

ILLINOIS POLLUTION CONTROL BOARD
May 5, 1983

UNITY VENTURES,)
)
) Petitioner,)
)
) v.) PCB 80-175
)
 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)
)
) Respondent.)

ORDER OF THE BOARD (by J. Anderson):

On April 12, 1983 the Agency moved the Board to set a hearing date in this matter, as a hearing scheduled for April 13, 1983 was generally continued by the hearing officer on the basis of Unity's representation that it intended to seek either Board reconsideration or Board certification for interlocutory appellate review of the Board's March 24, 1983 Order. That Order held that the sanction imposed on Unity December 2, 1982 for failure to respond to discovery, could not be evaded by the filing of an amended petition (merely changing the prayer for relief). The Attorney General argued on the Agency's behalf that Unity's motion for continuance in which to pursue Board or appellate court relief from the March 24, 1982 was "purely a delaying tactic", and part of the pattern of "intentionally dilatorious" conduct outlined by the Board in its Order of December 2, 1982.

On April 20, Unity filed a response in opposition, and a request that the Board reconsider its March 24, 1983 Order. The Attorney General filed a response April 28, 1983.

The motion for reconsideration is granted. Unity's primary argument is that the March 24 Order confirming that the December 2 sanction order applied to the amended petition filed pursuant to the December 30 Order (also reaffirming the December 2 Order) should be vacated on the grounds that the December 2 Order was predicated on the November 12 Order ordering discovery production, which Unity alleges to be void.

The November 12 Order denied in whole Unity's request to strike all interrogatories and requests to produce, granted the Agency's motion to compel, and ordered responses to be filed on or before November 19. The Order also granted in part the Agency's motion to compel responses to requests for admissions of fact, to which Unity had objected on relevancy grounds, and ordered that these also be answered on or before November 19.

The Board at its November 12 meeting voted to grant in part and to deny in part both the Agency's motion to compel and Unity's motion to strike. It did not discuss at the meeting which specific requests would be granted or denied, but stated that such would be reflected in its final Order. Unity argues that therefore the Board did not adopt its Order at a meeting "open to the public" as required by Section 5 of the Act and 35 Ill. Adm. Code 101.109(a), and further that the Board had unlawfully delegated its authority to an administrative assistant, based on a remark by the Board member assigned to prepare the Order. "Proof" of these allegations is asserted to be given by delay in transmission of the Order until November 16.

Unity's voidness argument is rejected. The Board's decision was made at a public meeting, at which Unity's counsel was admittedly present. Neither the Act nor the Board's rules preclude decision on a matter if a draft Order has not been prepared prior to a Board meeting. The Board's assignment of preparation of an appropriate Order to a Board Member, who may refer to the fact that an assistant will assist in preparing it, is no more unlawful a delegation than that of a court which directs a clerk or counsel appearing before it to draft an order for entry by the court. Orders prepared after Board meetings are routinely scrutinized by one, if not a majority of, Board Members when the subject matter is in any wise complex.

To the extent that a Board Member may have infelicitously phrased a remark at a Board meeting, it is to be remembered that

"...any transcript of such meeting is not part of the record for purposes of appeal. First, the opinions of individual Board members are personal in nature and not actions of the Board. Furthermore, such is not evidence. Also, the accuracy of the recorded information is disputed since a Board meeting, unlike a hearing before the Board, is not required to be recorded stenographically, or by another recording method (Ill. Rev. Stat. 1979, ch. 111½, par. 1105, 1032)." [Illinois Power Co. v. Pollution Control Board, et al., No. 81-34, (Ill. App. 3rd Dist. September 30, 1981 slip op. at 9).]

Any delay in transmission of a Board Order may be attributable to any one or a combination of factors involving slippage in actual drafting, typing, zeroxing, or the clerk's certification of an Order and mailing.

The exact circumstances of the four day transmission gap in this case are not known to the Board (any more than is the exact conversation of the November 12 meeting). The Board notes however that the Board's meeting was held on a Friday, and the Order was transmitted on a Tuesday. The four day gap does not in any case excuse Unity's delay from November 19 to December 1

in making any response to the Board's Order by way of motion or production, particularly since Unity's counsel was advised at the Board meeting that at least some discovery production would be required in fairly short order (See December 2 Order).


Unity's other arguments concerning the Board's November, December and March Orders have been considered and addressed once, if not more than once, and are rejected.

The Board's Order of March 24, 1983 is hereby affirmed. The Board declines to certify the question for interlocutory appeal to the Appellate Court. The Board is convinced by the Agency's argument that this Order is not a proper subject for interlocutory review, see People ex rel. Scott v. Silverstein, 87 Ill. 2d 167 (1981), and that administrative and judicial economy would be best served by having this matter proceed to hearing. The Agency's motion to set a hearing date is granted. Hearing shall be scheduled within 15 and held within 45 days of the date of this Order; the hearing officer shall not continue either date.

Given Unity's history of delay in this case, which "remand for hearing" history is now close to a year old, the Board advises the parties that no motion for reconsideration of this Order will be accepted unless a) it is a joint motion, and b) filed within 12 days of the date of this Order.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 5th day of May, 1983 by a vote of 4-0.


 Christan L. Moffett, Clerk
 Illinois Pollution Control Board