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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

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WOZNIAK INDUSTRIES, INC.)

Docket No. 5-EPCRA-97-051

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Respondent)

ORDER DENYING COMPLAINANT'S MOTION TO STRIKE
AND GRANTING RESPONDENT'S MOTION TO AMEND ANSWER

On December 10, 1997, Complainant filed a "Motion to Strike The Testimony of Witnesses and Evidence In Respondent's Prehearing Exchange Pertaining To The DeMinimis and Article Exemptions" found at 40 C.F.R. Sections 372.38(a) and 372.38(b).

Complainant based its Motion on the argument that Respondent did not allege the DeMinimis or Article exemptions in its Answer as grounds of defense as required in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules), Part 22, at 40 C.F.R. Section 22.16(b).⁽¹⁾

On December 18, 1997, Respondent filed its "Response To Complainant's Motion To Strike Portions of Respondent's Pre-Hearing Submission and Respondent's Motion To

Amend Answer".

Attached to its submission was a Notice of Filing prehearing exchange amendments. Respondent argues that its Answer, which generally denied the allegations contained in the Complaint, met the requirements of Section 22.15(b). With regard to the exemptions, Respondent contends that the inapplicability of these exemptions is part of Complainant's burden of proof. Respondent thereby seeks to amend its Answer to paragraphs 21,28,35,42,49, and 56 of the Complaint to reflect Respondent's anticipated witness and testimony provided in its pre-hearing submission to support its claim of exemption under Sections 372.38(a), and 372.38(b).

Complainant's Motion to Strike Respondent's claim of exemption for reason that it was not provided in the Answer is without merit. Respondent's subsequent defense of the DeMinimis and Article exemptions is permitted absent a showing of insufficient notice or prejudice to the Complainant. While Respondent could have raised the exemptions in its Answer, Complainant has not demonstrated that any prejudice will result from the granting of Respondent's Motion to Amend its Answer.

In addition to the Part 22 Rules which allow the Answer to be amended upon motion granted by the Presiding Officer, Rule 15(a) of the Federal Rules states that leave to amend "shall be freely given when justice so requires". The Federal Rules accept the principle that the purpose of pleading is to facilitate a proper discussion of the controversy on the merits. Conley v. Givson, 355 U.S. 41 (1957).

In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court held that leave to amend should be freely given in the absence of a finding of

"Undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment or futility of the amendment, etc..."

Clearly, Respondent's claim of exemption in this case falls short of any dilatory motive on its part. Moreover, its new affirmative defense is plausible enough to warrant the amendment of its Answer. As the hearing in this case has not yet been scheduled, the Complainant will be afforded more than sufficient time to prepare its arguments on this issue.

Should Respondent decide to claim exemption under 40 C.F.R. Sections 372.38(a) and 372.38(b), at the hearing, it shall bear the burden of proof, that it qualifies under these exemptions.

Pursuant to Part 22.24 of the Rules of Practice, "[f]ollowing the establishment of a prima facie case, respondent shall have the burden of presenting and going forward with any defense to the allegations set forth in the complaint." See, In the Matter of Standard of Scrap Metal Co., Docket No. TSCA-V-C-288, TSCA Appeal No.67-4 (1990). Thus Respondent will have both the burden of production and persuasion to prove that it qualifies under the DeMinimis and the Article exemptions of Sections 372.38(a) and 372.38(b).

ACCORDINGLY, Complainant's Motion to Strike is DENIED and Respondent's Motion to Amend Answer is GRANTED.

Stephen J. McGuire

Administrative Law Judge

Date: February 4, 1998
Washington, D.C.

1. Complainant incorrectly cites as support for its argument, to 40 C.F.R. Section 22.16(b). The correct citation is 40 C.F.R. Section 22.15(b), entitled "Answer to the Complaint".

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Last updated on March 24, 2014