. 853 (1st Dist. 1992) (service upon office clerk of village was ineffective when statute required that service be made on president of board of trustees or village clerk).) A judgment rendered without personal jurisdiction is void. (Id., 225 Ill. App. 3d at 110, 590 N.E.2d at 493, 168 Ill. Dec. at 856.)

---

[2] The Board adopted 101.243(b) in 1989 as part of a general revision to some of its procedural rules. The portion of the preamble to the Second Notice regarding 101.243(b) discusses only motions, not special appearances. (R88-5 (A) (June 8, 1989).)

[3] Of course, the Board could add such a requirement during its pending rulemaking regarding its procedural rules. (R97-8).

The Board's rules require that the complaint "either be served personally on the respondent or his authorized agent, or shall be served by registered or certified mail with return receipt signed by the respondent or his authorized agent." (35 Ill. Adm. Code 103.123.). The Board's procedural rules do not specifically address who may receive on behalf of a respondent such as a university. The Illinois Code of Civil Procedure, however, which applies in the absence of a specific Board rule, provides that a public corporation such as the University[4] is served through its "president, clerk or other officer corresponding thereto. . . ." 735 ILCS 5/2-211. Thus, the Board's procedural rules, together with the Code of Civil Procedure, required complainants to serve the complaint upon the president, clerk or other authorized officer of the University corresponding thereto, or one of their authorized agents personally or by registered or certified mail.

In this case, the complaint indicates that it was hand-delivered to "Office of the President" on September 6, 1996. The University has submitted the affidavit of Melvenia Taylor, a receptionist at the office of the president, in which Ms. Taylor states that on September 6, 1996, she was handed documents from the Illinois Pollution Control Board. Ms. Taylor further states that she is not the president of the University nor his authorized agent. The complainants do not contest this affidavit, but argue that no prejudice to the University resulted from the manner in which the complaint was served.

The Board finds that the University was not properly served and that the Board therefore must dismiss the University from this case. The University's uncontested affidavit establishes that the complaint was not served upon the president of the University or his authorized agent, and therefore service was not proper. (See Illinois Environmental Protection Agency v. RCS, Inc. and Michael Duvall, (December 7, 1995), AC 96-12 (service on an individual respondent was not properly made when citation was sent to respondent's place of employment and signed for by a person not authorized to act as an agent for respondent).)

The Board is compelled to find that service was improper even though the complainants may have reasonably believed that the receptionist at the Office of the President of the University had authority to accept service. Service on a person with apparent, but not actual, authority to accept service is not valid service. (Miller, 225 Ill. App. 3d at 112,113, 590 N.E.2d at 496, 168 Ill. Dec. at 858-59 (service on village office clerk at village did not constitute service on village, even though the village had not objected to such service in the past); Slates v. International House of Pancakes, 90 Ill. App. 3d 716, 728, 413 N.E.2d 457, 466, 46 Ill. Dec. 17, 26 (4th Dist. 1980) (service on employee without actual authority to accept service for employer was insufficient).)

---

[4] The Illinois Supreme Court held the University to be a public corporation in People v. Barrett, 382 Ill. 321, 46 N.E.2d 951 (1943).

Furthermore, while the pleadings make clear that the University knows of this case and the attempted service of the complaint, that knowledge does not legitimize the attempted service. (Miller, 225 Ill. App. 3d at 110, 590 N.E.2d at 493, 168 Ill. Dec. at 856 (without proper service of summons, a " judgment is void even where defendant had actual knowledge of the proceedings."); Bell Federal Savings and Loan Association v. Horton, 59 Ill. App. 3d 923, 376 N.E.2d 1029, 17 Ill. Dec. 700 (5th Dist. 1978) ("The fact that defendants had actual knowledge of the attempted service does not render the service effectual if in fact the process was not served in accordance with the requirements of the statute.")) Thus, while the manner of service seems unlikely to have prejudiced the University, the Board does not have discretion to ignore this jurisdictional requirement.

Accordingly, the Board dismisses the University from this action on the grounds that the University was not properly served and the Board therefore lacks personal jurisdiction over the University.[5] This ruling does not preclude the complainants from properly serving the University, either by serving the president, clerk or corresponding officer of the University or one of their authorized agents by registered or certified mail (with delivery restricted to the one of those persons) or by serving the one of them personally, in accordance with the Board's rules.

Claim that Complaint is Frivolous

Speedway claims that the complaint is frivolous on the grounds that it seeks relief that the Board does not have authority to grant. The Board is required to make this determination under Section 103.124(a) of the Board's procedural rules, which implements Section 31(b) of the Environmental Protection Act (415 ILCS 5/31(b)), which provides as follows:

> If a complaint is filed by a person other than the Agency, …the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous.

The complainants seek the following relief:

> … the Board order the Respondants (sic) to ciese (sic) and disist (sic) the pollution. Further that the University be ordered to follow the federal and state recommendations regarding resource reuse, specifically that reuse be placed above recycling or demolition. Practically what is sought is that the University be ordered to not demolish the useful buildings in our area (Halsted/Roosevelt/ Maxwell), and if any building is demolished that these terrible practices complained of be ended.

---

[5] The University also objected to service on the grounds that complainants attempted service of the complaint before it was filed with the Board, and on the grounds that the president can only be served in Urbana, Illinois. The Board does not find it necessary to address these alleged grounds for dismissal.

(Comp. at para. 9.)

Initially, the Board notes that an action before the Board generally is held to be frivolous only if it fails to state a cause of action upon which relief can be granted by the Board. (Citizens for a Better Environment v. Reynolds Metals Co. (May 17, 1973), PCB 73-173, 8 PCB 46.) Complainants have alleged facts that state a claim that respondents have created air pollution and engaged in open dumping in violation of Section 9(a) and 21 of the Act. Thus, the complaint is not frivolous.

Furthermore, if complainants prove these violations, the Board does have authority to issue at least some of the relief requested. The pleadings suggest that at least one of the buildings at issue in the complaint, at 727 W. Maxwell Street, has not yet been demolished. If the Board finds that the methods that Speedway used to demolish other buildings resulted in violations of the Act, the Board has authority to order respondents to cease and desist from using such methods in the future, including at 727 W. Maxwell Street. (Section 33(b) of the Act.) The Board also has authority to impose penalties for past violations.[6] (Section 42 of the Act.)

Speedway is correct in asserting, however, that the Board does not have authority to "order [the University] to not demolish the useful buildings" in complainants' area. Complainants have cited no statute or law that would enable the Board to order such extraordinary relief, and the Board has found no such authority. Therefore, the Board strikes this portion of complainants' request for relief.

Speedway has not argued that the complaint is duplicitous, and the Board finds that the complaint is not duplicitous.

The Board accepts this matter for hearing against the remaining respondent Speedway. The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and the Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

---

[6] The fact that some of the buildings have already been demolished does not render the complaint moot; penalties may still be available for violations that occurred during the demolition of these buildings. (See Shelton v. Crown, (May 2, 1996), PCB 96-52 (Board held that a noise complaint related to an air conditioner was not rendered moot merely because complainants had moved: "complainants may still be able to prove that an unreasonable interference occurred."))

IT IS SO ORDERED.

Chairman C.A. Manning dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of ___________, 1996, by a vote of ______________.

____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board