



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



)	
IN THE MATTER OF:)	
)	
TIGER SHIPYARD, INC.)	CERCLA 106(B) PETITION
PORT ALLEN, LOUISIANA)	NO. 96-3
)	
PETITIONER)	
)	

**ORDER GRANTING IN PART TIGER'S MOTION
 FOR PRODUCTION OF IMPEACHING EVIDENCE**

I. BACKGROUND AND PROCEDURAL HISTORY

Tiger Shipyard, Inc. (Tiger) operates a barge cleaning and repair facility on the Mississippi River just north of Port Allen, Louisiana. Based in part on statements allegedly made by former Tiger employees that drums containing rust and scale from the barge cleaning operations were dumped into the river, the United States Environmental Protection Agency, Region 6 (EPA) issued a unilateral administrative order (UAO) to Tiger on March 15, 1995, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). The UAO directed Tiger to locate and remove the suspected drums. Tiger complied with the order, removing 35 drums from the river bottom.

On April 9, 1996, Tiger timely filed a petition under Section 106(b)(2)(A) of CERCLA, 42 U.S.C. § 9606(b)(2)(A), for reimbursement of \$1,402,180.65, the costs it contends it incurred in complying with the UAO. Tiger argues that it is not a liable party of Section

107(a) of CERCLA, 42 U.S.C. § 9607(a), and that Region 6 arbitrarily and capriciously selected the response action. On April 25, 1997, Region 6 responded to the petition for reimbursement. After numerous filings by the Parties, the Environmental Appeals Board (Board) determined that an evidentiary hearing on the issue of Tiger's liability was necessary.¹

Pursuant to the Order of the Board dated April 20, 1998, the undersigned was appointed as the Presiding Officer in this case. The Presiding Officer was charged with conducting an evidentiary hearing and providing recommended findings to the Board on the following issues, namely, whether:

1. Tiger Shipyard, Inc. (Tiger) is liable within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), as an operator of a facility at which hazardous substances were disposed of;
2. Tiger is liable within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), as a person who by contract, agreement or otherwise arranged for disposal of hazardous substances; and
3. Tiger is liable within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4), as a person who accepted any hazardous substances for transport to disposal facilities.

¹The foregoing summary was taken from the Order Granting, in Part, Request for Evidentiary Hearing and Denying Motions to Strike at 1 - 2 (EAB April 2, 1998).

If the Presiding Officer determines that the answer to issues 1, 2, or 3 is yes, the Presiding Officer shall make recommended findings on the following two additional issues, namely, whether:

1. Tiger has a defense to liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), by virtue of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), which protects otherwise liable parties from the acts or omissions of third parties; and

2. Tiger has a defense to liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), by virtue of the "innocent landowner" defense raised by Tiger.

Order Scheduling Evidentiary Hearing at 1 - 2 (EAB April 20, 1998).

Furthermore, the Order provides that:

In conducting the prehearing proceedings and the evidentiary hearing, the Presiding Officer is authorized to make any necessary decisions including decisions regarding the admission of evidence. In so doing, the Presiding Officer shall look for guidance to the Consolidated Rules of Practice set forth at 40 C.F.R. Part 22 (recognizing, of course, that under the present circumstances the burden of establishing that reimbursement is appropriate is on Tiger).

Id. at 2.

On April 6, 1999, Tiger filed a Motion for Production of Impeaching Evidence, seeking an Order directing EPA to produce all evidence which would be used to impeach four potential EPA witnesses [Eric Minor, Thomas Firman, Troy Courville, and Mark Toepfer (either individually or as a representative of TT Barge)]. EPA filed its response on April 20, 1999. This Motion was also discussed at the April 21, 1999 prehearing conference call (which was not

transcribed). For the reasons set forth below, Tiger's Motion is granted in part and denied in part.

II. DISCUSSION

A. STANDARD FOR DISCOVERY

The basis for Tiger's motion is that the U.S. Supreme Court decision in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972) requires production of the requested information. "*Giglio* interprets the Brady rule² to require disclosure of promise made to sole witness linking defendant to crime." *Brison v. Tester*, 1995 U.S. District LEXIS 12515 (E.D. Penn. 1995). However, *Brady* and *Giglio* involved criminal prosecution, while this action is an administrative proceeding involving the reimbursement of money under CERCLA. This difference is significant. "Neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings." *Mister Discount Stockbrokers, Inc. v. Securities and Exchange Commission*, 768 F.2d 875, 878 (7th Cir. 1985). Since Tiger is seeking an Order requiring EPA to produce certain documents, Tiger's motion will be treated as a motion for discovery under EPA's administrative rules of practice.

Initially, it shall be noted that discovery in an administrative hearing is different from federal civil proceedings.

²*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) requires prosecutors to disclose exculpatory evidence to a criminal defendant.

First, there is no constitutional right to pretrial discovery in an administrative proceeding. *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28, 33 (7th Cir. 1977). However, an administrative agency must grant discovery if "a refusal to do so would so prejudice a party as to deny him due process." *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

Administrative agencies, however, are not bound by the standards of the Federal Rules of Civil Procedure and they traditionally enjoy "wide latitude" in fashioning their own rules of procedure. *In the Matter of Katson Brothers, Inc.*, 2 E.A.D. 111, 114 (CJO November 13, 1985); *Oak Tree Farm Dairy, Inc. v. Block*, 544 F.Supp. 1351, 1356 fn. 3 (E.D. N.Y. 1982).

Under the Rules of Practice used as guidance in this proceeding (40 C.F.R. Part 22), the parties were required to comply with a prehearing exchange. 40 C.F.R. § 22.19(b). The Parties' prehearing exchanges were filed on March 15, 1999. Additional discovery is authorized under certain limited circumstances. 40 C.F.R. § 22.19(f) provides the following:

Except as provided by paragraph (b) [prehearing exchange], further discovery under this section shall be permitted only upon determination by the Presiding Officer:

- (i) That such discovery will not in any way unreasonable delay the proceeding;
- (ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

Tiger seeks discovery of the following information against four potential government witnesses, Eric Minor, Thomas Firman, Troy Courville, and Mark Toepfer (individually or as representative of TT Barge):

1. Any notes, memoranda, or summaries of any oral or written statement or proffer made by the witness to a government agent that varies from the witness' testimony.
2. Any memoranda, reports, documents, or oral information which indicates that the witness provided information to the government pursuant to a grant of immunity or any other consideration or promise of consideration given to or on behalf of the witness. This should include, but not be limited to formal or informal, direct or indirect immunity, consideration, leniency, favorable treatment, or recommendations or other assistance with respect to any pending or potential criminal charge, parole, probation, pardon, clemency, civil, or other dispute which the witness may have with the government or with any criminal authority which arguable could reveal an interest, motive, or bias of the witness in favor of the government or against the defense or act as an inducement to testify or to color testimony.
3. All records or information revealing prior felony convictions or guilty verdicts attributable to each witness.

The foregoing discovery request will be reviewed against the discovery standard set forth in 40 C.F.R. § 22.19(f).

B. ANALYSIS

1. Will discovery unreasonable delay the proceeding

Under normal circumstances, Tiger's motion may be considered untimely. However, Tiger could not have filed the motion prior to receiving EPA's prehearing exchange. 40 C.F.R. § 22.19(f); *In the Matter of Richard M. Stern*, Docket No. 5-TSCA-97-007 (August 1, 1997) (discovery motion filed before prehearing exchange denied as premature). The Prehearing Order did not set any specific deadline for filing a motion. Further, Tiger is not seeking an extension of the hearing date (nor would one be granted). Therefore, the first condition for discovery has been met.

2. Is the information not otherwise obtainable

In regard to Items 1 and 2 of Tiger's request, this information relates to EPA's criminal investigation. Thus, this information is solely in possession of EPA, and thus not otherwise obtainable by Tiger. However, the Presiding Officer is not convinced that Tiger met its burden that the information sought by Item 3 (criminal convictions) is not otherwise obtainable by Tiger. Therefore, Tiger's Motion for Production of Impeaching Evidence is denied as to Item 3.

3. Does the information sought have significant probative value

As to the remaining items (Items 1 and 2), the main issue to be resolved is whether the information sought has significant probative

value. "The phrase 'probative value' denotes the tendency of a piece of information to prove a *fact* that is of consequence in the case. See *McCormick on Evidence* § 185, at 542 (3rd Ed. 1984) (evidence that affect the probability that a *fact* is as a party claims to be has probative value)." *In Re Chautauqua Hardware Corporation*, 3 E.A.D. 616, 622 (CJO June 24, 1991) (emphasis in original).

Tiger claims that the credibility of these witnesses is critical to the issue of whether Tiger disposed of the drums in the Mississippi River. In opposing Tiger's request for an evidentiary hearing, EPA has argued that the affidavits of Thomas Firman and Troy Courville, plus additional affidavits that EPA plans to obtain, are sufficient to establish liability. Order Granting, in Part, Request for Evidentiary Hearing and Denying Motions to Strike at 10 - 11 (EAB April 2, 1998). However, one of the reasons Tiger's request for an evidentiary hearing was granted was the need to have the "credibility of witnesses . . . tested in a trial-like forum." *Id.* at 12. Therefore, the information sought may have a tendency to prove a fact that is of consequence in the case (e.g, whether Tiger disposed of drums in the river). Therefore, Tiger's Motion for Production of Impeaching Evidence is granted as to Items 1 and 2.

III. CONCLUSION

For the reasons set forth above, Tiger's Motion for Production of Impeaching Evidence is granted in part and denied in part.

Therefore, it is hereby **ORDERED** that EPA will produce the following evidence for Eric Minor, Thomas Firman, Troy Courville, and Mark Toepfer (individually or as representative of TT Barge):

1. Any notes, memoranda, or summaries of any oral or written statement or proffer made by the witness to a government agent that varies from the witness' testimony; and
2. Any memoranda, reports, documents, or oral information which indicates that the witness provided information to the government pursuant to a grant of immunity or any other consideration or promise of consideration given to or on behalf of the witness. This should include, but not be limited to formal or informal, direct or indirect immunity, consideration, leniency, favorable treatment, or recommendations or other assistance with respect to any pending or potential criminal charge, parole, probation, pardon, clemency, civil, or other dispute which the witness may have with the government or with any criminal authority which arguable could reveal an interest, motive, or bias of the witness in favor of the government or against Tiger or act as an inducement to testify or to color testimony.

If EPA does not have any information that meets the requested information, it shall file a written statement to that effect. EPA shall file two copies of its response with the Presiding Officer, and submit a copy of its response to Tiger at the hearing on Monday, April 26, 1999.

Dated this 21st day of April, 1999.

/S/ _____
Evan L. Pearson
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of April, 1999, I served true and correct copies of the foregoing Order Granting in Part Tiger's Motion for Production of Impeaching Evidence on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Clerk of the Environmental Appeals Board (1103B)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____
AND VIA FAX (504) 582-8583**

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