

ILLINOIS POLLUTION CONTROL BOARD
April 18, 2002

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	
)	PCB 99-134
PEABODY COAL COMPANY, a Delaware)	(Enforcement – Water)
corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by N.J. Melas):

Today the Board decides if respondent Peabody coal company (Peabody) should be allowed to file its motion to dismiss or strike *instanter*. The motion to dismiss or strike is directed to the amended complaint in this matter.

The parties' relevant arguments are set forth below. For the reasons stated herein, the Board grants Peabody's motion for leave to file *instanter*. Although the response to the motion to file *instanter* was properly filed, the motion for leave to file a reply to the motion to file *instanter* and all of the pleadings filed on April 17, 2002 are stricken. The Board directs complainant to file a response to the motion to dismiss or strike the complaint by no later than May 2, 2002 so that the Board can address substantive issues in this matter.

PROCEDURAL MATTERS

On March 20, 2002, respondent Peabody Coal Company filed a motion for leave to file *instanter* (motion) along with a motion to dismiss or strike the complaint.

On April 2, 2002, complainant filed its response to the motion (response). Complainant requested that the Board deny Peabody's motion because Peabody failed to file its motion to dismiss or strike within the deadlines set by the Board's procedural regulations. Response at 3.

On April 11, 2002, Peabody filed a motion for leave to file a reply (leave to file reply) to complainant's response pursuant to 35 Ill. Adm. Code 101.500(e). On April 17, 2002 Peabody filed the reply.

On April 17, 2002, complainant filed a response to Peabody's motion for leave to file a reply. On April 17, 2002, Peabody filed a response to one paragraph of complainant's response to Peabody's motion for leave to file a reply. On April 17, 2002, Peabody also filed a motion to strike three paragraphs of complainant's response to Peabody's motion for leave to file a reply.

MOTION FOR LEAVE TO FILE**INSTANTER**

The February 7, 2002 hearing officer in this matter allowed complainant's motion for leave to file an amended complaint. Peabody's counsel Steve Hedinger claimed that he received the February 7, 2002 hearing officer order on February 11, 2002. Peabody cited the Board's procedural regulation at 35 Ill. Adm. Code 101.506 that allows a motion to dismiss or strike "within 30 days after the service of the challenged document." Peabody claimed that its motion to dismiss or strike was to be filed on March 13, 2002. Motion at 1-2.

Hedinger stated that he was unable to file the motion to dismiss or strike on March 13, 2002 because he was ill. Motion at 2. On March 20, 2002, Peabody filed its motion for leave to file *instanter* (motion) along with its motion to dismiss or strike the complaint.

Discussion

Section 101.506 of the Board's procedural regulations states "All motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after service of the challenged document, unless the Board determines that material prejudice would result."

Complainant filed its motion for leave to amend complaint and an amended complaint in this matter on May 31, 2000. The Board granted complainant's motion for leave to amend complaint in a hearing officer order dated February 7, 2002. The Board notes that Peabody's attorneys did not receive the February 7, 2002 hearing officer order until February 11, 2002. The Board agrees that the 30-day deadline to dismiss or strike the amended complaint would have been March 13, 2002.

The Board now examines if material prejudice would result if it denied Peabody's motion.

PREJUDICE

Peabody claimed that denial of the motion would "severely prejudice" Peabody. Its motion to dismiss or strike identifies numerous "inconsistencies and facial inaccuracies" which prevent Peabody from filing a meaningful answer to the second amended complaint. Motion at 2.

Complainant contended that granting Peabody's motion would prejudice complainant because Peabody failed to meet the deadline and did not attempt to secure an extension of time according to the Board's procedural regulations. Response at 3.

Complainant also pointed out that Peabody had been in possession of the amended complaint for over 20 months. Complainant also claimed that denial of Peabody's motion would not affect Peabody's ability to file a meaningful answer. Complainant stated that, as a result, Peabody would not be severely prejudiced if its motion is denied. Response at 3.

Peabody claimed that its motion to dismiss or strike should not prejudice complainant because the motion was only a few days late and that the answer to the amended complaint is not due to be filed for nearly four more weeks. Motion at 2.

Discussion

The Board chooses not to examine the effect of the motion on Peabody's ability to file an answer. In a March 29, 2002 hearing officer order in this matter, the hearing officer stated that Peabody must file an answer within 30 days after the Board rules on Peabody's motion to strike. The Board stands by the deadline set by the hearing officer.

Denial of the motion would prevent Peabody from its attempt to dismiss or strike the amended complaint. The Board notes that it received the motion to dismiss or strike on March 20, 2002, seven days after it was due. The Board finds that Peabody should have the opportunity to file a motion to dismiss or strike despite the fact that the motion to dismiss or strike was filed seven days late. The Board finds that there was good cause for the filing of the motion seven days late. The Board also finds that material prejudice would result if Peabody were not allowed to file the motion to dismiss or strike. The Board grants the motion for leave to file *instanter*.

MOTION FOR LEAVE TO FILE A REPLY

Peabody claimed that denial of the motion for leave to file a reply to complainant's response would materially prejudice Peabody by denying it the chance to reply to issues raised in complainant's response. Leave to File Reply at 2-3.

Discussion

Section 101.500(e) of the Board's procedural regulations provides "The moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. A motion for leave to file a reply must be filed with the Board within 14 days after service of the response."

The motion for leave to file a reply was filed within the 14-day deadline. However, the Board finds that denial of the right to file a reply will not prejudice Peabody. Peabody adequately stated its position in its motion for leave to file *instanter*. The Board strikes Peabody's motion for leave to file a reply.

APRIL 17, 2002 PLEADINGS

As the Board has already stricken the motion for leave to file a reply, Peabody's reply is also stricken as moot. In addition, complainant's response to Peabody's motion for leave to file a reply is stricken as moot.

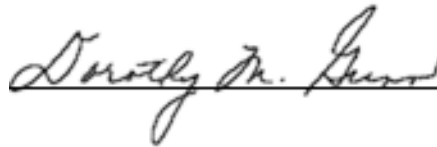
Since complainant's response to Peabody's motion for leave to file a reply is stricken, then the Board also strikes as moot Peabody's response to one paragraph of complainant's response to Peabody's motion for leave to file a reply. The Board also strikes as moot Peabody's motion to strike three paragraphs of complainant's response to Peabody's motion for leave to file a reply.

SUMMARY

1. The Board grants Peabody's motion for leave to file *instanter*.
2. The Board denies Peabody's motion for leave to file a reply.
3. The Board denies all motions filed on April 17, 2002 as moot.
4. As specified in the hearing officer order of March 29, 2002, complainant must file a response to the motion to dismiss or strike by no later than May 2, 2002 which is 14 days after the instant order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 18, 2002, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board