

6/20/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Patrick J. Neman, d/b/a)
The Main Exchange) Docket No. TSCA-V-C-024-88
)
)
Respondent)

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND THE COMPLAINT,
DENYING RESPONDENT'S MOTION TO DISMISS THE ORIGINAL COMPLAINT
AND THE AMENDED COMPLAINT

On August 26, 1994, the Environmental Appeals Board (EAB) vacated the default order, issued by the ALJ on July 9, 1993, and remanded the matter for further proceedings.¹ The EAB concluded that service of the amended complaint on which the default order was based was never accomplished and that EPA never had jurisdiction over Neman with respect to the amended complaint.

¹ In re: Patrick J. Neman, d/b/a The Main Exchange, TSCA Appeal No. 93-3, (August 26, 1994). The decision by the EAB also denied Respondent's request that the enforcement proceedings be dismissed on the grounds that the "subject matter" of the proceedings had been "concluded" by the United States Bankruptcy Court. The EAB concluded that the proceedings were not stayed when Respondent filed for bankruptcy and that the Bankruptcy Court did not resolve the subject matter of the proceedings.

The facts in this matter are delineated in the remand order of the EAB and will not be recited here except where necessary to clarify the bases for this order.

Subsequent to the EAB's decision, I directed the parties to file their views and recommendations as to further proceedings on or before November 25, 1994. The order directed the parties to include their positions on the issue of whether the initial complaint had been superseded. In response to this order, Complainant filed a Motion for Leave to Amend the Complaint, which addressed the issue of whether the original complaint was superseded, and a second amended complaint. Respondent also filed a response to the ALJ's order which included its views and recommendations on this issue.

On December 7, 1994, Respondent filed a motion to dismiss the original complaint and the first amended complaint, and an objection to Complainant's motion for leave to file a second amended complaint. On January 5, 1995, Complainant filed a response in opposition to Respondent's motion to dismiss the original complaint and the first amended complaint, and to Respondent's objection to Complainant's motion for leave to amend the complaint.

DISCUSSION

In its response to the question concerning the status of the original complaint, Respondent asserts that the decision in Washer v. Bullitt, 110 U.S. 558, 28 L. Ed. 249 (1884), established the controlling legal principle on this issue which states that when an amended complaint is filed, the original complaint is superseded and is rendered of no legal effect. Thus, Respondent argues, Complainant's original complaint is superseded and Complainant's case must rise or fall on the status of the amended complaint. Respondent then asserts that, since the amended complaint was not served within the time limits for service set out in Rule 4(m)² of the Federal Rules of Civil Procedure (FRCP), it should be dismissed.

Complainant, in its response to the order of October 14, 1994, and its January 5, 1995 response to Respondent's motion to dismiss, cites International Controls Corp. v. Vesco & Co. 556 F.2d 665 (2nd Cir., 1977), cert. denied, 434 U.S. 1014, as the controlling law on the issue, and based on the ruling in Vesco, asserts that the original complaint remains in effect. Complainant also claims that

² FRCP Rule 4(m) states:

Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

the second amended complaint is necessary to update the original complaint to add violations which occurred subsequently to the original complaint and to eliminate one count and portions of other counts for which the statute of limitations has run. The second amended complaint also includes a larger proposed penalty than the original complaint, but smaller than the first amended complaint which was never served.

The parties paint significantly different pictures of their actions and the efforts made to serve (or prevent from service) the first amended complaint.³ Respondent claims that there were no obstacles to serving the amended complaint, that he was at all times a resident of Akron, Ohio with listings in the phone book for his home and office, and was listed with the Courts of Ohio as to his current business address. Complainant, on the other hand, recites a number of actions by Respondent which allegedly were intended to delay the proceedings.⁴ Complainant points out that Respondent moved without informing the court or EPA of his new

³ Service of a complaint is completed when the return receipt is signed, 40 C.F.R. § 22.07(c).

⁴ Complainant cites, among other things, the cancellation of the original hearing when settlement seemed likely, Respondent's bankruptcy petition and his failure to propose a plan for reorganization, the failed agreement to settle the TSCA matter, and conversion of Respondent's bankruptcy petition from Chapter 11 to Chapter 7.

address.⁵ Complainant also mailed all filings to John Guy, Respondent's bankruptcy attorney.⁶

There is nothing in the record that indicates that Respondent's actions in this matter were taken with the intent to delay or impede the progress of this action and the service of pleadings. Bankruptcy petitions and decisions regarding settlement of legal actions are within the prerogatives of parties and have legitimate purposes. Absent clear evidence to the contrary, the ALJ will not ascribe nefarious intentions to such actions. Nevertheless, it is clear that Respondent's actions, whatever their intent, resulted in this action being delayed. Furthermore, it is reasonable to conclude that, had Respondent informed EPA of his change of address, the amended complaint would have been properly served, and this matter would have proceeded more expeditiously.

Complainant's Motion for Leave to Amend the Complaint presents a "different context," as alluded to by the EAB in its Remand Order, for consideration of the consequences of Respondent's failure to notify the Presiding Officer and EPA of his change of address as required by 40 C.F.R. § 22.05(c)(4). While such failure may be of little consequence in the context of a default

⁵ In its Remand Order, the EAB concluded that, in light of the dramatic difference between the original complaint and the amended complaint, Respondent's failure to notify Complainant of his change of address was of no consequence in this context. The EAB left open the significance of such failure in a different context.

⁶ The EAB held that, because there was no indication in the record that Mr. Guy was authorized to represent Respondent in the TSCA proceedings, mailing or otherwise serving filings on Mr. Guy did not constitute service on Respondent.

proceeding, it carries greater weight where, as here, Complainant merely seeks to amend its complaint.

As pointed out above, Respondent cites Washer v. Bullitt, supra, as establishing the principle that when an amended complaint is filed, the initial complaint is superseded. Respondent contends that Vesco, supra, carved out a narrow exception to this rule that only applies where a plaintiff has had great difficulty in serving its original complaint, and which is not applicable in this action. Complainant, on the other hand, asserts that the Vesco decision, rather than providing a narrow exception to the general rule, reiterated the rule in the Second Circuit that "after the filing of [an initial] complaint, the action remains in an inchoate state until service is completed. . ." Vesco, Id. at 669, citing, Messenger v. United States, 231 F.2d 328, 329 (2d Cir. 1956). The court further stated,

This rule implies that an amended complaint, at least one that must be personally served pursuant to Rule 5(a), is also in an "inchoate state" until served.

Id. Based on this reasoning, it is clear that in the present circumstances, the first amended complaint, which was not properly served, did not supersede the original complaint which remains in effect. Respondent's Motion to Dismiss the Original Complaint is, therefore, denied.

With regard to the motion for leave to file a second amended complaint, Complainant has delineated numerous reasons for the

necessity therefor⁷ and has given a reasonable explanation for the lengthy delays in this matter. Respondent, on the other hand, has not shown that he will be unduly prejudiced by Complainant's request to amend the complaint, and, as has been pointed out, Respondent bares much of the responsibility for the delays in this matter.⁸

Respondent relies heavily upon the rule in Washer, supra, and Rule 4(m) of the FRCP for its argument that Complainant's request to amend the complaint should be denied. However, while such rules may be instrumental as guidance, it has been pointed out elsewhere that "the FRCP do not govern the procedure in administrative agencies which enjoy "wide latitude" to fashion their own rules of procedure, See, In the Matter of Robert G. Naumann d/b/a Saunders County Aerial Spraying, IF&R-VII-787C-88P (July 11, 1988), citing, In the Matter of Katzson Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision, November 13, 1985), reversed on other grounds, Katzon Brothers, Inc. V. EPA, 839 F.2d 1396 (10th Cir. 1988). Amendments of the complaint in this matter are authorized by 40 C.F.R. § 22.14(d) which states:

⁷ As Complainant has pointed out, the necessity to amend the complaint is dictated, in part, by the statute of limitations which has run on one count and portions of other counts that were alleged in the first amended complaint.

⁸ See generally, In the Matter of Chem-Met Services, Inc., Docket No. RCRA-V-W-011-92, (April 15, 1993), ("mere delay is seldom, if ever, a sufficient reason for denying an amendment, that prejudice to the opposing party is the crucial factor and prejudice ...requires a showing of 'serious disadvantage,'"), citing, In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1 (EAB, August 5, 1992).

Amendment of the complaint. The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate. Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file his answer.

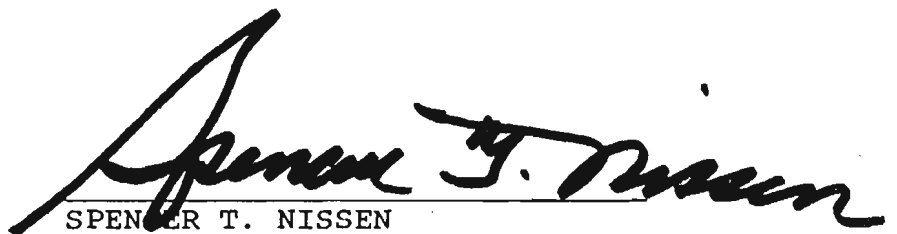
Thus, it is clearly within the Presiding Officer's discretion to allow or deny amendment of the complaint, See generally, In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company (supra note 8), (motion to file second amended complaint, allegedly to conform to proof, denied, because proposed additional counts were not proven; however, the EAB reiterated the legal principle that 'administrative pleadings are liberally construed and easily amended,' and that permission to amend a complaint will ordinarily be freely granted), citing, Yaffe Iron & Metal Co., Inc. v. U.S. Environmental Protection Agency, 774 F.2d 1008, 1012 (10th Cir. 1985).

Accordingly, having considered the arguments in this matter and the entire record of this proceeding, Complainant's motion for leave to amend the complaint is granted. Respondent's objection to Complainant's motion is denied. Further, the EAB having concluded that the first amended complaint was not properly served and is, therefore, not in effect, I conclude that Respondent's motion to dismiss the first amended complaint is moot.

ORDER

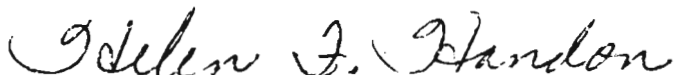
The motion to amend the complaint is granted. Respondent shall file an answer thereto within 20 days of the service of this order.

Dated this 30th day of June 1995.


SPENCER T. NISSEN
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER GRANTING COMPLAINANT'S MOTION TO AMEND THE COMPLAINT, DENYING RESPONDENT'S MOTION TO DISMISS THE ORIGINAL COMPLAINT AND THE AMENDED COMPLAINT, dated June 30, 1995, in re: Patrick J. Neman, d/b/a The Main Exchange, Dkt. No. TSCA-V-C-024-88, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).


Helen F. Handon
Legal Staff Assistant

DATE: June 30, 1995

ADDRESSEES:

Patrick J. Neman, Esq.
2045 Stabler Road
Akron, OH 44313-6038

Cathleen R. Martwick, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. V
77 West Jackson Boulevard
Chicago, IL 60604

Ms. Jodi L. Swanson-Wilson
Regional Hearing Clerk
U.S. EPA, Region V
77 West Jackson Boulevard
Chicago, IL 60604