

4/25/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Appalachian Power Company,)	Docket No. CAA-III-047
and Global Power Company,)	
)	
Respondents)	

Discovery -- 40 C.F.R. § 22.19(f)(I) -- Complainant's Motion for Discovery of available information regarding Respondents' approximately 50 workers at the disputed asbestos removal operation was granted because it would not unreasonably delay the proceeding, the information was not otherwise obtainable, and it would have significant probative value.

ORDER GRANTING DISCOVERY

This Order grants Complainant's Motion for Discovery in a case conducted under the authority of the Clean Air Act, 42 U.S.C. §§ 7401-7671q. Complainant is the Director, Air, Radiation, and Toxics Division, Region III, U.S. Environmental Protection Agency, and Respondents are Appalachian Power Company and Global Power Company.

The September 30, 1994 Complaint alleged that Respondent Global Power Company, in performing a 1994 asbestos removal operation in a West Virginia power plant owned by Respondent Appalachian Power Company, failed to wet adequately certain regulated asbestos-containing material. The proposed civil penalty was \$167,500. Respondents' joint October 27, 1994 Answer denied the allegations.

Complainant on March 26, 1996 moved for a discovery order requiring Respondents to produce a list of the names, telephone numbers, and addresses of the workers who participated in the asbestos removal operation at issue. Respondents' April 12, 1996 Motion in Opposition acknowledged that they had access to the names of the approximately 50 workers employed in the operation, but objected to Complainant's discovery request.

Procedure in this case is governed by the Agency's Consolidated Rules of Practice, 40

C.F.R. Part 22. Section 22.19(f)(I) of these Rules provides that discovery in this situation¹ "shall be permitted only upon determination ...

- (I) That such discovery will not in any way unreasonably delay the proceeding;
- (ii) That the information to be obtained is not otherwise obtainable; and
- (iii) That such information has significant probative value."

Positions of the Parties

Complainant argued that its discovery request satisfied these three criteria. According to Complainant, production of the information could be fast, it is not otherwise obtainable, since the union for these workers has since been absorbed by another larger union in another state, and workers employed in the operation may well know something of significant probative value.

Respondents disputed all three of these claims, and moved for a teleconference hearing. Respondents suggested that the discovery would unreasonably delay the proceedings, because Complainant might want to interview all 50 workers, and might add witnesses to its presentation at the hearing, and Respondents as well might add witnesses, lengthening the hearing itself. As to alternative availability of the information, Respondents said that the one former worker for Respondent Globe Power Company scheduled to testify for Complainant should be a source.

Finally, as to significant probative value, Respondents noted that the asbestos removal operation comprised at least thirteen separate activities in seventeen or more different areas and continued from January 3 to March 2, 1994.² But, Respondents noted further, Agency inspectors visited the operation only on January 25 and February 24, 1994. Therefore, contended Respondents, only those workers employed on the two inspection days at the places inspected would have significant probative knowledge, as opposed to all of the some fifty workers, citing In re JCC Industries, Inc., Docket No. II-TSCA-8(a)-90-0212, Order Granting Motion for Partial Accelerated Decision and Denying Discovery (July 2, 1991). In sum, according to Respondents, Complainant's discovery request was "entirely overbroad, overreaching, and burdensome."³ In addition, Respondents said that they do not have the requested current addresses and telephone numbers for the workers

Complainant's Motion actually requested the addresses and telephone numbers only "where

¹ Prehearing exchanges have been submitted by Complainant and Respondents.

² Respondents' Answer, at 1 (October 27, 1994).

³ Respondents' Motion in Opposition to Complainant's Motion for Discovery, at 3 (April 12, 1996).

available," and, where unavailable, "any available information to assist EPA in locating these people."⁴ Complainant argued also that Respondents' Motion in Opposition was "filed ... untimely."⁵ Respondents replied to this last point that they had timely voiced their opposition in a March 26, 1996 telephone conference with the undersigned, and that their written filing had been delayed because of a misunderstanding with Complainant.⁶

Discussion

The procedural dispute over the timing of Respondents' opposition to discovery--whether it was timely advanced during the telephone conference, and whether any untimeliness of the written submission stemmed from a misunderstanding for which Complainant may have been responsible--will be accorded no weight. The amount of time in question--two days⁷--is minor, and no party appears to have suffered any prejudice connected with this timing. It is desirable where reasonably possible to decide issues on the merits rather than on a procedural point, and accordingly the parties' motions will be reviewed on the merits.

On the merits, none of Respondents' objections to Complainant's Motion for Discovery is persuasive. As for possible "unreasonable delay," nothing has been shown to suggest that Respondents' transferring the requested information to Complainant would cause much of any delay at all. Consequences that could conceivably flow from this transfer, such as Complainant's interviewing all 50 workers or either or both parties adding names to their hearing witness list, are not at issue at the moment. Such problems can be dealt with if and when they arise, and Respondents are free to object if any such problem threatens unreasonable delay. But the mere possibility of these problems is not a ground for denying Complainant's request for discovery now.

As to alternative availability of the requested information, nothing has been shown to suggest that the former worker for Respondent Globe Power Company with whom Complainant is in contact would know the names of his several dozen coworkers. Thus, on the face of the record, the requested information is not "otherwise obtainable."

As for "significant probative value," there is only one asbestos removal operation involved, and it is possible that workers from areas other than those inspected and from days other than the

⁴ Complainant's Memorandum in Support of Motion for Discovery, at unnumbered pages 3-4 (March 26, 1996).

⁵ Complainant's Status Report (April 15, 1996).

⁶ Complainant's Motion for Discovery was mailed March 26, 1996, so that Respondents' Motion in Opposition should have been mailed by April 10, 1996, but it was not mailed until April 12, 1996.

⁷ See note 6 supra.

days of the inspection might know something relevant to the areas actually inspected. It is at least possible enough that Complainant is entitled to pursue the inquiry with any of the some 50 workers from the operation.

Respondents' citation of In re ICC Industries, Inc. is inapposite. In that case the party seeking discovery failed to show the existence of any genuine factual issue to which the discovery request could relate. In the instant case, by contrast, Complainant has submitted plausible evidence, in the form of reports of the Agency inspections of the facility at which Respondents' asbestos removal operation was conducted, to support Complainant's version of what happened there.⁸

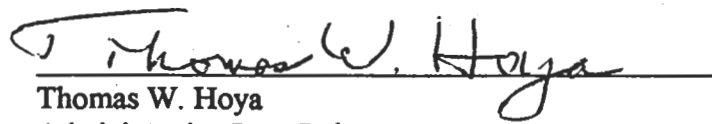
As noted, Respondent contended that the discovery request was "entirely overbroad, overreaching, and burdensome." What has been said above regarding the possible relevance of the knowledge of any of the some 50 workers answers the "overbroad" and "overreaching" concerns. Nothing was offered to substantiate the "burdensome" claim, and it therefore is rejected also.

Respondents' request for a teleconference hearing likewise is denied. The written submissions of the parties provide a sufficient basis for ruling on Complainant's Discovery Motion.

Order

Complainant's Motion for Discovery is granted, and Respondents' Motion in Opposition to Complainant's Motion for Discovery is denied. Respondents' request for argument by teleconference hearing also is denied.

Accordingly, Respondents are directed to supply Complainant, within five days of their receipt by facsimile of this Order Granting Discovery, the names, current addresses, and current telephone numbers of all of the workers on the asbestos removal operation that is the subject of this case, insofar as such names, addresses, and numbers are available to Respondents, and, for any of such workers for whom such addresses and numbers are unavailable, to supply any information available to Respondents that would assist Complainant in locating such workers.


Thomas W. Hoya
Administrative Law Judge

Dated: April 25, 1996

⁸ Complainant's First Pretrial Submittal, Exhibits 1-6 (December 5, 1995).

In the Matter of Appalachian Power Company & Global Power Company, Respondent
Docket No. CAA-III-047

Certificate of Service

I certify that the foregoing **Order Granting Discovery**, dated April 25, 1996, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Lydia A. Guy
Regional Hearing Clerk
U.S. EPA
841 Chestnut Building
Philadelphia, PA 19107

Copy by Regular Mail to:

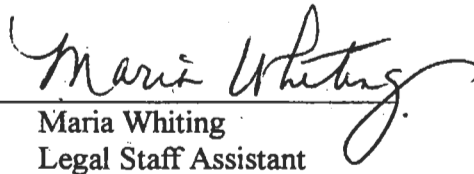
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Maria Whiting
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Dated: April 25, 1996