

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 11 2015
STATE OF ILLINOIS
Pollution Control Board

NACME Steel Processing, L.L.C.,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 15-153 (Permit Appeal)

 ORIGINAL

**NACME STEEL PROCESSING INC.'S MOTION TO STRIKE STATE'S REPLY BRIEF
ARGUMENT OR FOR LEAVE TO FILE SUR-REPLY**

Petitioner NACME Steel Processing, L.L.C. ("NACME"), by its attorneys, Reed Smith, LLP., moves the Board to strike certain portions of the Illinois Environmental Protection Agency's (the "Agency") Reply to NACME's response to the Agency's motion for summary judgment, or for leave to file the attached Sur-Reply, and in support of its Motion states as follows:

1. The Agency moved for summary judgment herein maintaining that under the "plain language" of the Metal Coil Surface Coating Rule (40 CFR 60 Subpart TT) the conditions it had placed in a FESOP issued to NACME were appropriate. (Agency MSJ, p. 11)
2. In its Reply brief served on August 4, 2015 the Agency raises for the first time the argument that the Coating Rule is "ambiguous" also citing new authority for its interpretation of the Rule. (Agency Reply, p. 4-5)

3. It is improper to raise new argument and issues in a reply brief. *Panhandle Eastern Pipe Company v Illinois Environmental Protection Agency*, 734 N.E. 2d 18, 21 (1st Dist. 2000). (failure to raise issue in initial brief constituted waiver)

4. In addition to new argument, the Agency cites new legal authority, an EPA administrative decision (AD) nowhere mentioned in its initial brief. (Reply, p 5) Points not presented in an initial brief may not be raised in the reply brief. *Smith v Intergovernmental Solid Waste Disposal Association*, 605 N.E. 2d 654, 656 (4th Dist. 1992) (declining to consider new argument); see also, Illinois Supreme Court Rule 341(g) (87 Ill.2d R. 341(g))

Wherefore, NACME requests that the Agency's new "ambiguity" argument be stricken, and that its reference to EPA's 2013 AD be disregarded or in the alternative that NACME be given leave to file the attached Sur-Reply.

Petitioner **NACME STEEL PROCESSING, L.L.C.,**

By:  _____
One of Its Attorneys

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**NACME STEEL PROCESSING INC.'S SUR-REPLY TO
STATE'S MOTION FOR SUMMARY JUDGMENT**

Petitioner NACME Steel Processing, L.L.C. ("NACME"), by its attorneys, Reed Smith, LLP., sur-replies to the Illinois Environmental Protection Agency's (the "Agency") Reply to NACME's Response to the Agency's Motion for Summary Judgment, as follows:

1. The Agency has Improperly Made New Legal Arguments in its Reply Brief

The Agency presents an entirely new argument in its Reply Brief. It now argues that, the Coating Rule, which it earlier characterized as containing "plain language", is now "ambiguous". (MSJ, p. 11; Reply, p. 4) The Agency tries to cover-up its new argument by stating that it "previously, but briefly, noted in its MSJ that the ambiguity in the..."Rule required it to consult an EPA AD. (Reply, p 4) The Agency does not provide a citation to where it made this argument previously and review of the MSJ shows this statement to be inaccurate. As noted in NACME's Motion to Strike filed herewith, it is improper to raise new argument and issues in a reply brief. *Panhandle Eastern Pipe Company v Illinois Environmental Protection Agency*, 734 N.E. 2d 18, 21 (1st Dist. 2000). (failure to raise issue in initial brief constituted waiver)

In addition to new argument, the Agency cites additional legal authority, an EPA administrative decision (AD) nowhere mentioned in its initial brief. Points not presented in an initial brief may not be raised in the reply brief. *Smith v Intergovernmental Solid Waste Disposal Association*, 605 N.E. 2d 654,656 (4th Dist. 1992) (declining to consider new argument); see also, Illinois Supreme Court Rule 341(g) (87 Ill.2d R. 341(g)) The Agency has waived its improper new argument and reliance on new authority by failing to include both in its Reply Brief.

Moreover, the Agency cites no authority for its new “ambiguity” argument including how the Board should proceed under the law in interpreting the purportedly ambiguous Coating Rule. The Agency’s unsupported interpretation of the Coating Rule would result in absurdity and would render superfluous the language used by the legislature in the Rule. If the Agency is correct, the phrases “curing oven and quench station” conjoined in the Rule with “coating application station” and the phrase would be rendered superfluous and only “coating application station” need be considered according to that. But statutes may not be construed in a way that renders statutory language superfluous. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 179 Ill.2d 367, 228 Ill.Dec. 636 (Ill., 1997). Moreover, if the Agency’s argument holds the Rule becomes absurd because if the terms “coating application station”, “curing oven” and “quench station” can all be separated from each other and considered separately, then under the Agency’s interpretation “coating” apparently could be deemed to occur *in the absence of a coating application station!* Under this absurd interpretation, the Rule could apply where only a curing oven or quench station is involved and improper. In its strained interpretation of the Rule the State also ignores the requirement that some “drying or curing” be involved before any coating is deemed to occur In its twisted interpretation of the Rule.

The new AD cited by the Agency actually wholly undermines its argument. At the “Coater B” facility in issue in the AD “two coating application stations, each followed by a drying oven, and a print station with a small oven for making product markings”, are present. (Reply, p. 4; see section II of the AD) While the Agency focuses solely on the answer to Question 4 in the AD concerning the printing line, it ignores answers to other questions about the same facility which describes the equipment present, including, for the print station, an oven. As noted, NACME facility does not contain an oven.

2. The Board may Consider the Affidavit of John DuBrock On a Motion for Summary Judgment.

Rather than separately moving to strike the affidavit of John DuBrock so that NAMCE would have a chance to respond, the Agency instead argues in its Reply that the affidavit be stricken, apparently intending to procedurally thwart a response by NACME. In any event, The Agency’s argument that IAC § 105.214, entitled “*Board Hearing*” precludes consideration of John DuBrock’s affidavit as “outside the record” is wrong. Among other things the Agency ignores the fact that this matter is not *at hearing*. IAC § 101.156 b), states in relevant part:

If the record, including pleadings, depositions and admissions on file, together with any affidavits show that there is no issue of material fact, and that the moving party is entitled to judgment as a matter of law...(emphasis supplied)

Clearly the Board, on a motion for summary judgment, may consider the record *together with any affidavits*, including John DuBrock’s here.

3. The Salient Facts Stated in John DuBrock’s Affidavit are Already Part of the Record

The Agency potentially misleads the Board about facts already in the record and which are simply reiterated in DuBrock's affidavit. In fact the Agency itself cites to the Record Facts also included in DuBrock's affidavit, as follows:

1. *The Facility operates as a steel pickler to remove scale from metal.*

. DuBrock Aff. ¶ 3; Agency MSJ, p. 4; R. at 252 and 712.

2. *Oil is then applied to the steel.*

DuBrock Aff. ¶ 3; MSJ p. 4; R 252 and 712.

3. *The oil stays on the steel coils for protection prior to final use by a customer.*

DuBrock Aff. ¶ 5; Agency citation to June 26, 2012 Mostardi Platt letter, R. 97-104 containing this fact MSJ – p 4 - (also exhibit D to NACME's Response)

4. *NACME's Facility contains neither curing nor quenching equipment.*

DuBrock Aff. ¶ 4; Agency citation to Mostardi-Platt letter dated May 15, 2012, MSJ, p. 5; R 119-125, 121.

5. *NACME's oil lubricated steel is neither cured nor dried.*

DuBrock Aff. ¶ 4; Agency citation to Mostardi-Platt letter dated May 15, 2012, MSJ, p. 5; R 119-125, 122.

6. *NACME does not apply a prime or finish coat to its steel.*

DuBrock Aff. ¶ 4; Agency citation to Mostardi-Platt letter dated May 15, 2012, MSJ, p. 5; R 119-125, 122,124

Assuming arguendo that the Board decides not to consider Mr. DuBrock's affidavit in this matter, the facts that show that the Agency's decision to burden the subject FESOP with

inapplicable conditions is wrong are already part of the Record. In fact, the Agency cites to many of the Record documents setting forth the same facts as are contained in Dubrock's affidavit.

Dated: August 11, 2015

Respectfully submitted,

NACME STEEL PROCESSING, L.L.C.,
Petitioner

By: Edward Walsh
One of Its Attorneys

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CERTIFICATE OF SERVICE


I, the undersigned attorney at law, hereby certify that on August 11, 2015, I served true and correct copies of **NACME STEEL PROCESSING INC.'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT** upon the persons and by the methods as follows:

[Electronic Filing]

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