

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
RUSSELL LEFEBER d/b/a ) DOCKET NO. CAA-VII-97-100  
LEFEBER REFRIGERATION, )  
 )  
RESPONDENT )

ORDER ON MOTION TO EXCLUDE COUNSEL FOR

COMPLAINANT AS RESPONDENT'S WITNESS

ORDER SCHEDULING HEARING

This matter arises under the authority of Section 113(d)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d)(1). The parties have filed their prehearing exchange in this matter pursuant to the undersigned's Prehearing Order entered on February 26, 1997. As a result of the prehearing exchange, the Complainant has filed a "Motion for an Order to Exclude Counsel for Complainant as Respondent's Witness." The Respondent has not responded to the Complainant's motion. See Section 22.16(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice").

In its prehearing exchange, the Respondent listed Complainant's counsel, Henry F. Rompage, as a proposed witness for the Respondent. According to the Respondent, Mr. Rompage would be called to testify "regarding the Respondent's repeated attempts to comply with the EPA requirements" and "the application of the Clean Air Act reporting requirements to second generation nonozone depleting refrigerants."

The Complainant, in its motion, argues that the Respondent is attempting to disqualify Complainant's counsel, thereby denying the Complainant of its choice of legal representation. The

Complainant asserts that the Respondent has provided no justification for such action and has set forth no necessity for Mr. Rompage to testify. In this regard, the Complainant maintains that the Respondent has not demonstrated that any information is not available from other witnesses or that the testimony would not be duplicative of the other proposed witnesses.

The Complainant's motion is **Granted**, and Complainant's counsel, Mr. Rompage, is ordered excluded as Respondent's proposed witness. As argued in the Complainant's unopposed motion, the Respondent has not demonstrated the relevancy of Mr. Rompage's testimony or that his proposed testimony as a witness for the Respondent could not be obtained from another witness. See Shelton v. American Motors Corp., 805 F. 2nd 1323, 1327 (8th Cir. 1986); see also Ross v. Great Atlantic and Pacific Tea Co., 447 F. Supp. 406, 408 (S.D.N.Y. 1978). The Complainant correctly points out that the Respondent's proposed witness, Russell Lefeber, will be able to testify to the Respondent's alleged "repeated attempts to comply with the EPA requirements" and that Mr. Lefeber's testimony on this issue is the best evidence. See Sections 22.22(a) and (b) of the Rules of Practice. Moreover, I note that Mr. Rompage's testimony is not needed to establish the governing statutes or federal regulations and that the Respondent's allegations regarding the "reporting regulations", as that term is characterized by the Respondent, if at all relevant, are more appropriately raised as a legal argument.

The Complainant, in its rebuttal prehearing exchange, objects to the appearance of Michael McManigal as Respondent's proposed witness on the grounds that the nature, extent, and relevance of his testimony cannot be determined from the description of his proposed testimony in the Respondent's prehearing exchange. I agree. The proposed testimony of Mr. McManigal regarding the alleged "poor, unfair, and discourteous manner in which he was treated by the same officials of the Environmental Protection Agency (EPA) as are involved in the present process" is not relevant to the issues before me and any possible sanction for such alleged mistreatment is not within the scope of my authority. Therefore, unless the prehearing exchange is supplemented to demonstrate the relevancy of the proposed testimony of Mr. McManigal, he may not be called as a witness at the hearing.

The Complainant also requests that the Respondent be required to supplement its prehearing exchange with complete federal tax returns, including all schedules, for the last three reporting

years, or that the Respondent's testimony as to financial condition be excluded for failure to comply with the Prehearing Order. While I will not exclude the Respondent's testimony as to his financial condition, this testimony will be accorded appropriate probative value in view of the scarcity of corroborating documents, such as complete tax returns. The penalty policy puts the burden of demonstrating inability to pay upon the Respondent. If the Respondent fails to provide sufficient information, this factor should be disregarded. In re House Analysis & Associates & Fred Powell, CAA Appeal No. 93-1 (EAB, Feb. 2, 1993).

The supplements specified above or any desired supplements to the prehearing exchange shall be filed on or before **August 15, 1997**.

Further, the parties are advised that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the other party and to permit the issuance of an order on the motion before the deadlines set by this order or any subsequent order. Section 22.16(b) of the Rules of Practice allows a 10-day period for responses to motions and Section 22.07(c) provides for an additional 5 days to be added thereto when the motion is served by mail.

The file does not reflect that any settlement negotiations have been held in this matter. United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18(a), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding. However, the pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failure to comply with the requirements or schedule set forth in this Order. The parties are hereby directed to hold a settlement conference on this matter on or before **September 12, 1997**, to attempt to reach an amicable resolution of this matter. See Section 22.04(c)(8) of the Rules of Practice. The Complainant shall file a status report regarding such conference and the status of settlement on or before **September 26, 1997**.

In the event the parties have failed to reach a settlement by that date, they shall strictly comply with the requirements of this order and prepare for a hearing. In connection therewith, on or before **October 17, 1997**, the parties shall file a joint set of stipulated facts, exhibits, and testimony. The time

allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

The Hearing in this matter will be held beginning at 9:30 a.m. on Wednesday, **November 5, 1997**, in Harlan, Iowa, continuing if necessary on November 6, 1997. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

original signed by undersigned

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Barbara A. Gunning

Administrative Law Judge

Dated: 7-09-97

Washington, DC