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TRANSCRIPT OF PROCEEDINGS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OCEAN STATE ASBESTOS REMOVAL, INC.	)
	)
Respondent.	)
	)Docket No. CAA-I-93-1054
versus	)
	)
U.S. ENVIRONMENTAL PROTECTION AGENCY,	)
	)
Complainant.	)

Telephonic Prehearing Conference

Washington, D. C.
February 4, 1994

Pages 1 thru 23

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	
OCEAN STATE ASBESTOS REMOVAL, INC.,	
Respondent,	
v.	Docket No. CAA-I-93-1054
U.S. ENVIRONMENTAL PROTECTION AGENCY,	
Complainant.	

Friday, February 4, 1994

Washington, D.C.

The telephone prehearing conference in the above-entitled matter commenced at 1:00 p.m.

BEFORE:

JOHN G. LOTIS, Administrative Law Judge

APPEARANCES:

Counsel on behalf of Complainant:

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P R O C E E D I N G S

JUDGE LOTIS: We will be on the record now.

So the reporter can recognize the voice when you make comments, would you please identify yourselves for the record. First counsel for EPA?

MR. MARTINEZ: This is Hugh Martinez, Your Honor, counsel for complainant.

JUDGE LOTIS: All right. And for the respondent?

MR. VOLPE: This is Fred Volpe, V-o-l-p-e, counsel for respondent.

JUDGE LOTIS: Thank you.

Before I get into the matter at hand which prompted this phone call today, I would like to ask whether the parties since this matter has arisen have had an opportunity to discuss settlement.

MR. VOLPE: We had, if Your Honor please, an initial meeting in Boston. I appeared with the respondent, by client, and we had an initial sit-down and discussed a number of issues. However, issues had developed subsequent to that meeting, as Your Honor can glean from the memo, the motions, et cetera, in terms of proper identification of the respondent corporation, as well as the issue of prior

violations.

So with that occurrence, we have really not sat down to try to quantify what we are dealing with at this point in time.

JUDGE LOTIS: Mr. Volpe, can you comment on that?

MR. VOLPE: This was Fred Volpe, Your Honor.

JUDGE LOTIS: I'm sorry. I'm sorry.

MR. MARTINEZ: This is Hugh Martinez, counsel for complainant.

We did meet back in May of last year for our initial settlement meeting. There were a number of issues that were raised at that time, and at this point I feel that settlement negotiations really have broken down. Complainant, as I believe I have indicated in a couple of filings on the record at this point, has anticipated the receipt of some documentation from respondent, including financial documentation, which I have to receive. So I feel to a certain extent the settlement process never concluded as anticipated. But I am not sure there is any reason for the failure of respondent to get that material to me.

MR. VOLPE: May I interject, Hugh?

MR. MARTINEZ: Sure.

MR. VOLPE: Not to interrupt your thought.

MR. MARTINEZ: No. Yes?

MR. VOLPE: The issue of respondent neglecting to provide financial documents, that statement is somewhat misplaced. On the face of the record, there is a question of which corporation was the proper corporation, and I had forwarded a revocation of corporation charter of Ocean State Asbestos Removal and, in fact, all of the prior correspondence has been with Ocean State Asbestos Building Wrecking and Asbestos Removal, which is the proper corporate name.

Now, I cannot provide financial records, unless we identify which is the proper corporation. If Mr. Martinez takes the position that it is Ocean State Asbestos Removal, that corporation virtually has no assets, because it hasn't been in business for about 4 or 5 years. So I am not trying to complicate the issue, but we are in a kind of catch 22. We first have to flesh out and agree as to the proper respondent, and then move from there.

I certainly am not averse to meeting with meeting with Mr. Martinez and members of the EPA in trying to streamline some of the issues and try to move towards a settlement. But things had developed as we went along after

the initial complaint.

We had the issue of proper identification of respondent, we had the issue of past violations that had not been discussed at our meeting, except respondent's request to clarify the 1988 issue that was retracted in the journal. So things began to change somewhat, as the case progressed, and I never felt as if we had a handle as to what the substantive issues were in terms of proper respondent, and also the alleged prior violations. But I would be happy to meet with Mr. Martinez to attempt to resolve this, if we can.

JUDGE LOTIS: Well, let's look at this motion that EPA filed before me for this conference. Taking the items one by one, the first item deals with -- and I will just summarize it -- in a sense, as I see it, is EPA is not satisfied that sufficient information was provided by the respondent in the prehearing exchange in terms of ability to pay. Is that correct?

MR. MARTINEZ: That's one of the issues, certainly.

JUDGE LOTIS: I know. We are starting one at a time.

MR. MARTINEZ: Yes.

JUDGE LOTIS: Why have you waited this long? Why

haven't you pursued self-help measures?

MR. MARTINEZ: I anticipated receipt of that information, and certainly in the fall of last year, counsel for respondent and myself exchanged correspondence with respect to the nature of respondent and some of these other issues that have been identified. At this point, I have provided the agency's position with respect to those issues to respondent's counsel and, again, reemphasized the importance of submission of documentation on financial matters to the extent we have issues to resolve in that way.

JUDGE LOTIS: I am not sure what you are saying, counsel. It is clear as a matter of law that the company is saying it is unable to pay. It has the burden of proof, and I should be able to go on from there at the trial in two weeks. It had the responsibility to put on evidence and it may choose to do so, or they may elect not to do so.

The fact that you're not satisfied with the prehearing exchange in terms of identification of the type of financial information that they would present, that's the problem of EPA. They should have pursued that long before this time. THis is not even a motion before me to attempt to obtain that information. It is merely a request for a

prehearing conference made a little more than one month before the trial.

MR. MARTINEZ: Right.

JUDGE LOTIS: Clearly, the information which you claim is inadequate was furnished you October 13th, and it consists of a one-sentence statement, and certainly that could have been reviewed and you could have filed a motion long before this time, and you still haven't made one, and I think it is too late to make one. So as far as that aspect of the case is concerned, we are going forward with it.

Now, the second item that you list in your motion that causes you concern, let me see here -- complainant also notes that no documentary evidence as to the appropriateness of the penalty or any other financial matter is offered by the respondent. That is his prerogative. If he has a burden, he is going to have to sustain it.

Let me go on here and see what else we are dealing with, and then I will allow you to respond.

Again, you are dissatisfied with the fact that they may introduce documentary evidence from the National Weather Bureau and local newspaper. You are dissatisfied that this satisfaction should have been apparent sometime back in

October, and you could have filed a motion with me. That has not been done, so as far as I am concerned, at this point it's a failure of EPA to prosecute its case in that area, in that little facet of this case.

I can't do anything about the case at this posture. I have set it for hearing, and with close to 200 cases on my calendar, I cannot try cases and allow counsel shortly before a hearing to tell me something that was filed 3 months earlier was deficient and the trial needs to be postponed, so we can have a prehearing to discuss it. If I followed that pattern, I would have to follow it for all the respondents and cases would never get to trial. That cannot be the practice here.

Let me go on and look at the remainder of your prehearing request.

You refer to a motion for accelerated decision that you believe that you could prevail on. There is no time limitation for you under the agency's rules to file motions for accelerated decision. One could have been filed at the time of the original filing of the complaint. One has not been filed and one still has not been filed, and I believe it certainly would be untimely to file on at this point two

weeks before the trial, if that is your intent. I am certainly not going to delay the trial for that possibility.

Let me go on. You ask at this conference that I set up some sort of a schedule for the filing of dispositive motions. As I have indicated, we are long past that point.

Issue of respondent's identity should be resolved before the hearing. I agree with you, counsel. You should have had it resolved. There is a motions practice that was available to you, whether it be for default judgment and motion for clarification or motion for disclosure. Counsel can probably think of other motions that would have been available to him to elicit that information.

This causes me a problem, though, apart from the counsel's lack of filing something. I don't intend to go forward with a hearing where we don't have a respondent with an interest in this case. So I would like to discuss that with Mr. Volpe. Who is the party in interest of interest here, Mr. Volpe?

MR. VOLPE: If Your Honor please, the party of interest is Ocean State Building Wrecking & Asbestos Removal, Inc.

JUDGE LOTIS: We are just talking about this. Now,

what are you suggesting, Mr. VOle, can or cannot be done because -- is it that the complaint needs to be, as a formality, amended to remove the name of Ocean States Asbestos Removal, Inc., and change it to Ocean State Building Wrecking & Asbestos Removal Company?

MR. VOLPE: That was my initial suggestion. Again, I may have proceeded in a somewhat informal fashion, because when I realized that the name was incorrect, I simply picked up the phone and contacted Mr. Martinez and said we've got the wrong respondent's name. However, some of the information I assume he had in his file indicated that the name of Ocean State Asbestos Removal was the proper name, and I suggested that he file a motion to amend the respondent.

JUDGE LOTIS: It seems to me it's important, but it's a formality, as well, though. Is there a problem with that, Mr. Martinez?

MR. MARTINEZ: With respect to amending the complaint?

JUDGE LOTIS: Yes, to reflect the change of name, if that is all there is here.

MR. MARTINEZ: Again, Your Honor, on the basis of information I have before me, including the corporate

documentation of rescission of the certificate of incorporation or whatever Mr. Volpe referred to it as, I see no basis for amending at this point.

You will notice in the notification provided for this job the respondent's name that was given was as it is set forth in the complaint. Again, that notification was provided to EPA and I believe to the state agency involved in asbestos matters, and this corporate document is dated after the job had concluded, and it's in the way of a notice of revocation of the certification of incorporation 60 days from the date of this notice for failing to file an annual report. This is dated November '92. Again, this is after this job took place.

With respect to the proper party here, it seemed to me that I had no real basis in fact to amend this and charge any different party with liability with respect to a job that took place during the summer of 1992 at the Roger Williams School.

JUDGE LOTIS: I am not going to try this case for either party and we will leave it at that.

MR. VOLPE: As a result of that position, Your Honor, I filed my motion to amend the answer, so that I could

reserve that issue, because Mr. Martinez would not file the amended complaint.

Again, I am not sure why, because if you look at the named defendant now and you look at his issue of past violations, the past violations cite the corporation that I am saying should be named in the present petition. If he pursues as claim against Ocean State Asbestos Removal, Inc., I don't believe there are any past violations or alleged violations against that particular company. If you look at the past notices, they all went to Ocean State Building Wrecking & Asbestos Removal, Inc., which is another issue.

JUDGE LOTIS: I will take the record as developed and a I find it. I am not resolving that question at this time.

Going on from there, again because I have no definitive motion before me to deal with any of these matters, I wanted to see if anything could be resolved in this conference without such action be taken by either party to resolve these issues.

Let me proceed. I read some more of this pleading and, again, with respect to the identity of the respondent, I have no pleading before me to act upon. All I see is the

difficulty that EPA counsel is having in determining the respondent or being dissatisfied with the respondent's identification to this date.

Again, I am not a litigant here and I am not here to take sides on these questions. I do want to say to both counsel that, now and in the future, counsel have to employ all the legal techniques available to them to clear these issues away well in advance of trial. If you are on the trial date and you haven't cleared these away, to me that's the equivalent of being unprepared for the trial. I am not going to move the trial date because counsel is unprepared. There has been plenty of time to handle these issues well in advance of the hearing.

Let me go on to item number 3 on page 4 of the request for the prehearing. Again, counsel for EPA requests nothing here, suggests there is a problem, identifies the problem, but has not moved timely to resolve it and still has not, so there is nothing for me to act upon. I am not being called upon to act on anything, except to act perhaps as an attorney on behalf of EPA to attempt to elicit information that counsel has not been able to produce or to adduce by otherwise established legal means.

We are right on the eve of trial, and counsel for EPA should have pursued this in a timely fashion and had all the vehicles available to him to do that, and nothing is before me right now to act upon, other than merely the identification that counsel is having in this case. But he hasn't exercised any self-help measures to bring those matters to resolution. This to me is not being prepared for trial.

Again, I would emphasize to both counsel, if I were to entertain matters like this and convert them into motions, I would be, in effect, acting almost as a co-counsel and a litigant, and I am not acting in that capacity at all.

Further, I can't delay trials on the basis of a pleading such as this. There are too many trials here. I have approximately upwards of 180 to 200 cases on my docket at this time, and to extend time for hearings on the grounds that have been set forth in this request for prehearing conference would mean that we would never get to trial. Counsel for the respondents could do likewise.

Since these penalty cases do not require any interest if a penalty is found, it would be always in the best interest of respondents to wait until the eve of trial and to produce similar type motions for delay. To me, there

is absolutely no grounds for acting favorably with respect to the request of EPA counsel.

Had these matters been put forward by clear specific motions, with case law supporting it, the issue could have been joined with an answer and I could have ruled on many of these matters. But essentially what I have now is a situation, unfortunately for the public interest, a case which is not ready for trial. It is not ready for trial, because of a lack of adequate trial preparation.

This is not the only case that I have seen this occur. I have seen it occur in a number of cases. And with the caseload of this agency, we cannot use these types of requests for prehearing conferences and things of this sort to delay the case.

So the hearing will be held and the record will be established and, based on the briefs, I will rule the best I can on the record that both counsel have developed in this case. In the meantime, I would encourage counsel for EPA and Mr. Volpe to attempt to get together to resolve this matter. Forget about legal principle. Look at the dollar amount that is involved and how both parties' interests could somehow be made to coincide and a resolution reached.

The amount of money -- and I am not aware of the respondent's financial situation -- the amount of money, it seems to me, is in an area in which there is room for compromise and a resolution short of trial. The expense associated with the continuation of this proceeding is something that would have to be borne by both sides, and I ask both sides to take that into account in considering a settlement.

Remember that there is much greater likelihood that either side is going to be satisfied with the result in this case, if it is a result that you can design and devise yourself by way of settlement. The chance are that, if left to the litigation process, going through a judge's decision, possibly an appeal from that to the Environmental Appeals Board, taking into consideration that time, that delay, those costs, I would think that a settlement might be very profitable and worthwhile for both sides, and I would ask you to consider that seriously between now and the date of the hearing.

MR. VOLPE: If Your Honor please, I will contact my clients this weekend and I will contact Mr. Martinez on Monday.

JUDGE LOTIS: Let me say this, Mr. Volpe: In light of what I said, I wouldn't be over-confident as to what the conclusion of this case may be, because all I have said is that the record that is going to be developed appears to me to be inadequate, and that inadequacy can work against either side or both sides.

You know, there are certain things that have to be presented in the prehearing exchange, and that can be held against you, if you attempt to introduce evidence that has not been clearly identified in the prehearing exchange. So you have to think about that. The fact that we have an inadequate record doesn't benefit either party here, and it seems to me both stand to lose somewhat, because of this situation.

So I think there will be two good options here. One option is to settle, and the second is to try to clean up this situation of the differences that you are having over the type of record that we are looking at, and try to resolve those before we go to trial. I think either course is better than going to trial based on the record I have.

But from an administrative judicial standpoint, I cannot run a caseload of 180 to 200 cases and delaying cases

such as these. I just have to move forward, and I hope you both understand that.

MR. MARTINEZ: Your Honor, I haven't really responded at all to your assertions with respect to the timing and everything on my motion for a prehearing conference. In defense of that motion and the efforts to limit the issues before you at a hearing and to conserve resources and time involved in that formal process, I must say that the complainant has been attempting diligently to resolve matters in this case.

We had a motion to amend the complaint to work on from this end, and, as you know, motions such as that do involve the input of others in my office, both in the legal and technical management chain here. So I think to the extent that I have been frustrated with the level of information I have been getting from the respondent in relation to some of these other issues, as well as having other issues to work on in the formal proceeding here, I think that the delay in bringing these issues forward is in my mind understandable and should be excusable, in the interest of limiting this matter sufficiently pursuant to the PAR 22 rules.

JUDGE LOTIS: Counsel, I have been a trial attorney

for a number of years and if I received a respondent's memorandum dated October 13th, which has one sentence as to the evidence he is going to adduce, and I find it insufficient, a motion could have been filed within two days or a week. I mean this is inexcusable. There is no excuse for that.

To sit on a one-statement response as to what the witness is going to present and say that you need months to deliberate on that -- we are looking at a two-page document here that is being questioned, and I think a motion to compel should have been forthcoming immediately, giving the company maybe a week to supply it voluntarily, if not a motion to compel, things of that sort. That is basic legal practice.

The chain of command shouldn't stand in the way of filing motions to compel. The agency should allow freedom of trial counsel to pursue legitimate discovery. Certainly that was available to you, along with the other things that you are having problems with. A motion to compel, a motion to disclose, a motion for discovery, whatever you want to call it could have been filed within days of the prehearing exchange that was filed by the respondent.

MR. MARTINEZ: Well, to the extent -- I hear that,

Your Honor -- to the extent that at this point information that is exclusively in the possession of the respondent to which complainant must respond to in this proceeding, I would ask that Your Honor give complainant time to respond to any financial information that is presented at the hearing.

JUDGE LOTIS: I think it is premature. I will rule upon that question when we cross the bridge. I am not going to make any judgments of that sort. We don't know if the case is going to settle, if you are going to reach agreement on some of these areas of controversy at this point, or even if we are going to get a witness on this from Mr. Volpe. So I am not going to cross that bridge until I come to it.

MR. MARTINEZ: Again, the possibility of settling, in the absence of any analysis of his financial --

JUDGE LOTIS: Well, you should have done that, counsel. This is something --

MR. MARTINEZ: -- getting meaningful information on this, and --

JUDGE LOTIS: Counsel, let me interrupt. In informal settlement discussions, you can certainly exchange financial information, if they are willing to provide it. That is part of the settlement discussion. If counsel

doesn't want to provide it, he may not choose to settle and we are going to go to hearing in two weeks. All I am saying is that what you are telling me now are matters that are normally taken up in the course of settlement discussion, and if there is to be a settlement, I assume there would be some free exchange of documents for settlement purposes. If not, the case won't settle and we will go to trial in two weeks.

It is important that counsel pursue these matters that are causing him problems and pursue them at an early stage, and there was plenty of opportunity. These were base problems that arose from the outset that should have been clarified earlier on.

That is all I had. I would encourage you, though, both sides to attempt to settle or at least limit your differences, so that we can get an adequate record established. If the record is inadequate, then I will just have to rule on the basis of what I see and the case law in that situation. Who it may benefit, I don't know. It could cut either way.

That is all I have today. Are there any other matters that need be discussed?

MR. VOLPE: No, I don't believe so, Your Honor.

JUDGE LOTIS: Again, I would urge you to settle, and I think that in the end would be the most profitable result for both sides, given the uncertainty of this situation.

MR. MARTINEZ: Very well.

JUDGE LOTIS: Thank you.

MR. MARTINEZ: Thank you, Your Honor.

MR. VOLPE: Thank you, Your Honor.

[Whereupon, at 1:32 p.m., the prehearing conference in the above-entitled matter was concluded.]