

ILLINOIS POLLUTION CONTROL BOARD

August 7, 2014

PEOPLE OF THE STATE OF ILLINOIS,)
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)
Complainant,)
)
)
v.) PCB 13-12
) (Enforcement – Air)
NACME STEEL PROCESSING, LLC, a)
Delaware limited liability corporation,)
)
)
Respondent.)

ORDER OF THE BOARD (by D. Glosser):

The People of the State of Illinois (People) filed a complaint against NACME Steel Processing, LLC (NACME) on September 5, 2012, alleging that NACME operates a major stationary source without a Clean Air Act Permit Program (CAAPP) permit in violation of various provisions of the Illinois Environmental Protection Act (415 ILCS 5/1 *et seq.* (2012)) (Act). The complaint concerns NACME's steel processing facility located at 429 West 127th Street, Chicago, Cook County.

The Board today rules on a motion to strike the affidavit of Valeriy Brodsky, an employee with the Illinois Environmental Protection Agency (Agency), Bureau of Air. The Board reserves ruling on the motion for summary judgment. NACME may file a response to the motion for summary judgment by August 21, 2014. The People may file a reply by September 4, 2014.

PROCEDURAL BACKGROUND

On September 5, 2012, the People filed the complaint against NACME (Comp.). The complaint alleges NACME violated Sections 9(b), 39.5(5)(x), and 39.5(6)(b) of Act (415 ILCS 5/9(b), 39.5(5)(x), and 39.5(6)(b) (2012)). The complaint alleges that NACME violated these provisions of the Act by operating a major air pollution source without obtaining the proper permits. On September 20, 2012, the Board accepted the People's complaint for hearing.

On June 6, 2013, the Board granted the People's motion to strike certain affirmative defenses filed by NACME. The Board also denied the People's request to strike other defenses and allowed NACME the right to argue laches and waiver.

On May 16, 2014, the People filed a motion for summary judgment that included an affidavit by Mr. Brodsky. On June 5, 2014, NACME filed a motion to strike the affidavit (Mot.). On June 20, 2014, the People responded to the motion to strike (Resp.). Also on June 20, 2014, NACME filed an interim response to the People's motion for summary judgment.

NACME's MOTION TO STRIKE

NACME filed a motion to strike the affidavit of Mr. Brodsky as opposed to filing a motion for summary judgment as contemplated by the Hearing Officer order of March 27, 2014. NACME argues that the motion to strike should be granted for two reasons. First, the affidavit failed to comply with the Illinois Supreme Court Rule 191(a). Second Mr. Brodsky has not been disclosed as an expert witness. The Board will address those arguments in turn below.

Failure to Comply with Supreme Court Rule 191(a)

NACME argues that Mr. Brodsky's affidavit fails to comply with Supreme Court Rule 191(a). Rule 191(a) requires that affidavits be made on "the personal knowledge of the affiants" and "shall not consist of conclusion". Mot. at 2. NACME argues that Mr. Brodsky more than once stated in the affidavit that he relied on third party information. Mot. at 3. NACME asserts that in the affidavit, Mr. Brodsky made a variety of conclusions without providing the factual basis for those conclusions, such as mathematical equations and abbreviations, without explaining what they mean. *Id.* Additionally, NACME claims that Mr. Brodsky failed to attach certified copies of the papers he relied on to make his conclusions, such as permit applications and stack tests. Mot. at 4. Finally, NACME argues that there is nothing included in Mr. Brodsky's affidavit that indicates that he can competently testify about what he is asserting. *Id.*

Not Disclosed as an Expert Witness

NACME also argues that Mr. Brodsky was never disclosed as an expert witness. He was only disclosed as a lay witness, yet NACME claims his affidavit makes assertions that an expert witness would normally make. Mot. at 5. "Under Supreme Court Rule 213(f)(1), a 'lay witness' is a person giving only fact or lay opinion testimony". *Id.*, quoting S. Ct. Rule 213(f)(1). However, NACME asserts that Mr. Brodsky's affidavit delivers technical analysis as well. *Id.* Because Mr. Brodsky was only disclosed as a lay witness, NACME asserts it was unable to depose him as an expert witness. *Id.* Additionally, NACME maintains that the non-disclosure of Mr. Brodsky as an expert witness violated the hearing officer's orders. *Id.*

Relief Requested

Based on these failures, NACME argues that Mr. Brodsky's affidavit must be stricken. Mot. at 5. If the Board decides not to strike the affidavit, NACME requests that they be allowed to re-depose Mr. Brodsky as an expert witness. *Id.* Additionally, NACME requests that it's time to respond to the People's motion for summary judgment be extended for 14 days after the ruling on this motion to strike. *Id.*

PEOPLE'S RESPONSE

The People argue that the Board should deny NACME's motion, deny NACME's request for additional time to depose Mr. Brodsky, deny NACME an extension of time to respond to the People's motion for summary judgment, and ultimately grant the People's motion for summary

judgment. In support of its requests, the People argue: 1) the Board is not subject to the Supreme Court rules, and that even if the Board took the Supreme Court rules into consideration, Mr. Brodsky's affidavit fulfills the requirements of the rule; 2) that NACME should not be allowed additional time to depose Mr. Brodsky because he is not an expert witness; and 3) NACME should not be allowed additional time to file a response to the People's motion for summary judgment because they had an opportunity to file it along with a counter affidavit and chose to file the motion to strike instead of a timely response.

The Board is Not Subject to the Supreme Court Rules

The People indicate that, as part of the Board's procedural rules, the Board is not bound by any rules other than its own; however, the Board may consider the Supreme Court Rules and the Code of Civil procedure for guidance. 35 Ill. Adm. Code 101.100. With this in mind, the People argue that even if the Board consulted the Supreme Court Rules and the Code of Civil Procedure, Mr. Brodsky's affidavit is within the requirements. Resp. at 4.

The affidavit fulfills the requirements of Supreme Court Rule 191(a) because the affidavit consists of factual statements based on personal and special knowledge, not based on hearsay. Resp. at 5. The statements rely on knowledge that Mr. Brodsky acquired through his 19 years of work experience with the Agency. Mr. Brodsky states in his affidavits that he gathered the information used to perform his calculations from documents that NACME submitted to the Agency. Memo. at 6. He further identifies the two documents he relied on as NACME's 2002 Construction Permit Application and the 2005 federally enforceable state operating permit application. *Id.*

Additionally, the People argue that NACME's claim that Mr. Brodsky's statements use vague abbreviations and mathematics is not supported. The People point out that each of the abbreviations that Mr. Brodsky uses in his affidavit are defined in the People's motion for summary judgment. Resp. at 7. The People also state that NACME erred when arguing that Mr. Brodsky's calculations of the potential to emit were "offhand conclusions" because the meaning is explicitly defined by Section 39.5(1) of the Act (415 ILCS 5/39.5(1) (2012)).

Finally, the People state that there was no need for Mr. Brodsky to attach supporting documentation to the affidavit because all supporting documents mentioned were submitted in the People's motion for summary judgment. Memo. at 10. Therefore, there is no need to submit duplicate documents because Mr. Brodsky's affidavit is part of the motion for summary judgment. *Id.*

NACME Should Not Have Additional Time to Depose Mr. Brodsky

The People argue that NACME should not have additional time to depose Mr. Brodsky because Mr. Brodsky is not an expert witness. Memo. at 11. The People state that Mr. Brodsky is merely a lay witness with special knowledge and the calculations that he performs in the affidavit are "application of special knowledge performing simple math . . . to a formula that Mr. Brodsky learned during his 19 years working at the Agency . . .". Resp. at 12. The People further argue that even if Mr. Brodsky's statements were his personal opinion, he is exempt from

the rule prohibiting lay witness opinions in testimony because he had special knowledge of the matter. Resp. at 12 (*citing Gowdy v. Richter*, 20 Ill. App. 3d 514, 527).

Furthermore, the People argue that NACME falsely claims that it did not have an opportunity to depose Mr. Brodsky on the issues presented in his affidavit because NACME conducted a deposition that exceeded 3 hours and extensively questioned Mr. Brodsky's qualifications and knowledge of how to calculate a potential to emit (PTE) calculation. Memo. at 14.

Finally, the People argue that NACME had ample time to acquire any additional materials prior to the close of discovery. Memo. at 15. The People also state that NACME possessed all of the certified copies of the documents presented in the People's motion for summary judgment before it deposed Mr. Brodsky. *Id.*

NACME Should Not be Granted a Filing Extension

Finally, the People argue that NACME should not be granted its requested filing extension for a response to the People's motion for summary judgment. NACME did not even file its own motion for summary judgment. The People argue that NACME could have filed a response to the People's motion for summary judgment and a counter affidavit to Mr. Brodsky's affidavit by June 16th. Resp. at 16. However, NACME chose to file its motion to strike instead.

Relief Requested

Because of this rationale, the People request that NACME be denied both its motion to strike and its request for a filing extension for its response to the motion for summary judgment. The People contend that the Board does not have to adhere to the Supreme Court Rules; that NACME had ample time to depose Mr. Brodsky and should not be granted additional time because he is not an expert witness and, in fact, testified on the issues presented in his affidavit; and that NACME did not follow the deadline to submit a response to the People's motion for summary judgment, but chose to file a motion to strike instead, and therefore should not be granted an extension. Taking all of this into consideration, the People ultimately request that the Board grant its motion for summary judgment.

DISCUSSION

The Board's procedural rules provide:

The provisions of the Code of Civil Procedure [735 ILCS 5] and the Supreme Court Rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board. However, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent.
35 Ill. Adm. Code 101.100(b)

The Board's procedural rules do not provide specifics on expert witnesses or on material to be included in an affidavit. Therefore the Board will look to the Supreme Court Rules for guidance.

The Supreme Court rules require that “upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify” at trial and identify if they are a lay witness or an expert witness. S. Ct. Rule 213(f)(1) and (2) (2014). “A ‘lay witness’ is a person giving only fact or lay opinion testimony. *Id.* Further, the Supreme Court rules provide that in motions for summary judgment, “affidavits in support of and in opposition to a motion for summary judgment . . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.” S. Ct. Rule 191 (a) (2014).

The Board reviewed the affidavit of Mr. Brodsky and the other filings by the People in the motion for summary judgment. The Board is unconvinced by the arguments of NACME. Mr. Brodsky testified to facts which are within his purview as an employee for the Agency and used documents and materials that the Agency had at its disposal in preparing Mr. Brodsky’s affidavit. Furthermore, the documents relied upon by Mr. Brodsky are either in NACME’s possession or were included in a different attachment to the motion for summary judgment. *See* Attach F to People’s motion for summary judgment. NACME had the opportunity to depose Mr. Brodsky in his role as an Agency employee. Specifically, Mr. Brodsky was identified as being;

Expected to testify in support of the violations alleged in the People’s complaint, including his familiar [sic] with permit applications and permit-related communications and documentation, including stack tests, associated with the NACME Facility. . . . Mr. Brodsky is expected to testify about documents and correspondence submitted by NACME and its environmental consultants to the Agency. Mot. Attach D at 2.

Clearly NACME was on notice concerning Mr. Brodsky’s potential testimony, and the Board finds that the affidavit is within the scope identified by the People. Therefore, the Board denies the motion to strike Mr. Brodsky’s affidavit.

NACME may provide a counter-affidavit in its response to the motion for summary judgment, which the Board will allow. NACME must file its response by August 21, 2014 and the People may file a reply by September 4, 2014.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 7, 2014, by a vote of 4-0.



Don A. Brown, Assistant Clerk
Illinois Pollution Control Board