

10/6

# TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

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In the Matter of:	:	
	:	
OCEAN STATE ASBESTOS REMOVAL,	:	
INCORPORATED,	:	Docket No. CAA-I-93-1054
	:	
Respondent.	:	
	:	
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TELEPHONIC RULING ON COMPLAINT'S MOTIONS TO COMPEL  
PRODUCTION AND TO CONFORM THE PLEADINGS

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October 6, 1994

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TELEPHONIC RULING ON COMPLAINANT'S MOTIONS TO COMPEL  
 PRODUCTION AND TO CONFORM THE PLEADINGS

Environmental Protection  
 Agency  
 Room 2107  
 401 M Street, Southwest  
 Washington, D.C.

Thursday, October 6, 1994

The telephonic hearing in the above-entitled  
 matter convened, pursuant to notice, at 10:30 a.m.

BEFORE:

JON LOTIS, Administrative Law Judge

## APPEARANCES OF COUNSEL:

On Behalf of the Complainant:

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On Behalf of the Respondent:

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(401) 295-5323

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P R O C E E D I N G S

JUDGE LOTIS: We are on the record.

If you would just repeat your name for purposes of the record, so that the transcript will be clear as to who was on this telephone conference call.

MR. MARTINEZ: For complainant, Hugh Martinez, EPA Region I.

MR. VOLPE: For the respondent, Fred J. Volpe, [spelling] V-o-l-p-e.

JUDGE LOTIS: Thank you.

Today, I'd like to rule on two pleadings that have been filed by the complainant, the complainant's Motion to Compel production and also the complainant's motion to conform to pleadings. There has been a response filed to each of those and both motions are still outstanding. So, I'd like to rule on those today.

The issues are joined, I believe, from the pleadings. So, I don't believe there is need for further argument with respect to them.

This case has somewhat of a history and I'd like to break it down just for clarity and for the subsequent readers of this transcript of this trial to see how this all

began. I will begin with what I call chapter one, how it all began.

This case began with the filing of a complaint by the EPA in March of 1993. In October, 1993, the respondent filed its prehearing exchange. As I tell this story, I'm only bringing out the facts that bear on the motions before me and would be of some interest in lending an appropriate backdrop to what I am about to say today.

In November of 1993, I set the matter for hearing, which was to commence on February 17, 1994. In January, 1994, EPA filed a motion for a prehearing conference. In its motion, the EPA expressed dissatisfaction with the lack of information provided in the respondent's prehearing exchange. The EPA requested a prehearing conference to discuss those matters. I granted the motion for the prehearing conference and convened that conference on February 4, 1994.

At that conference, I expressed dismay that EPA had waited until the eve of the trial date to raise these issues. I also expressed dissatisfaction with the fact that the EPA did not to that date file a motion with me to compel the production of the information that was missing.

Instead, EPA, the prosecutor of the complaint, asked the judge to sort these matters out for it during the prehearing conference. As the transcript of that prehearing conference shows, I refused to do so for a number of reasons.

First, there was no Motion to Compel before me. Second, in the absence of a motion, the rule of the judge is not to carry the EPA's burden in prosecuting its case nor is it the judge's burden to carry that burden of the respondent. I'm here to resolve disputes not to carry either attorney's case. Third, coming on the eve of the trial of the case, I found that EPA's action was untimely in pursuing this matter.

There comes a point when you are ready to go to trial. We go and I decide the case on the merits. If one party's evidence is lacking or does not carry sufficient weight, I would not perhaps decide in that party's favor. It is a simple matter of trial practice.

Now, we get to chapter two, which I call postponed because of illness.

The hearing did not take place as I had scheduled. First because of a medical emergency on the complainant's side of the case, the February 17th hearing was postponed

until May 25th. In May, the day before the trial was to begin, the hearing again had to be postponed because of an illness on the respondent's side of the case. A new trial date has not yet been set.

So, we are at chapter three: Now what?

On July 20, 1994, EPA filed the present Motion to Compel, which is the subject of today's conference primarily. I'd like to refer to EPA's pleading.

MR. MARTINEZ: Hello.

JUDGE LOTIS: Yes, I'm still here.

MR. MARTINEZ: Okay.

JUDGE LOTIS: I'm still --

MR. MARTINEZ: I heard a click. I wasn't sure if we had been disconnected.

JUDGE LOTIS: Oh, no.

[Pause]

JUDGE LOTIS: Just looking at page three of the Motion to Compel, the top paragraph, let me quote from it. I think it is accurate. It is a very accurate portrayal of this situation.

"Respondent's prehearing memorandum contains a general reference to documents respondent may submit into

evidence, namely, records kept in the ordinary course of business by the National Weather Bureau relative to weather conditions at the time of the alleged violation and newspaper articles from the "Journal-Bulletin," Providence, Rhode Island. Respondent filed no specific identifiable documentary evidence along with its prehearing memorandum."

I agree with EPA. That appears clear.

Further in the Motion to Compel, on page four, the EPA -- and I'll accurately paraphrase this. What the prehearing order said, my prehearing order, on the bottom of page four and I'll quote that. The quote is: "The prehearing order requires each party to submit the names of the expert and other witnesses intended to be called at the hearing with a brief narrative summary of their expected testimony and copies of all documents and the exhibits to be introduced.

"The prehearing order also requires respondent, to the extent it intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on the respondent's ability to continue in business, to furnish copies of respondent's statement of financial position or in lieu thereof, copies of



respondent's federal tax return for the latest fiscal year."

Then the complainant goes on to say that, in its view -- and I'll refer to page five and I'll refer to this language approvingly again, at the bottom of page five and it is June 8, 1993, the Amended Answer and it is the February 7, 1994 Answer to the Amended Complaint.

"The respondent claims that the proper corporate name of respondent is Ocean State Building, Wrecking and Asbestos Removal Company, Inc., rather than Ocean State Asbestos Removal, Inc., as alleged in the complaint. The respondent also asserts that the proposed civil penalty is inappropriate. However, despite raising such significant claims, respondent's prehearing memorandum fails to attach or reference any documentary or testamentary evidence relevant to a determination of the real party in interest in this case.

"Respondent's prehearing memorandum also fails to summarize the expected testimony of respondent's witness on financial matters and to attach or reference any documentary evidence relevant to a determination of respondent's financial condition and an appropriate penalty in this case."

Then going on to page seven of the motion, at the top of page seven, which I concur with. "Based on the above, if the respondent intends to introduce evidence at a hearing relating to its allegations concerning respondent's name and financial condition, respondent has violated the prehearing order and the requirements set forth in the consolidated rules."

The complainant then goes on to request that respondent be compelled to comply with my prehearing order and supplement its prehearing exchange or, in the alternative, to be prohibited from introducing any evidence about which inadequate notice was provided to the complainant.

Now, up to this point, I did not have a Motion to Compel before me. I believe that the EPA has finally got it this time and they have taken the appropriate procedural tool. I find the status of this case different than what it was in February. I am, because of the workload and because of the parties' own schedules, unable to establish an immediate hearing date to this. So, it appears to me, there is adequate time for the respondent, if it chooses to, to amend its prehearing exchange to follow the directives I set

forth in the prehearing order.

Of course, this was always the case even prior to the ruling here today, except that respondent undertook a tremendous risk that, had we gone forth with the hearing as scheduled and their failing to present this type of material as they were required by the prehearing order, they could be subject to a motion filed by the EPA for a directed verdict because of a failure to present witnesses by the respondent on the issues it deemed appropriate. So, as it stands now, I'm giving the company, the respondent the option.

They either comply with the prehearing order or run the risk, as they always have in the past, to go to trial with only that evidence put on by EPA and that evidence that it has identified and those witnesses it has identified in its prehearing exchange. I will permit the respondent an opportunity to amend its prehearing exchange to comply with the directives of my prehearing order. That is in terms of identification of witnesses, narrative statements of the summary of their testimony and any proposed exhibits you intend to introduce.

If that is not forthcoming and we still go to trial, you bear the risks that are associated with that.

EPA still has a burden of proof related to many of these matters, but I'm going to have to view the evidence as it comes in and I will not accept evidence at the time of the trial that has not been identified in the prehearing exchange.

So, with that in mind, I will permit the respondent an opportunity to file an amended prehearing exchange and I will permit them to file that amended prehearing exchange on or before November 18, 1994. That would include, of course, the submission, the names of the experts and other witnesses it intends to call at the hearing, with the brief narrative summary of their expected testimony and copies of all documents and exhibits they intend to introduce. Once we get to trial, additional material will not be permitted, barring exception circumstances.

This is perfectly consistent with the -- not that I am relying on it -- but the rules of EPA in this regard in terms of the prehearing exchange, preceded the change in the Federal Rules of Civil Procedure, Rule 26, which makes mandatory the submission of this type of information. It is a matter of fair notice to the parties and it is expected in

EPA proceedings. It predates the Rule 26 change.

Also, as I indicated in the prehearing order, if respondent intends to take a position it is unable to pay or that will have an adverse effect on its ability to continue in business, it should bring in whatever information it chooses to during the prehearing exchange portion of the case as to the defense it would be making. This is only fair trial practice.

If it does not amend its prehearing exchange to present this type of material, then it runs the associated risks of going to trial without it. Once we get to the trial date, the evidence will not be received.

If the prehearing exchange is amended by the respondent on November 18th or before November 18th, EPA may file a response to that amended prehearing exchange on or before December 15th.

Also, there is pending before me the complainant's motion to conform to pleadings. I also have received respondent's answer to that. I will grant the motion. There is no prejudice to the company, the respondent. Respondent itself has admitted the real party in interest might be another party than that was named in the complaint.

So, I will grant the motion and add the name Ocean State Building, Wrecking and Asbestos Removal Company, Inc. as a party to this proceeding. I will deem this motion to conform, a motion to in effect amend the complaint to conform with the pleadings and the complaint will be deemed so amended.

Are there any other matters we need to discuss today?

[No response]

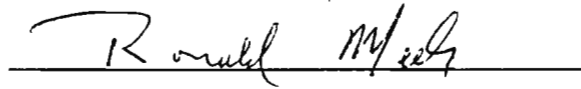
JUDGE LOTIS: Hearing none, this session will be adjourned.

Thank you both very much.

[Whereupon, at 10:45 a.m., the proceedings were concluded.]

**C E R T I F I C A T E**

I, **RONALD MEEK**, the Official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.

A handwritten signature in cursive script, reading "Ronald Meek", is written above a horizontal line.

RONALD MEEK