

8/9/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Empire Corporation) Docket No. TSCA-V-C-075-94
)
Respondent.)

ORDER GRANTING ADDITIONAL DISCOVERY

Complainant filed its prehearing exchange on February 12, 1996. Respondent filed its prehearing exchange on May 20, 1996. On July 16, 1996 Complainant moved for additional discovery. Respondent replied on July 25, 1996 by moving for a protective order. Complainant filed a reply to the motion for a protective order, received on August 5, 1996 by the Administrative Law Judge.

The standard for a motion for additional discovery after the prehearing exchanges have been made is stated in the EPA's Consolidated Rules of Practice, 40 CFR Part 22. Additional discovery may only be granted by the presiding officer if he determines:

- (i) That such discovery will not in any way unreasonably delay the proceeding;
- (ii) That the information to be obtained is not otherwise obtainable; and
- (iii) That such information has significant probative value.

40 CFR 22.19(f).


Complainant's motion for additional discovery seeks answers to interrogatories and the production of documents. First, the interrogatories are intended to develop a list of Respondent's employees who were involved in the operation of the transformer in question or compiling and maintaining the records of the transformer. Second, respondent seeks a list of all employees named George during the period from 1980 to 1982 in order to identify the employee formerly believed to be named George Mishiska. Finally, Complainant's request for production of documents seeks financial records and documents relating to the transformer in question for the year 1981.

Complainant's motion for additional discovery through answers to its interrogatories and production of documents is granted. All three requirements of 40 CFR 22.19(f) are met. First, Complainant's discovery request will not unduly delay the proceeding because a hearing in this matter is set for September 10, 1996, approximately one month away. That is ample time for the Respondent to supply the requested information to EPA, especially since the information should be readily available. Second, the information sought by Complainant is not otherwise obtainable because they consist of business records of Respondent, which are under the exclusive control of Respondent.

In addition, the information sought has significant probative value. The employees identified through the interrogatories and called to testify may shed light on the Respondent's practices in handling and operating the transformer in question. Respondent itself raised the issue concerning the veracity of the transformer test document by Sun Ohio of dated March 25, 1981, and of the letter directed to "George Mishiska." If the mysterious employee "George" is identified, he can be called to testify regarding the alleged transaction between Respondent and Sun Ohio Corporation (now known as ENSR Corp.) which appears to be central to Complainant's case.

Respondent's objections to the discovery motion, made in its motion for a protective order, are not persuasive. Respondent alleges that it has already supplied some or all of the information requested to Complainant. If this is so, Respondent need merely point out where the information may be found within its earlier submissions to EPA. Respondent also alleges that Interrogatory Nos. 2 & 3 are unduly burdensome in terms of time and money. However, Mr. Robert Andrews, President of Respondent Empire Corp., stated in his affidavit that he has searched the relevant files for records of a "George Mishiska," indicating that at least some of the information is available. If any particular interrogatory cannot be completely answered or the requested documents cannot be found, Respondent can respond to the best of its ability and set forth the specific reasons why all the requested information is not reasonably available.

Therefore, Complainant's motion for additional discovery is granted. Respondent is directed to reply to Complainant's interrogatories and request for production of documents by August 20, 1996.



Andrew S. Pearlstein
Administrative Law Judge

Dated: August 9, 1996
Washington, D.C.