

OCT 14 2003

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
CHAMPAIGN COUNTY, ILLINOIS

OCT 14 2003

STATE OF ILLINOIS
Pollution Control Board

MORTON F. DOROTHY,

Complainant,

vs.

FLEX-N-GATE CORPORATION,
an Illinois Corporation,

Respondent.

No. PCB 05-049

MOTION TO ACCEPT FOR HEARING AND FOR EXPEDITED DISCOVERY

Morton F. Dorothy, complainant, moves that the Board accept the complaint for hearing, and authorize the hearing officer to preside over expedited discovery, and as reason says as follows:

1. The complaint was filed on September 8, 2004.
2. Section 31(d) of the Environmental Protection Act (415 ILCS 5/31(d)) and 35 Ill. Adm. Code 103.212(b) allow the respondent to file a "duplicitous or frivolous" motion with respect to a citizen complaint within 30 days following the date of service.
3. The complaint was mailed to respondent on September 7, and received on September 8, 2004.
4. More than 30 days have elapsed since the date of service.
5. Complainant filed a motion to dismiss on or about October 7, 2004.
6. The motion to dismiss did not extend the time for filing a "duplicitous or frivolous" motion.
7. The Board normally accepts non-citizen enforcement cases for hearing without waiting for resolution of motions to dismiss.
8. The incident alleged in the complaint also involved violation of rules promulgated by the Occupational Safety and Health Administration (OSHA), which violations are the subject of OSHA Complaint No. 204985014.
9. On September 10 and 14, 2004, respondent made the following statements to

OSHA in connection with OSHA Complaint No. 204985014:

- a. "We did not have ... a release of hydrogen sulfide gas at any time."
 - b. "We did have a break in one of the discharge pipes in the chrome plating department tank #8 which has a diluted sulfuric acid content..."
 - c. "We do not have any chemicals that would produce hydrogen sulfide gas."
 - d. "Guardian West did not have ... a release of hydrogen sulfide gas on August 5, 2004."
 - e. "We did have a pipe break in our plating department, which contained a diluted sulfuric acid content,..."
 - f. "We have not had any spills or releases."
10. The statements made to OSHA and quoted in the preceding paragraph are false, and respondent knew them to be false at the time they were made.
 11. The Occupational Safety and Health Act provides that: "Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both." (29 USC 666(g))
 12. The response to OSHA implies that respondent intends to deny the following allegations of the complaint in this case: Common allegations 14, 15, 22, 23, 24, 25, 26 and 27.
 13. If denied by respondent, truth of these allegations will be relevant and material in this case.
 14. Complainant knows of the existence of certain documents which were produced in connection with the incident of August 5, 2004, which are relevant to the truth of common allegations 14, 15, 22, 23, 24, 25, 26 and 27, and of additional relevant documents which should have been routinely produced, which documents are in the possession of respondent. Complainant has copies of some, but not all of these documents.
 15. Complainant believes that, in light of the false statements made to OSHA, respondent intends to alter or destroy the incriminating documents before they can be seized by OSHA or discovered in this case.

16. Complainant does not wish to list the documents at this time, lest it give respondent a list of documents to destroy or alter.
17. Complainant requests that the Board authorize the hearing officer to preside over an expedited initial round of discovery aimed at securing from respondent documents relevant to the truth of common allegations 14, 15, 22, 23, 24, 25, 26 and 27, without complainant having to disclose the identity of the documents to respondent sufficiently far in advance to allow for the destruction or alteration of the documents.
18. Complainant requests that the Board authorize the hearing officer to conduct an expedited hearing on discovery, at which complainant and respondent's attorney will meet with the hearing officer to discuss the scope of discovery. The hearing officer would enter an order for the production of documents, which order would be given to respondent's attorney. Complainant and respondent's attorney would then proceed directly to the facility to obtain the documents, without affording the respondent an advance list of the documents.
19. Complainant would reserve the right to conduct additional discovery after respondent files an answer in this case.

WHEREFORE complainant prays:

- A. That the Board accept the complaint for hearing.
- B. That the Board authorize the hearing officer to preside over an expedited initial round of discovery aimed at securing from respondent documents relevant to the truth of common allegations 14, 15, 22, 23, 24, 25, 26 and 27 of the complaint, without complainant having to disclose the identity of the documents to respondent sufficiently far in advance to allow for the destruction or alteration of the documents.
- C. That the Board authorize the hearing officer to conduct an expedited hearing on discovery, at which complainant and respondent's attorney will meet with the hearing officer to discuss the scope of discovery. The hearing officer would enter an order for the production of documents, which order would be given to respondent's attorney. Complainant and respondent's attorney would then proceed directly to the facility to obtain the documents, without affording the respondent an advance list of the documents.

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Morton F. Dorothy
Morton F. Dorothy, Complainant