

ILLINOIS POLLUTION CONTROL BOARD
May 3, 2001

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 98-148
) (Enforcement – Land)
DOREN POLAND, LLOYD YOHO, and)
BRIGGS INDUSTRIES, INC. a/k/a BRIGGS)
PLUMBING PRODUCTS, INC.,)
)
Respondents.)

BRIGGS INDUSTRIES, INC.,)
)
Third-Party Complainant,)
)
v.) PCB 98-148
) (Enforcement – Citizens, Land)
) (Third- Party Complaint)
LOREN WEST and ABINGDON)
SALVAGE COMPANY, INC.,)
)
Third-Party Respondents.)

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

This enforcement action is before the Board on two matters: first, an appeal by Briggs Industries, Inc. (Briggs) of a March 19, 2001 hearing officer order admitting several documents into the record, and a motion to strike; second, a motion by Briggs for leave to file a response to new matters raised in complainant's reply brief, or alternatively a motion to strike. Briggs' appeal and motion for leave were both filed on March 29, 2001. On April 9, 2001, complainant filed a response to Briggs' motion seeking leave to respond to complainant's reply brief. On April 12, 2001, complainant filed its response to Briggs' appeal of the hearing officer ruling and Briggs' motion to strike.¹

¹ The March 19, 2001 hearing officer order shall be referred to as "HO Ord. at ___." Briggs' appeal and motion to strike shall be referred to as "App. at ___." Complainant's response to the appeal shall be referred to as "Resp. at ___." Briggs' motion for leave to file response to complainant's reply brief shall be referred to as "Mot. at ___." Complainant's response to Briggs' motion for leave shall be referred to as "Resp. to Mot. at ___."

BACKGROUND

This enforcement action, filed on April 30, 1998, involves violations alleged to have occurred at a permitted landfill (old landfill) and an unpermitted site (new landfill) in Abingdon, Knox County, Illinois. The complaint alleges that respondents Doren Poland (Poland) and Lloyd Yoho (Yoho) owned both the old and new landfills and that respondent Briggs sent its process waste, including ceramic material, vitreous china, and plaster molds, to the old and new landfills during the period 1979-1997.

During the course of a hearing conducted on November 28-29, 2000, a dispute arose regarding the existence of documents allegedly prepared for Briggs by Andrews Environmental Engineering firm of Springfield, Illinois (Andrews) that had not been produced to complainant. Both at hearing and again in ruling on the motion to compel formalized in writing by complainant, the hearing officer ordered that the documents be produced. The Board affirmed the hearing officer's directives in its own order dated February 15, 2001. People v. Poland (February 15, 2001), PCB 98-148.

The two documents (Andrews documents) Briggs ultimately produced on February 21, 2001, in response to these orders were:

1. a two-page letter dated October 26, 2000, from an Andrews Engineering employee providing advice regarding obtaining an inert landfill permit for the new landfill; and
2. a four-page facsimile dated November 10, 2000, from Andrew Rathsack of Andrews Engineering to Briggs' attorney forwarding findings and leachate test results generated by an outside lab.

After Briggs produced the Andrews documents, complainant sought to have them admitted into evidence. Over Briggs' objection, the hearing officer granted complainant's motion and admitted the Andrews documents on March 19, 2001. HO Ord. at 2. On March 29, 2001, Briggs filed this appeal with the Board.

APPEAL OF HEARING OFFICER ORDER

In its appeal, Briggs argues that the hearing officer erroneously admitted the Andrews documents as business records because complainant failed to lay the proper foundation for their admission. App. at 3. Briggs argues that it "has been deprived of its right to challenge (e.g., cross-examine) both any foundation witnesses' testimony and the documents themselves or to put on additional evidence regarding matters raised in the documents." App. at 3-4. Briggs claims that it and the other respondents have been prejudiced by the admission of these documents, and seeks to have the hearing officer's March 19, 2001 order overturned and the documents stricken from the record. App. at 5.

Complainant responds to Briggs' appeal by placing the blame for the lack of a conventional foundation on Briggs itself. Resp. at 2. Specifically, complainant argues,

Briggs has no legitimate grounds to complain that the posture of the proceeding deprives it of the usual opportunity to challenge the admissibility of documents, and to attack the weight of such evidence through cross-examination and other testimony, and argument. Complainant was similarly deprived of opportunities to bolster its case through further testimony. Resp. at 2.

Furthermore, complainant asserts that information supporting the introduction of the Andrews documents as business records was already addressed on the record at hearing. Resp. at 5. According to complainant, the documents were generated at the request of Briggs, they were prepared by an environmental engineering firm, and, their content pertains to the new landfill. *Id.* Complainant also urges the Board to take official notice pursuant to Section 101.630 of the Board's procedural rules (35 Ill. Adm. Code 101.630) that the documents were prepared by a consulting engineer in the regular course of business within a reasonable time of the acts at issue. Resp. at 6. Finally, complainant maintains that evidence must be competent, relevant, and material for it to be admissible, and, having demonstrated the competency of the documents, argues that Briggs does not challenge the Andrews documents' relevancy or materiality. Resp. at 4-5. Accordingly, complainant asks the Board to affirm the hearing officer's order admitting the Andrews documents into the record. *Id.*

We find that Section 101.626 of the Board's procedural rules (35 Ill. Adm. Code 101.626) guides this issue. Regarding business records, Section 101.626 provides, in pertinent part:

To be admissible, the writing or record will have been made in the regular course of business, provided it was the regular course of business to make the memorandum or record at the time of the act, transaction, occurrence, or event. . . . [a]ll other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be admitted to affect the weight of the evidence, but will not affect admissibility. 35 Ill. Adm. Code 101.626.

In light of the Board's procedural rules, the hearing officer properly admitted the two Andrews documents. The documents meet the requirements of Section 101.626 for admission of business records. These documents are of the type typically generated by an environmental engineering firm in the course of its investigations of a site such as a landfill, and the documents were developed within a reasonable time of the event. The hearing officer's order of March 19, 2001, is affirmed and the documents are admitted into the record. Briggs' motion to strike is denied.

BRIGGS' MOTION FOR LEAVE TO RESPOND TO COMPLAINANT'S REPLY

The second matter before the Board involves Briggs' request that it be given an opportunity to respond to complainant's reply brief. Briggs maintains that a response is necessary in order for it to address new matters raised by the complainant's reply. In the alternative, Briggs asks the Board to strike those portions of complainant's reply that contain the "new" material.

Briggs identifies five statements or arguments that it claims are not properly raised in complainant's reply. They are: (1) a new argument regarding the burden of proof; (2) a new legal theory regarding "capability of control"; (3) new arguments regarding remedy; (4) new and inaccurate statements regarding evidence; and (5) new arguments regarding the Andrews documents. Mot. at 1-2.

Briggs argues that it will be denied due process if it is not afforded an opportunity to respond to each of these new arguments. Mot. at 3. As a remedy, Briggs asks the Board to accept a response brief attached to its motion, or alternatively, to strike those portions of complainant's brief which contain the purportedly new arguments or statements.

Complainant responds to Briggs' motion by arguing that the Board's procedural rules do not allow for such a response without a showing of material prejudice, and that Briggs has not made such a showing. Resp. to Mot. at 3. Complainant refers the Board to Section 101.500(e) of the Board's procedural rules (35 Ill. Adm. Code 101.500(e)) which applies to the filing of motions and responses. Section 101.500(e) allows the hearing officer or Board to allow additional briefings of a motion when necessary to prevent material prejudice. 35 Ill. Adm. Code 101.500(e).

Complainant also argues that, with regard to the Andrews documents, Briggs does not come to the Board with "clean hands." Resp. to Mot. at 5. Complainant maintains that it is because of Briggs' own failure to disclose and produce the documents in a timely fashion during discovery that a full and complete examination of those documents could not be had by either party. *Id.* Complainant maintains that it too has been deprived of an opportunity to further bolster its own case by the late disclosure of these documents. *Id.* Finally, complainant argues that its reply is a proper response to Briggs' post-hearing brief and that any elaboration on arguments first presented in its own brief is proper. Resp. to Mot. at 6. Accordingly, complainant asks the Board to deny Briggs' motion.

Although not directly applicable, the Board finds the standards of Section 101.500(e) to be helpful in considering Briggs' motion. Therefore, we consider whether Briggs has demonstrated that its response is necessary to prevent material prejudice. Having carefully examined the post-hearing briefs of both parties, we find that complainant's reply does not improperly inject new theories or arguments into the case, and that Briggs has not demonstrated material prejudice.

The Andrews documents, however, come to us with an abbreviated airing in the record. Of necessity, argument concerning the Andrew documents has trailed briefing of other issues. Leave to submit a supplemental response concerning the Andrews documents is hereby granted despite the fact that the necessity giving rise to this supplemental response was occasioned only by Briggs' failure to timely produce the documents in question. Accordingly, Briggs' motion for leave to file a response to complainant's reply brief is denied in part and granted in part, but only as Part IV at pages 14-15. Briggs' motion to strike portions of complainant's reply brief is denied.

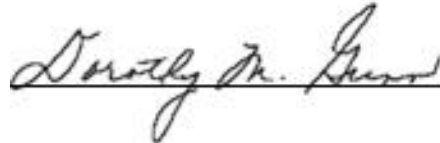
Except for arguments concerning the Andrews documents, this case is now fully briefed. Complainant argues that it, the party bearing the burden of proof in this case, must be afforded an opportunity to "close the argument." Resp. to Mot. at 5. Complainant is hereby granted leave to file a supplemental response concerning Part IV at pages 14-15 of Briggs' response to complainant's reply brief. Its supplemental response must be filed within seven days of the date of this order.

CONCLUSION

The Board affirms the hearing officer's ruling admitting the two Andrews documents into the record. The Board grants Briggs' motion for leave to respond to complainant's reply brief, but only insofar as the response relates to complainant's arguments regarding the Andrews documents. All other portions of Briggs' supplemental response are stricken.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 3rd day of May 2001 by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board