



**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

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In re:))
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Titan Tire Corporation & Dico, Inc.))
(Southern Iowa Mechanical Superfund Site)) CERCLA § 106(b) Petition No. 10-01
))
CERCLA Administrative Order))
No. CERCLA-07-2009-0006))
_____)

ORDER GRANTING STAY OF PROCEEDINGS

On May 24, 2010, Titan Tire Corporation and Dico, Inc. petitioned the Environmental Appeals Board ("Board") for reimbursement of costs incurred in complying with an administrative order the United States Environmental Protection Agency, Region 7, issued them under section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA), 42 U.S.C. § 9606(a). The order directed Titan Tire and Dico to conduct hazardous substance removal activities at the Southern Iowa Mechanical Superfund Site ("SIM Site") in Ottumwa, Iowa, to abate an "imminent and substantial endangerment" to public health, welfare, or the environment presented by the release and threatened release there of polychlorinated biphenyls ("PCBs").

In their petition to the Board, Titan Tire and Dico assert that they are not liable for response costs at the SIM Site under CERCLA section 107(a), which assigns cleanup liability to, among others, owners and operators of facilities at which hazardous substances are disposed and parties that arrange for the disposal or treatment of hazardous substances they own or possess. *See* CERCLA §§ 106(b)(2)(C), 107(a), 42 U.S.C. §§ 9606(b)(2)(C), 9607(a). Titan Tire and Dico also assert that the Region's actions in ordering the cleanup were arbitrary, capricious, and

not in accordance with law. Because they disclaim liability, and because they have now completed the removal activities specified in the administrative order, Titan Tire and Dico contend they are entitled to reimbursement of their reasonable removal costs, plus interest, under CERCLA section 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A).

On October 26, 2010, the United States Department of Justice (“DOJ”) filed a civil complaint against Titan Tire and Dico in the United States District Court for the Southern District of Iowa, seeking to recover response costs EPA incurred and will incur going forward in connection with the release and threatened release of PCBs at and from the SIM Site. DOJ claims that the United States is entitled to recovery of these response costs because Titan Tire and Dico are, in fact, liable for the costs under section 107(a) of CERCLA, 42 U.S.C. § 9607(a). DOJ also seeks civil penalties and punitive damages, in accordance with CERCLA sections 106 and 107(c)(3), 42 U.S.C. §§ 9606, 9607(c)(3).

On October 28, 2010, the Region filed a motion to stay proceedings in the cost reimbursement matter Titan Tire and Dico filed with the Board. The Region points to the parties’ competing claims of liability and notes that, absent a stay, the Board and the district court will each become involved in adjudicating identical claims. In the Region’s view, the district court provides a superior venue for resolving liability questions because the Federal Rules of Civil Procedure in effect there offer a more expansive discovery process than the section 106(b) guidelines used before the Board. Furthermore, even if the Board were to hold that Titan Tire and Dico are liable for response costs at the SIM Site, the Region would nonetheless be obliged to relitigate liability in the Southern District of Iowa because federal district courts have sole subject matter jurisdiction over section 107(a) claims. This unnecessary duplication of effort, the

Region argues, could be avoided if the Board were to stay the present proceeding until the district court rules on the question of liability. The Region concludes by arguing that Titan Tire and Dico would not be harmed by a stay even if they ultimately prevailed on the question of liability, because section 106(b)(2)(A) provides for payment of interest on a prevailing petitioner's claim.

On November 10, 2010, Titan Tire and Dico filed an opposition to the Region's motion for stay. They contend that a stay of their cost reimbursement action would continue to deprive them of their constitutional rights to due process, cause undue hardship by reducing capital available for business operations, and result in unreasonable and unnecessary delay.

Discussion

Several years ago, the Board was presented with a stay request in another CERCLA section 106(b) case under circumstances similar to those before it today. In that case, the petitioner argued that Congress intended CERCLA's reimbursement mechanism to offer an expeditious expense recovery procedure for innocent parties who, despite their innocence, choose to comply with a section 106(b) administrative order, and that the issuance of a stay would frustrate that objective. Titan Tire and Dico's own arguments echo this plea. The Board expressed sympathy for that position but ultimately decided to grant the stay, holding that where the same issues are subject to adjudication by the same parties in the same time frame but in different forums, "principles of judicial economy strongly dictate in favor of a stay." *In re Raytheon Aircraft Co. (Tri-County Public Airport Site)*, CERCLA § 106(b) Pet. No. 06-01, at 7 (EAB Feb. 1, 2007) (Order Staying Proceedings) (citing *In re W. Suburban Recycling & Energy Ctr., LP*, 6 E.A.D. 692, 702-03 (EAB 1996) (explaining *Colorado River* doctrine, which allows a federal court to decline to exercise jurisdiction for reasons of judicial economy when there is a

parallel state proceeding in which substantially the same parties are litigating substantially the same issues)).

In the present case, as in *Raytheon*, questions of CERCLA section 107(a) liability are central to the outcome of proceedings before both the Board and the district court. The efforts expended by the parties to litigate, and by the two forums to adjudicate, these questions appear likely to be at least partially, if not completely, duplicative. This fact argues in favor of a stay on judicial economy grounds. Moreover, in this case, as in *Raytheon*, the Board does not perceive the issuance of a stay as materially prejudicial to Titan Tire and Dico. The Region correctly observes that prevailing petitioners are awarded interest on “amounts expended from the date of expenditure,” thereby compensating them for any financial disadvantage they experienced as a result of adjudicatory delays. *See* CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A).

The primary difference between this case and *Raytheon* is the filing sequence: here, the Board petition preceded the district court case. This difference does not necessarily supply a reason to deny the stay. As noted in briefing before the Board, the Board lacks authority to grant EPA’s response costs claim under CERCLA section 107(a); only a federal district court has power to do that. CERCLA § 113(b), 42 U.S.C. § 9613(b) (subject matter jurisdiction). Moreover, should Titan Tire and Dico challenge any final decision by the Board, that decision would be reviewable in federal district court. *See id.* §§ 106(b)(2)(B), 113(b), 42 U.S.C. §§ 9606(b)(2)(B), 9613(b); *see also, e.g., Chem-Nuclear Sys., Inc. v. Bush*, 139 F. Supp. 2d 30, 31-45 (D.D.C. 2001) (reviewing appeal of Board decision to deny petition for reimbursement), *aff’d*, 292 F.3d 254 (D.C. Cir. 2002); *A&W Smelters & Refiners, Inc. v. Clinton*, 962 F. Supp.

1232, 1235-40 (N.D. Cal. 1997) (same), *aff'd in part, rev'd in part, & remanded*, 146 F.3d 1107 (9th Cir. 1998).

In such circumstances, a more prudent course for all concerned would be for the Board to step back and allow the federal district court case to proceed. The Board's guidelines for section 106(b) cases generally contemplate such an outcome. See Environmental Appeals Board, *Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions* 6 (Nov. 10, 2004) (“[The Board] may exercise its discretion to stay further action on a petition at any time. The [Board] may, for example, defer consideration of a petition while related settlement discussions or judicial actions are proceeding, or for other good cause.”).

Conclusion

In summary, the Board hereby **GRANTS** the motion to stay proceedings in CERCLA § 106(b) Petition Number 10-01. The stay shall remain in effect until such time as the federal district court renders a decision on the question of Titan Tire and Dico's liability. Within two weeks after the district court's decision is issued, the Region, Titan Tire, and Dico shall submit to the Board (preferably jointly but separately if need be) a status report advising the Board of the substance of the district court's decision and setting forth recommended next steps for orderly resolution of the present appeal.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: December 10, 2010

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Granting Stay of Proceedings** in the matter of *Titan Tire Corp. & Dico, Inc. (Southern Iowa Mechanical Site)*, CERCLA § 106(b) Petition No. 10-01, were sent to the following persons in the manner indicated:

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DEC 10 2010
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Annette Duncan
Secretary