

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6164

Petition and complaint of Green Mountain)
Power Corporation ("GMP") for a determination)
of Dig Safe liability between GMP and Sprint)
Communications Company L.P.)
)

Order entered: 2/23/2000

Report Re: Summary Judgment

I. Summary

This case involves a dispute between Green Mountain Power Corporation ("GMP") and Sprint Communications Company L.P. ("Sprint") in which the Public Service Board ("Board") was asked for a determination of liability for damage caused to a Sprint fiber optic cable as the result of excavation undertaken by GMP on September 9, 1996. GMP originally asked for an investigation and declaratory ruling from the Board to determine liability for this damage, arguing that the Board should declare that GMP was not liable to Sprint for the damage caused by its excavation. Sprint filed an answer and counterclaim that placed blame for the damage on GMP and denied that the Board has jurisdiction to absolve GMP of liability, and contended that if the Board does have jurisdiction, then the Board should award money damages to Sprint. Sprint and GMP filed cross motions for summary judgement, both claiming that issues of liability and Board jurisdiction could be disposed of without a hearing.

II. Facts

The undisputed facts in this case begin with GMP providing notification to Dig Safe, Inc., (Dig Safe)¹ that it intended to excavate a site in White River Junction. GMP provided notice to Dig Safe at 10:30 a.m., on Thursday, September 5, 1996. By Monday morning, September 9, 1996, Sprint had not marked the excavation site; such markings were required to be made not later than 10:30 that morning (48 hours after notification to Dig Safe, excluding weekends) according to Board Rule 3.803(C). Shortly after 8:00 a.m. the supervisor of the excavation received a phone call that purported to be from a Sprint employee who authorized GMP to proceed. Sometime between 8:15 and 8:25 a.m. the excavator for GMP struck and damaged a Sprint fiber optic cable at the site. When Saturday and Sunday, September 7 and 8, are excluded, less than 48 hours elapsed between GMP's notice to Dig Safe and the damage to Sprint's fiber optic cable. GMP alleges, and Sprint does not deny, that Sprint did not have anyone on the way to mark the cable location, and that the damage would have occurred even if GMP had waited until 10:30 a.m.

III. Procedural History

GMP initiated this proceeding on September 25, 1998, by filing a petition pursuant to 3 V.S.A. § 808 and Board Rule 3.805 (B). In its complaint, GMP requested a declaratory ruling that GMP is not liable under 30 V.S.A. Chapter 86 and Board Rule 3.800 for damage to the Sprint fiber optic cable caused by the excavation. GMP also requested that the Board declare that Sprint is subject to the civil penalty provided in 30 V.S.A. § 7008(c) for its failure to mark its

favor to fully compensate Sprint for the cost of repair to its fiber optic cable. GMP filed an answer to Sprint's counterclaim on October 24, 1998.

On November 16, 1998, I held a prehearing conference in this case. At that conference, the parties represented that there probably were no contested facts at issue and agreed that each would file a motion for summary judgment. I issued a prehearing conference memorandum on December 12, 1998, which established a schedule for further filings.

On December 23, 1998, Sprint filed a motion for summary judgment in its favor, both on GMP's petition and on Sprint's counterclaim. Attached to that motion was a legal memorandum in support of the motion which argued, in part, that the Board did have authority to award damages in this matter. Sprint's motion also requested that the Board enter a judgment in Sprint's favor in the amount of \$23,971.63, plus interest at the statutory rate for damages, and assess a civil penalty against GMP in accordance with 30 V.S.A. § 7008(a). Also attached to Sprint's motion was a statement of material facts, as required under V.R.C.P. 56(h) and Board Rule 2.219, and affidavits from John Anninos and Keith Kowalski, Sprint employees.

GMP made a responsive filing to Sprint's motion for summary judgment on March 8, 1999. GMP's response included a memorandum in support of its position that the Board should grant summary judgment in GMP's favor, deny Sprint's counterclaim, and determine that GMP is not liable to Sprint for any damages to Sprint's facilities caused by the excavation in White River Junction on September 9, 1996. GMP's response requested that the Board find that Sprint is subject to the civil penalty provided under 30 V.S.A. § 7008(c) for its alleged failure to mark its underground facilities as required by 30 V.S.A. § 7006. Attached to GMP's response was its

IV. Summary Judgment

Pursuant to Board Rule 2.219, summary judgment in Board proceedings is governed by V.R.C.P. 56. Under V.R.C.P. 56 (a) and (b), any party may seek relief in any action by moving for summary judgment. Section (c) of V.R.C.P. 56 requires that the moving party's motion must contain a short statement of material facts as to which it contends there is no genuine issue. The opposing party may respond and that response must include a statement of the material facts as to which it contends that there exists a genuine issue to be tried. Both Sprint and GMP provided filings that meet the requirements of the rule.

Subsection (3) of that same rule provides the relevant standard to be applied when forming a judgment under the rule:

Judgment. Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment when appropriate may be rendered against the moving party.

I have reviewed the facts and legal arguments presented by Sprint and GMP and I have determined that, for reasons elaborated upon below, there are no genuine issues of material fact with respect to liability and therefore this issue is ripe for judgment.

V. Board Jurisdiction

The legislature has vested the Board with the authority to (1) determine liability, (2)

If underground facilities are damaged because a company has not marked them as required by section 7006 or 7006a, the company shall be subject to a civil penalty as provided in subsection (b) of this section and, in addition, shall be liable for any damage incurred by the excavator as a result of the company's failure to mark the facilities.

Most significantly, 30 V.S.A. § 7008 (d) specifically states that "[t]he board shall have jurisdiction over all actions pursuant to this chapter."

Sprint's motion for summary judgment cites the language of 30 V.S.A. § 7008 as evidence of "an unambiguous legislative intent to vest all aspects of underground utility excavation regulation, including the award of damages, in the Public Service Board and not the courts."⁴ GMP does not contest the Board's jurisdiction to act on Sprint's motion for summary judgment with respect to the issue of liability between Sprint and GMP. GMP does claim that in the event that the Board does determine that GMP is liable for some or all of Sprint's damages, summary judgment on Sprint's counterclaim for an award of damages is inappropriate for summary judgment because "there are material facts in dispute as to the amount of damages suffered by Sprint."⁵

The Board generally has limited jurisdiction and the award of civil penalties has traditionally been a matter for the civil courts rather than the Board.⁶ While the Vermont Supreme Court ruled in *Trybulski v. Bellows Falls Hydroelectric Corp.*, 112 Vt. 1, 10 A.2d 117 (1941) that, under the applicable statute, the Public Service Commission did not have jurisdiction to assess damages for injuries to the petitioner's property, the Court's holding in that case explained:

Board with jurisdiction to decide this matter, including the determination of liability for the damage to Sprint's cable, determination of the amount of damages to be paid by the party found to be liable for that damage, and the imposition of civil penalties.

VI. Discussion

Vermont's underground utility damage prevention system has been in effect since 1988. It requires all utilities to join a designated central notification service; DigSafe, Inc., has been designated by Board rule. Before any person makes an excavation he is required to give notice to DigSafe, who passes the information on to each utility that might have buried plant. The notice must be at least 48 hours before the excavation begins, excluding weekends and holidays. Each utility is then required to mark the location of any underground plant. Once the markings are in place, it is the responsibility of the excavator to avoid damaging the plant. Penalties are provided both for failure to give notice and for failure to mark plant locations.

There is no dispute that, prior to 8:30 a.m. on September 9, 1996, GMP's excavator did strike and cut a Sprint fiber optic cable at the White River Junction excavation site. GMP admits that the damage to Sprint's cable occurred less than 48 hours (excluding the weekend) after GMP gave notice to Dig Safe for the proposed excavation.

GMP offers two reasons why it has no liability to Sprint. First, GMP argues that the 48-hour time limit was waived by a telephone call from a Sprint employee to GMP's excavation supervisor at the site. Second, GMP argues that Sprint "could not and had no plans to mark its facilities by 10:30 a.m. on September 9, 1996."⁷ GMP submits that no Sprint representative

approve the excavation, and events quickly proved that the person's assurances were worthless. But even were it possible to find that person, GMP was not justified in relying upon an oral "waiver" of facilities markings. The statute and the Rule are quite clear; by waiting another 2½ hours GMP could have dug with impunity, but before the 48 hours had run GMP acted at its peril.

Sprint does not dispute GMP's allegation that Sprint had made no provision for marking the underground facilities before the 10:30 deadline. Sprint vigorously points out that Sprint employees did show up to begin repairs at around 10:30, but Sprint's affidavits make clear that these employees were dispatched in response to the interruption of service. It is therefore impossible to say that the damage to Sprint's cable would not have occurred but for GMP's decision to begin excavation early. GMP would have waited in vain for marking to occur before 10:30. Since Sprint would not have marked the facilities in time for the excavation, scheduled to commence at 10:30 a.m., GMP's early start was not the proximate cause of the damage to Sprint's cable.

VII. Conclusion

It is necessary to understand the penalties provided for in 30 V.S.A. § 7008 before deciding this case. Section 7008(a) provides that the penalty for failing to give notice of an excavation at least 48 hours in advance is "a civil penalty of up to \$1,000.00, in addition to any other remedies or penalties provided by law or any liability for actual damages." This section does not create a liability for actual damages, nor does it establish a *per se* rule of strict liability, but only recognizes that some liability may exist and negates any suggestion that the penalty here

recovery by Sprint under Vermont's comparative negligence statute, 12 V.S.A. § 1036. Consequently, GMP is not liable for the damage to Sprint's fiber optic cable.

On the other hand, the civil penalties are established as *per se* rules; the statute does not require any actual damage to underground facilities in order for the penalties to be imposed. The Board's Rule 3.807(J) provides that, when imposing a penalty, the Board shall consider:

. . . the gravity of the violation, the culpability of the person responsible for the violation, any history of prior violations, the good faith of the person in attempting to achieve compliance, the size of the business of the person being charged, the likely deterrent effect of the penalty, and any other relevant or mitigating factors.

In this case, GMP had taken the proper steps to comply with Dig Safe procedures, but then went outside the rule by accepting a (supposed) telephone waiver and caused substantial damage. Not only should GMP have known better, but GMP should be seen to be above reproach in this matter if it expects the excavating public to follow the Dig Safe rules. Considering the damage that resulted, a civil penalty of the maximum of \$1,000 is appropriate to impose upon GMP.

Section 7008(d) requires that the civil penalty is to be paid into the general fund of the state. Thus Sprint's motion to award the civil penalty to Sprint must be denied.

GMP's motion that the Board impose a penalty upon Sprint for failure to mark the excavation site must also fail: if as noted above the statute (30 V.S.A. § 7008(c)) automatically imposes a penalty for failure to obey its provisions, there must be an actual failure to obey. Since the 48 hours provided for Sprint to mark had not yet run, there was never an actual violation of the statute by Sprint.

The Board may wish to consider, or the utilities in Vermont may wish to ask the Board or

DATED at Montpelier, Vermont, this 29th day of December, 1999.

s/John P. Bentley _____
John P. Bentley, Esq.
Hearing Officer

BOARD DISCUSSION

The Board heard oral argument by counsel on January 25, 2000, at the request of Sprint. Sprint's main argument concerns the proper interpretation of Vermont's Dig Safe Law, 30 V.S.A. §§ 7001 et seq. Sprint contends that the statute creates strict liability for money damages where an excavator does not follow the procedures set out in the statute. Sprint asserts that, because GMP is strictly liable, then the Hearing Officer erred in not awarding actual money damages to Sprint because of GMP's excavation. Sprint further argues that, because it relied on the strict liability theory, it ignored GMP's assertions as to the timing and purpose of the arrival at the construction site of Sprint's technician. Sprint further argues that its reliance on strict liability explains its attempt to file affidavits more than six months after the case was given to the Hearing Officer on cross motions for summary judgement.

The language at issue is contained in 30 V.S.A. § 7008(a):

Any person who violates any provisions of Section 7004 . . . shall be subject to a civil penalty up to \$1,000, in addition to any other remedies or penalties provided by law or any liability for actual damages.

Sprint argues that, if the legislature had meant that Sprint needed to prove negligence and the other elements of tort recovery, the legislature would have ended the sentence after the word "law," because negligence is a remedy provided by law. Therefore, Sprint asserts, the last part of the sentence, "or any liability for actual damages," must create a kind of liability not dependent on fault.

uses language of negligence, "direct and proximate cause," in its claim that GMP should be held liable.

We also rule that Sprint may not attempt to present new evidence⁸ after having asked for summary judgement and acceding to GMP's statement of the facts. We do not find Sprint's failure to recognize the controlling rule of law to be an adequate basis for failure to present relevant evidence on a timely basis.

Finally, we note that the Hearing Officer's discussion includes comments about the impossibility of a waiver of the 48-hour period or other Dig Safe provisions. We disagree that such a waiver is illegal, and we do not accept that part of the Proposal for Decision. However, any such waiver must be documented to a degree necessary to ensure its reliability with a level of certainty appropriate to construction activities that could affect both physical safety and significant commercial interests.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The Report of the Hearing Officer is accepted, except as noted.
2. The motion of Sprint Communications Company L.P. for summary judgment is denied.
3. The motion of Green Mountain Power Corporation for summary judgment is granted in part and denied in part.
4. The petition of Sprint Communications Company L.P. for actual damages is denied.

DATED at Montpelier, Vermont, this 23rd day of February, 2000.

<u>s/Michael H. Dworkin</u>)	
)	PUBLIC SERVICE
)	
<u>s/Suzanne D. Rude</u>)	BOARD
)	
)	OF VERMONT
<u>s/David C. Coen</u>)	

OFFICE OF THE CLERK

FILED: February 23, 2000

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.