

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
B & R Oil Company, Inc.,) [UST] Docket No. RUST-007-91
)
Respondent)

ORDER DENYING MOTION TO REOPEN HEARING

An initial decision was issued in this matter on September 4, 1997. Respondent B&R Oil Company, Inc. ("B&R Oil"), was found liable for the alleged violation and ordered to pay a civil penalty. Thereafter, B&R Oil filed an appeal of this decision with the Environmental Appeals Board. Subsequent to this appeal, B&R Oil filed the subject Motion to Reopen Hearing, pursuant to Rule 28 of the Consolidated Rules of Procedure. 40 C.F.R. 22.28.⁽¹⁾ B&R Oil's motion to reopen is opposed by the U.S. Environmental Protection Agency ("EPA").

In requesting that this case be reopened, B&R Oil relies upon the affidavit of Mark Dobson, an employee of respondent, and a memorandum from the Michigan Department of Environmental Quality, dated September 9, 1996. B&R Oil asserts that these documents constitute "new evidence" bearing upon its defense that EPA unlawfully singled it out for prosecution. EPA responds that B&R Oil's motion to reopen is untimely. Complainant also argues that the post-decision documents submitted by respondent are not relevant and otherwise are an inadequate basis for the reopening of this matter.

EPA is wrong in arguing that the motion to reopen was untimely filed. Considering the date appearing in the motion's certificate of service, and taking into account the time deadlines specified in Section 22.28 (Motion to reopen a hearing), Section 22.16 (Motions), and Section 22.05(b)(2) (Service of documents other than complaint, rulings, orders, and decisions), B&R Oil's motion to reopen was filed on time.

Nonetheless, EPA is correct in arguing that the documents submitted by respondent are not relevant to the violation that was at issue in this case and would not, in any event, change this court's decision on matters of liability and penalty. First, the post-decision memorandum of the Michigan Department of Environmental Quality refers to State enforcement strategy in effect several years after the events which gave rise to the EPA enforcement action which is the subject of this case. This document, therefore, does not tend to show that EPA unlawfully singled out B&R Oil's operation for prosecution.

Moreover, even if the events referred to in this Michigan Department of Environmental Quaility document were contemporaneous to those in the instant case, the documents relied upon by respondent still do not show that EPA exceeded its lawful regulatory enforcement authority in proceeding against B&R Oil, an Indiana corporation, under the facts established in this case. The information which B&R Oil cites as new evidence does not in any way change the fact that in proceeding as it did in this case, EPA did not abuse its prosecutorial discretion.

Accordingly, B&R Oil's motion to reopen the hearing is *denied*.

Carl C. Charneski

Administrative Law Judge

Issued: October 23, 1997

Washington, D.C.

1. B&R Oil failed, however, to serve this motion on the presiding judge as required by Rule 28.