

ILLINOIS POLLUTION CONTROL BOARD
November 16, 1995

JOSEPH BOGACZ,)
)
 Complainant,)
)
 v.) PCB 96-47
) (Citizens Enforcement - Air)
 COMMONWEALTH EDISON CO.,)
)
 Respondent.)

ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on a complaint filed on August 23, 1995 by Joseph Bogacz. At issue are certain high voltage (HV) electric transmission lines and other equipment, including transformers, operated by respondent Commonwealth Edison Company (ComEd). Mr. Bogacz alleges that corona discharge from the HV equipment produces ozone air pollution in violation of Title II of the Environmental Protection Act (Act) (45 ILCS 5/1 et seq.) Sections 8, 9, 9.1, 9.5, 9.6 and "other applicable Sections" (Complaint at ¶5).

On September 20, 1995 ComEd filed a Motion to Dismiss contending that the complaint is duplicitous and frivolous; Mr. Bogacz filed a response and motion to amend complaint¹. On November 1, 1995 ComEd filed a response to complainant's motion to amend complaint. The Board hereby grants complainant's motion to amend complaint.

Prior to addressing the contention that the complaint is duplicitous and frivolous, the Board first addresses that portion of the complaint which specifies the Sections of the Act alleged to have been violated, i.e., Sections 8, 9, 9.1, 9.5, 9.6 and "other applicable Sections". The Board's procedural rules require that a formal complaint contain a reference to the provision of the Act or regulation alleged to be violated. (35 Ill. Adm. Code 103.122(c)(1).) The portion of the complaint alleging violation of "other applicable Sections" does not comply with this requirement, and the Board accordingly strikes that portion of the complaint alleging violations of "other applicable Sections".

¹ Pursuant to Board order dated October 5, 1995, Mr. Bogacz was given leave to file his response on or before October 24, 1995. On November 1, 1995 the Board received a copy of Bogacz's original response, along with a copy of the certified mail receipt indicating the original response was posted on October 23, 1995. On November 7, 1995 the Board received the original response post-dated October 23, 1995.

The Board next notes that Sections 8, 9.5 and 9.6 of the Act are improperly asserted in the complaint. Sections 8 and 9.5 of the Act set forth legislative declarations and do not enumerate prohibited acts. (415 ILCS 5/8 and 9.5 (1994).) Accordingly, the Board hereby finds that ComEd cannot violate Sections 8 and 9.5 of the Act. Section 9.6 addresses the air pollution operating permit fee scheme. (415 ILCS 5/9.6 (1994).) There are no Board regulations requiring air pollution permits for transmission lines. Therefore, the instant HV electric transmission lines operated by ComEd are not sites which require an air pollution operating permit under Section 9.6. Consequently, complainant's allegation of a violation of Section 9.6 of the Act is improper. The Board hereby finds the alleged violations of Sections 8, 9.5 and 9.6 of the Act are not properly the subject of the instant enforcement action and, accordingly, also strikes those Sections from the complaint.

The Board next addresses the issue of whether the complaint is duplicitous or frivolous concerning the remaining alleged violations of the Act, Sections 9 and 9.1. Section 103.124(a) of the Board's procedural rules, which implements Section 31(b) of the Environmental Protection Act (415 ILCS 5/31(b)), provides:

... If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124.

The Board has held that an action is duplicitous if the matter is identical or substantially similar to one brought in another forum. (See, Fore v. Midstate Kart Club (October 7, 1993) PCB 93-171; Mandel v. Kulpaka PCB 92-33 (August 26, 1993); In re Duplicitous or Frivolous Determination (June 8, 1989), RES 89-2, 100 PCB 53.)

ComEd claims the instant action is duplicitous because it attempts to raise claims that were or could have been the subject of a previous action filed by complainant before the Illinois Commerce Commission (ICC) regarding transmission line corona. (Bogacz v. Commonwealth Edison Company, ICC No. 93-0112.) ComEd alleges that complainant has already had a full and fair opportunity to litigate the issues of ionization and corona, and

that decision is *res judicata*. (Res. at 8-9.)² ComEd argues that it is comprehensively regulated by the ICC and the Board does not regulate electrical transmission lines.

Mr. Bogacz responds that the action is not duplicitous because it does not involve the same cause of action and the subject of the complaint before the Board is the new "issue of ozone air pollution (which) was not in any way an issue in the ICC case". (Com. Res. at 3.) Mr. Bogacz argues that "(n)o claim of ozone air pollution exists within the ICC order, complaint or hearing". (*Id.*)

The instant complaint alleges violations of the Environmental Protection Act due to corona discharge resulting in ozone formation. Within the Act it is the Board that is charged to "determine, define and implement the environmental control standards applicable in the State of Illinois" (415 ILCS 5/5(b) (1994)) and the Board "shall have authority to conduct hearings upon complaints charging violations of this Act" (415 ILCS 5/5(d) (1994)). The ICC is not a court of concurrent jurisdiction with regards to adjudicating violations of the Act. Therefore the Board is the appropriate forum in which to adjudicate alleged violations of the Act.

The Board also observes that the ICC order³ in 93-0112 does not address any alleged violations of the Act, nor the subject of corona discharge from the transmission lines resulting in ozone. Instead, the ICC order addresses Mr. Bogacz's complaint regarding: 1) ComEd equipment causing television interference (TVI) in his residence; 2) ComEd lines creating a health and safety hazard on his property; 3) ComEd's failure to notify him of the placement of additional lines near his property; and 4) ComEd's responsibility for several power outages which complainant experienced.

Given the information before the Board, this matter is not identical or substantially similar to ICC 93-0112 or any matter brought in another forum⁴. Therefore, the Board finds that,

² Mr. Bogacz's amended complaint will be cited as (Comp. at ___); ComEd's Motion to Dismiss will be cited as (Res. at ___); Mr. Bogacz's response in opposition to ComEd's motion to dismiss will be cited as (Comp. Res. at ___); the amended complaint will be referenced simply as the "complaint".

³ A copy of the complaint before the ICC in 93-0112 has not been filed with the Board. Therefore the Board must look to the corresponding ICC order.

⁴ Additionally the matter before the Board is not barred by *res*

pursuant to Section 103.124(a), the complaint is not duplicitous.

Next the Board turns to whether Mr. Bogacz's complaint is frivolous. An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. (Citizens for a Better Environment v. Reynolds Metals Co., PCB 73-173, 8 PCB 46 (1973).)

Mr. Bogacz requests that the Board: 1) order respondent to stop polluting; 2) initiate, consider and adopt appropriate regulations applicable to respondent; and 3) order respondent to pay money penalties. First, the Board has specific statutory authority to order a respondent to cease and desist from violations of the Act. (415 ILCS 5/33(b) (1994).) If the Board finds that respondent is violating the Act, it has the power to order respondent to cease and desist from such activity.

Second, pursuant to Section 28(a) of the Act, any person may present written proposals for the adoption of Board regulations, and the Board may make such proposals on its own motion. Based upon our statutory authority regarding rulemaking necessary to accomplish the purposes of the Act (415 ILCS 5/26 (1994)), opening a regulatory docket is relief the Board may grant.

The third relief requested by complainant is to order respondent to pay money penalties. The Board has been granted the statutory authority to impose civil penalties (415 ILCS 5/33(b) (1994)) and has frequently exercised this authority. There is no reason why the Board cannot continue to utilize its rights granted in the Act in this matter.

In sum, the Board can grant the relief requested in complainant's amended complaint. Therefore, the Board finds that, pursuant to Section 103.124(a), the complaint is not frivolous.

Having found that the instant complaint is neither duplicitous nor frivolous, the Board hereby denies ComEd's motion to dismiss on these grounds. Accordingly this matter shall proceed to hearing. The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and the Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the

judicata because it fails both tests adopted by Illinois courts: the "same evidence" test and the "transactional approach" test.

Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1995, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board