

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In THE MATTER OF)	
)	
ENSCO, INC.,)	Docket Nos. TSCA-VI-591C &
)	TSCA-VI-532C
Respondent)	

ORDER

This matter, arising under the Toxic Substances Control Act, 15 U.S.C. § 2601, et seq. (TSCA), deals with alleged violations of regulations pertaining to polychlorinated biphenyls (PCBs).

On September 30, 1993¹, respondent filed a motion to strike or set rebuttal deadline. The motion is recited in its entirety:

Comes the Respondent and moves the Court to either:

1. Set an appropriate rebuttal submittal deadline for Respondent, or
2. Strike Complainant's Amended Pre-Hearing Exchange and order Complainant to file a new Pre-Hearing Exchange document limited in scope to issues directly related to VI-591C which were not available to Complainant on July 31, 1992.

From this cryptic filing, the undersigned Administrative Law Judge (ALJ) takes it to mean that respondent is unhappy with complainant's filing of an amended prehearing exchange on September 17. Respondent now wants to have an appropriate rebuttal submittal deadline set for its response to complainant's submission, or in the alternative, to strike complainant's

¹ Unless otherwise indicated, all dates referred to in this Order are for the 1993 calendar year.

submission of its amended prehearing exchange and have the ALJ order the filing of a new prehearing exchange but limiting it in scope to those issues directly related to case number VI-591C² which were not available to complainant on July 31, 1992³.

On October 5, complainant filed a response to respondent's above quoted motion stating, in pertinent part, that it informed the ALJ and respondent in "three prior status reports that i[t] intended to list additional exhibits and add additional witnesses to Docket No. VI-532C."⁴ Thus, respondent was on notice concerning complainant's action.

Further, complainant urges that objections to proposed witnesses, testimony, and exhibits should not be entertained in connection with a prehearing exchange, and that the proper time to object to these witnesses and exhibits is at the hearing.

Complainant asserts finally that it has no objection to the ALJ allowing respondent an opportunity to file a rebuttal prehearing exchange, if it also allows complainant the option to file a response.

On October 15, respondent filed a reply to complainant's response to respondent's motion to strike or set rebuttal deadline. Attached to this reply was a cover letter requesting that this document be filed in spite of the ALJ's order issued August 12

² The two related cases VI-591C and VI-532C were consolidated by the undersigned ALJ on August 12.

³ Date of the original prehearing exchange submittal in the VI-532C case.

⁴ Emphasis eliminated.

which stated, in significant part, as follows:

13. [U]nless ordered otherwise, there shall be no further pleadings beyond the response of any party.

This order, in part, directed the parties to file their prehearing exchange materials by September 17. Complainant submitted its prehearing exchange on this date. It is this submission which is the subject of respondent's motion.

On the September 17 deadline for filing a prehearing exchange in the newly consolidated matter, respondent filed a one page letter which states, in pertinent part, "Respondent has nothing to add to the previously submitted pre-hearing exchange materials at this time". It was only after seeing complainant's submission that respondent decided that it wanted to either "rebut" the submissions contained in complainant's prehearing exchange or have the latter's submission stricken and order it to file a new submission limiting the scope of the materials contained therein.

The ALJ will first deal with respondent's October 15 filing of a reply to complainant's response to respondent's motion to strike or set rebuttal deadline. This submission is rejected. The August 12 order makes it abundantly clear that, unless otherwise ordered, there shall be no further pleadings beyond the response of any party. In this matter, respondent had every opportunity to present arguments and supporting materials in their original, one page submission. Respondent was fully aware that it would get "only one bite at the apple." It would be unfair to complainant to allow for consideration of respondent's reply.

The ALJ next looks to respondent's original submission in this case. This motion asks for an appropriate rebuttal deadline to be set in which respondent can reply to complainant's prehearing exchange submissions. In the alternative, respondent asks that complainant's prehearing exchange be stricken from the record and complainant ordered to file a new prehearing exchange limited in scope to issues directly related to case VI-591C which were not previously available to complainant at the time of their initial prehearing exchange submittal. Both of these requests are rejected. Respondent had every opportunity to prepare and present a prehearing exchange submission for the September 17 deadline. Respondent declined this opportunity. Any attempt to do so now is inappropriate and rejected as such. There are no rebuttals in prehearing exchanges. A prehearing exchange is designed to expedite the disposition of a proceeding by providing to the opposing party the following:

(1) The names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits which each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the presiding officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer.⁵

⁵ Consolidated Rules of Practice, 40 CFR § 22.19(b).

It is important to note that respondent has already filed a prehearing exchange in this matter dated July 30, 1992. When given an opportunity to add to this original submission, respondent declined. Respondent's mock surprise at seeing complainant submit a prehearing exchange on September 17 is insufficient to allow it to either "reply" to complainant's submission or to have complainant's submission "stricken" and have the ALJ order a more limited submission. Complainant asserts correctly that it has informed all involved that once consolidation was complete that it wished to file an amended prehearing exchange listing additional witnesses and exhibits for Case No. VI-532C as well as for identifying exhibits and witnesses for Case No. VI-591C. These notifications were made in the status reports filed by complainant on May 26, June 28 and July 26. In addition the ALJ's order of August 12 does not limit the scope of these submissions to merely the VI-591C case.

IT IS ORDERED that:

1. Respondent's motion to strike or set a rebuttal deadline be **DENIED**.
2. The parties shall, to the extent not done so already, engage in good faith efforts to settle this matter.

3. Complainant shall arrange with the staff of the ALJ for a telephone conference for the purpose of setting a hearing date if this matter is not settled within 30 days from the service date of this order.

Frank W. Vanderheyden

Frank W. Vanderheyden
Administrative Law Judge

Dated: *April 19, 1994*

IN THE MATTER OF ENSCO, INC., Respondent
TSCA Docket Nos. VI-532C and VI-591C

Certificate of Service

I certify that the foregoing Order, dated 4/19/94, was sent this day in the following manner to the below addresses.

Original by Regular Mail to: Ms. Lorena S. Vaughn
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region VI
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Copy by Regular Mail to:

Attorney for Complainant: Evan Pearson, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region VI
1445 Ross Avenue,
Dallas, TX 75202-2733

Attorney for Respondent: Willis D. Cronkhite, III, Esquire
Cronkhite Law Firm
724 Garland - Cantrell at State
P.O. Box 1300
Little Rock, AR 72203

Marion Walzel
Marion Walzel
Legal Staff Assistant

Dated: April 20, 1994