

ILLINOIS POLLUTION CONTROL BOARD

July 18, 1974

ENVIRONMENTAL PROTECTION AGENCY,

Complainant,

vs.

GLENN WILSON and GARY BAILEY,

Respondents.

PCB 73-393

Mr. Dale R. Turner, Assistant Attorney General, on behalf of the Environmental Protection Agency;
Mr. Howard Campbell, Attorney, on behalf of Respondents.

OPINION AND ORDER OF THE BOARD (by Mr. Seaman):

On September 17, 1973, the Environmental Protection Agency filed Complaint against Glenn Wilson and Gary Bailey, charging therein that the named Respondents caused or allowed the open burning of refuse in violation of Section 9(c) of the Environmental Protection Act, Ill. Rev. Stat., 1971, Chapter 111 1/2, § 1009(c) and in violation of Rule 502(a) of Chapter 2, Part V of the Regulations of the Pollution Control Board adopted pursuant to Section 10 of the Environmental Protection Act Ill. Rev. Stat., 1971, Chapter 111 1/2, § 1010.

More specifically, Complainant alleges that Respondent Wilson owns certain rural real estate located in McClellon Township, Jefferson County, Illinois. It is further alleged that Respondent Wilson sold certain junk automobiles located on said property to Respondent Bailey and that Bailey subsequently open burned the automobiles on Wilson's property.

As stated in Respondents' Answer Brief:

"[T]he essential facts concerning the violation are not in dispute. Respondent Glenn Wilson is the owner of the rural real estate on which the open burning involved in this action took place. Respondent Gary Bailey stipulated to and testified to setting the fire complained of, with a match, for salvage purposes. It is therefore undisputed by the Respondents that Respondent Gary Bailey violated the Environmental Control Act and the rules and regulations of the Pollution Control Board specified in the complaint by conducting open burning operations for salvage purposes. The dispute of Respondents with the statement of facts given by the Complainant concerns any alleged violation by Respondent Glenn Wilson, and the consideration to be given to mitigating and aggravating factors introduced in evidence in this cause."

Bailey frankly admitted setting the fire for salvage purposes on July 12, 1974. (R. 45). Bailey testified that he did not advise Wilson that he intended to burn the junk cars. (R. 46). Bailey further testified that it was his responsibility to remove the cars from Wilson's property. (R. 47).

Wilson testified that he did not know that Bailey intended to open burn the cars, nor did he authorize such action. (R. 66). Wilson indicated that the cars were to be stripped in a hard, level area specifically set aside for the operation. (R. 69).

The mere ownership of land on which the burning occurred, in the face of uncontroverted, competent testimony that Wilson did not participate or even realize that such burning was to occur, is insufficient to prove violation. To do so would strain any construction of the term "allow" beyond reason. From the Record, it is clear that all of the incidents of ownership were transferred from Wilson to Bailey, nor can any agency relationship be implied. Bailey's disposition of his personal property was the independent and efficient cause of the violation. Since there can be no implication from the Record that Wilson knew or had reason to know that the burning was to take place, Wilson is no more liable for the burning than he would be if the blaze had been started by a cigarette thrown from a passing car.

Regarding the magnitude of the open burning, Respondent Bailey testified that approximately fifty to sixty cars were partially or completely burned during the single date of violation alleged. (R. 45). Mr. Jim Tate, Fire Department Chief, testified that he observed black smoke rising hundreds of feet into the air (R. 6).

The open burning took place in a remote area approximately two miles from the city limit of Mt. Vernon, Illinois. Respondent Bailey testified that, although he knew that open burning was illegal within the city limits of Mt. Vernon, he did not know that open burning in rural areas was illegal. (R. 49-51). Respondents in their Answer Brief emphasize that no contention is made that scienter is an element of the offense and that Bailey's motives and intentions were introduced solely for the purpose of mitigating his violation and to show that no flagrant or intentional violation of the law was intended.

Respondent Bailey testified that he had knowledge that junk cars were open burned for salvage purposes in the vicinity of Jefferson and Marion Counties. (R. 54). Respondent Wilson testified that he had heard of people open burning cars and saw many loads of burned-out cars pass his property. (R. 72).

Respondent Bailey is twenty-nine years old, married, and the father of two children. (R. 42). Bailey is without a high school education and automobile salvage is his sole vocation. (R. 45,56). Bailey testified that he has two or three hundred dollars in a bank account and is buying a home on contract. (R. 59)..

Due to Respondent Bailey's circumstances and apparent lack of wrongful intent, we are disposed to assess a small penalty for the single instance of violation found.

The Respondents have, in their Answer, raised two affirmative defenses.

In the First Affirmative Defense, Respondents allege that Rule 332(b) of the Pollution Control Board's Procedural Rules is unconstitutional because it exceeds authority granted by the Act, denies due process and equal protection, and unconstitutionally grants judicial authority to the Board.

In the Second Affirmative Defense, Respondent contends the penalty power is unconstitutional because the legislature has set no standards for such imposition of penalty.

These arguments are without merit. (See, City of Waukegan v. Pollution Control Board, 311 N.E. 2d 145 (1974).

This Opinion constitutes the findings of fact and conclusions of law of the Board.

IT IS THE ORDER of the Pollution Control Board that:

1. Complaint against Respondent Wilson be dismissed.
2. For the violation found herein, Respondent Bailey shall pay to the State of Illinois the sum of \$25.00 within 35 days from the date of this Order. Penalty payment by certified check or money order payable to the State of Illinois shall be made to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706.
3. Respondent Bailey shall cease and desist from the violation found herein.

Mr. Dumelle dissents and will file a dissenting opinion.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted on this 18th day of July, 1974 by a vote of 4-1,

Christan L. Moffett