

ILLINOIS POLLUTION CONTROL BOARD

August 9, 2001

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 00-127
)	(Enforcement – Land, Tires)
DAYNE ROGERS, an individual, and BLACK)	
GOLD INTERNATIONAL, a dissolved Illinois)	
corporation,)	
)	
Respondents.)	

OPINION AND ORDER OF THE BOARD (by S.T. Lawton, Jr.):

The People of the State of Illinois (People) filed this action on January 31, 2000. On November 2, 2000, the Board adopted an order that granted the complainant’s motion for summary judgment, ordering respondents to cease and desist violations of the Environmental Protection Act (Act) and Board regulations, and awarding \$38,730.46 for the Environmental Protection Agency’s (Agency) cost of corrective action. The Agency expended these costs when it cleaned up accumulated used and waste tires at a tire facility operated by Dayne Rogers and Black Gold International (Black Gold) in Rockford, Illinois.

The Board also ordered the parties to clarify whether Rogers and Black Gold are liable to the People for punitive damages at hearing. The People addressed the remaining issue of whether Rogers and Black Gold failed without sufficient cause to take preventative or corrective action, at hearing on April 24, 2001, and in its May 14, 2001 posthearing brief. The Board discusses whether Rogers and Black Gold are liable to the State for \$77,460.92 in punitive damages in the opinion below.

BACKGROUND

On January 31, 2000, the State filed a complaint on behalf of the Agency against respondents, Rogers, Black Gold, and Crosby & Associates. The complaint alleged that Rogers, who was president of Black Gold, operated a tire facility at or near 1140 Harrison Avenue, Rockford, Winnebago County, Illinois (site). Comp. at 2.¹ The Board dismissed Crosby & Associates from the case in response to its motion to dismiss on April 20, 2000. According to the complaint, Black Gold involuntarily dissolved as an Illinois corporation on December 1, 1997. Comp. at 2.

¹ The State filed a complaint in this matter on January 31, 2000, which is referred to as “Comp. at ____.”

The State sought to recover \$38,730.46 in costs spent by the Agency to clean up accumulated used and waste tires at the site, pursuant to Sections 55.3(g) and (k) of the Act. See 415 ILCS 5/55.3(g), 55.3(k) (2000). The State also requested \$77,460.92 in punitive damages pursuant to Section 55.3(h) of the Act. See 415 ILCS 5/55.3(h) (2000). Rogers and Black Gold did not file an answer to the complaint.

The State served a Request to Admit Facts upon Black Gold and Rogers on or about July 31, 2000. See Motion at 2,² State Exh. C.³ The respondents failed to respond to the State's Request to Admit Facts. The State filed a motion for summary judgment on September 14, 2000, which alleged that the facts, if deemed admitted, prove that Rogers and Black Gold are liable for costs of corrective action and punitive damages under Sections 55.3(g), (h), and (k) of the Act. See 415 ILCS 5/55.3(g), 55.3(h), 55.3(k) (2000),

The Board, in its November 2, 2000 order, deemed the facts presented by the State to be admitted in accordance with 35 Ill. Adm. Code 103.162(c), because Rogers and Black Gold failed to respond to the State's Request to Admit Facts. People v. Rogers (November 2, 2000), PCB 00-127, slip op. at 3. The Board found that these facts, in conjunction with an affidavit and other uncontested State exhibits, sufficiently proved that the State was entitled to a judgment under Sections 5/55.3(g) and (k) of the Act (415 ILCS 5/55.3(g), 55.3(k) (2000)) as a matter of law. Rogers, PCB 00-127, slip op. at 5. The Board granted the State's motion for summary judgment in part and found Rogers and Black Gold were liable for the actual cost of the tire-removal in the amount of \$38,730.46. Rogers, PCB 00-127, slip op. at 5.

The Board, in the same order, denied the part of the State's motion for summary judgment that requested punitive damages under Section 55.3(h) of the Act. 415 ILCS 5/55.3(h) (2000). Rogers, PCB 00-127, slip op. at 5. The Board found that a genuine issue of material fact remained as to whether Rogers and Black Gold failed without sufficient cause to take corrective or preventative action after it received notice from the Agency pursuant to Section 55.3(d) of the Act (415 ILCS 5/55.3(h) (2000)). Since the State had not proven the element of the absence of sufficient cause in its motion for summary judgment, the Board directed the parties to hearing on the issue of punitive damages. Rogers, PCB 00-127, slip op. at 5.

The State filed a motion for reconsideration on November 29, 2000, which again requested the Board to grant punitive damages based on the evidence presented in its motion for summary judgment. The Board denied the State's motion because it did not provide new facts that addressed whether Rogers or Black Gold had sufficient cause to fail to take preventative or corrective action. People v. Rogers (January 4, 2001), PCB 00-127, slip op. at 2. The Board ordered the State to present evidence supporting this point at hearing if it sought to pursue punitive damages against Rogers and Black Gold. Rogers, PCB 00-127, slip op. at 2.

² On September 14, 2000, the State filed a Motion for Summary Judgment with the Board, which will be referred to as "Mot. at ____."

³ The exhibits attached to the State's motion for summary judgment will be cited to as "State Exh. at ____."

The Board held a hearing on punitive damages on April 24, 2001. Kaare Jacobsen, Agency field inspector, and Todd Marvel, Manager of the Agency's Used Tire Unit testified on behalf of the State. Respondent failed to appear at hearing. Tr. at 5. The State filed a posthearing brief on May 14, 2001. Respondent failed to file a post-hearing brief or response to the State's brief.

DISCUSSION

The only remaining issue in this matter is whether the Board should find that Rogers and Black Gold should pay the State \$77,460.92 in punitive damages. The Board first discusses whether the State provides sufficient evidence that respondents are liable to the State for punitive damages, pursuant to 55.3(h) of the Act. See 415 ILCS 5/55.3(h) (2000). The Board next addresses the appropriate amount of damages, if any, that it should assess against the respondents.

Elements of Punitive Damages under 55.3(h) of the Act

The State requests the Board to impose \$77,460.92 in punitive damages against Rogers and Black Gold, pursuant to Section 55.3(h) of the Act. See 415 ILCS 5/55.3(h). Section 55.3(h) provides that:

Any person liable to the Agency for costs incurred under subsection (g) of this Section may be liable to the State of Illinois for punitive damages in an amount at least equal to, and not more than 2 times, the costs incurred by the State if such person failed without sufficient cause to take preventative or corrective action pursuant to notice issued under subsection (d) of this Section." 415 ILCS 5/55.3(h) (2000).

The Board has not previously imposed punitive damages under this section. See People v. Cyber America (March 5, 1998), PCB 97-8, slip op. at 8-9.

The State must prove three factors under Section 55.3(h) of the Act (415 ILCS 5/55.3 (2000)). First, the State must show that Rogers and Black Gold are liable for costs incurred by the Agency under Section 55.3(g) of the Act. See 415 ILCS 5/55.3(g) (2000). Second, the State must prove that Rogers and Black Gold failed to take preventative or corrective action pursuant to notice issued by the Agency under 55.3(d) of the Act. See 415 ILCS 5/55.3(d) (2000). Finally, the State must show that Rogers and Black Gold failed to take this corrective action without sufficient cause. The State provided adequate evidence to prove all three factors.

The Board, in its November 2, 2000 order, found that Rogers and Black Gold were liable for the costs incurred by the Agency for corrective action, pursuant to Section 55.3(g) of the Act. People v. Rogers (November 2, 2000), PCB 00-127, slip op. at 4. It found that Rogers received notice from the Agency under 55.3(d) of the Act, and failed to take preventative or corrective action pursuant to the notice. Rogers, PCB 00-127, slip op. at 3-4.

The State proved the final element that Rogers failed to take such corrective action without sufficient cause, at hearing and in its posthearing brief. The State showed that Rogers and Black Gold were aware of the possibility of punitive damages, had ample opportunity to show cause to fail to take preventative or corrective action, and did not raise any reason to fail to comply with Section 55.3 of the Act. Marvel testified that the Agency's Section 55.3(d) notice and subsequent letter to Rogers both notified him that the Agency reserved the right to pursue punitive damages as allowed under the Act. Tr. at 22. The Agency specifically included the language concerning punitive damages under Section 55.3(h) of the Act in the Section 55.3(d) notice that it sent to Rogers. Exh. B at 4. Despite the Agency's warning that the failure to take corrective or preventative action without sufficient cause can result in punitive damages, Rogers failed to submit any form of a response to the Agency.

In its brief, the Agency suggests that it would reward Rogers and Black Gold for their complete failure to participate in this matter if the Board were to find that their choice not to respond prevented the State from showing that they failed to act without sufficient cause. Comp. Br. at 5.⁴ The Board agrees that this finding would allow respondents to evade punitive damages by simply remaining silent and inactive.

The failure by Rogers and Black Gold to take any corrective action or participate in any manner in these proceedings, especially after the Agency's numerous attempts to cooperate and avoid corrective action, provides adequate proof that they did not have sufficient cause to fail to take such action under 55.3(h) of the Act. See 415 ILCS 5/55.3(h) (2000). Rogers and Black Gold failed to attend the hearing on punitive damages, and did not offer any evidence to contradict the testimony and legal arguments presented by the State. The State testified that Jacobsen even notified Rogers about the nature of the hearing prior to when it took place. Even though Rogers knew of the impending decision by the Board on the issue of punitive damages, and had received notice about the potential amount that he faced in the Agency's Section 55.3(d) notice, he failed at every turn to provide evidence on his behalf.

The State also testified at hearing that Rogers and Black Gold not only failed to take corrective action without sufficient cause, but Rogers continues to accumulate used and waste tires on the site. Tr. at 11. Jacobsen testified that he re-inspected the site in February 2001. Tr. at 11. Jacobsen stated that Rogers restarted his tire resale operation and brought more used and waste tires onto the premises. Tr. at 11. When the Agency sent Rogers a letter in February 2001, discussing the new accumulation of tires, Rogers once again failed to respond to the Agency. Tr. at 11.

Purpose of Punitive Damages

The Board finds that the complete failure to abide by Section 55.3 of the Act, pay for corrective action, and participate in any way in the proceedings before the Board is the type of conduct that punitive damages are designed to punish and prevent. "The purpose in awarding

⁴ The State filed a posthearing brief on May 14, 2001 with the Board, which is referred to as "Comp. Br at ____."

punitive damages is to punish an individual responsible for the wrongful conduct, to teach the individual not to repeat the wrongful conduct, and to deter others from similar conduct.” Page v. City of Chicago, 299 Ill. App. 3d 450, 463, 701 N.E.2d 218, 227 (1st Dist. 1998), appeal denied, 182 Ill. 2d 552, 707 N.E.2d 1240 (1998).

Imposing punitive damages against Rogers and Black Gold is necessary both to punish the respondents for their total lack of preventative or corrective action at the site, and to stop Rogers from continuing to violate Section 55.3 of the Act. After the Agency spent \$38,730.46 to clean up the site, Rogers resumed his operation of a dissolved corporation, and accumulated more used and waste tires at the site. Tr. at 11. Rogers continued to do this despite the fact that he received the Agency’s prior notice under Section 55.3(d) of the Act and the Agency’s subsequent letter. When the Agency sent correspondence to Rogers about the February 2001 inspection, he once again failed to respond to the Agency about the new condition of the site. Tr. at 11. The punitive damages are necessary to deter the respondents from continuing to accumulate used and waste tires at the site in violation of 55.3 of the Act.

Punitive damages are also necessary to deter others from failing to comply with Section 55.3 the Act. If the Board imposed only costs, but not punitive damages in this case, it would send the message to the public that people can completely fail to expend any time or money to remove and dispose of accumulated used and waste tires. Respondents would face no consequence other than the finding of liability and an assessment of the Agency’s actual costs for the corrective action. The respondent could wait for the Agency to clean up its site, and delay in repaying any of the actual costs until the Agency expended additional time and resources in litigating the case. Without punitive damages, the respondent’s liability is potentially limited to the same expense that it would incur if it took on the responsibility of cleaning up the site. This defeats the design and intent of the tire management program under 55.3 of the Act, and abuses the State’s limited resources.

Amount of Punitive Damages

The Board finds that Rogers and Black Gold are liable to the State for punitive damages in the full amount of \$77,460.92. Section 55.3(h) specifically sets a scale for imposing punitive damages. See 415 ILCS 5/55.3(h) (2000). The Board can award punitive damages ranging from the amount of the Agency’s actual cost of corrective action up to twice this amount. *Id.* The Board, in this matter, may impose punitive damages in an amount ranging from \$38,730.46 to \$77,460.92. The Board has no discretion to award an alternative amount.

The Board finds that Rogers and Black Gold are liable to the State for the maximum amount of punitive damages allowable under Section 55.3(h) of the Act because they completely failed to take any corrective action pursuant to 55.3 of the Act, repay the Agency for cleaning up the site, or participate at all this proceeding. The facts in this case show that Rogers and Black Gold repeatedly chose to do nothing to acknowledge or mitigate their liability under the Act.

According to the facts that the Board deemed to be admitted for this proceeding, Rogers and Black Gold failed to respond to the Agency’s 55.3(d) notice and subsequent correspondence. They did not answer the complaint in this matter, and failed to respond to the State’s request to

admit facts. Rogers and Black Gold failed to contest the State's motion for summary judgment, and did not appear at the hearing on April 24, 2001, even after Jacobsen notified Rogers of the issue of punitive damages pending before the Board. Neither Rogers nor Black Gold filed with the Board posthearing briefs or responses to the State's briefs. The record does not show anything that mitigates Rogers' or Black Gold's total lack of participation in this matter. The Board accordingly grants the State's request to impose the maximum amount of punitive damages against respondents in the amount of \$77,460.92.

CONCLUSION

In conclusion, the Board finds that Rogers and Black Gold are liable to the State for punitive damages in the amount of \$77,460.92, pursuant to Section 55.3(h) of the Act (415 ILCS 5/55.3(h) (2000)). The Board awards the State twice the amount of the actual costs incurred by the Agency in removing accumulated waste and used tires from the site operated by Rogers and Black Gold.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

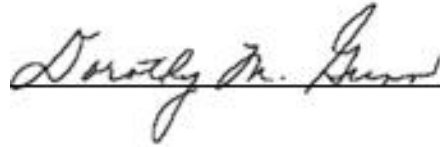
1. The Board finds that respondents, Dayne Rogers (Rogers) and Black Gold International (Black Gold) are liable to the People of the State of Illinois for punitive damages, pursuant to Section 55.3(h) of the Act (415 ILCS 5/55.3 (2000)).
2. The Board orders Rogers and Black Gold to pay a total of \$77,460.92 in punitive damages to the Used Tire Management Fund under the jurisdiction of the Illinois Environmental Protection Agency (Agency). This amount is twice the actual costs incurred by the Agency to clean up the accumulated used and waste tires at the site located at or near 1140 Harrison Avenue, Rockford, Winnebago County, Illinois.
3. Payment shall be made in the form of a certified check or money order, payable to the Used Tire Management Fund, in accordance with Section 55.6(a) of the Act. See 415 ILCS 55.6(a) (2000). The case number, name, and respondents' social security numbers or federal employer numbers should also be included on the check or money order.
4. The check or money order shall be sent to:

Illinois Environmental Protection Agency
Used Tire Management Fund
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (2000)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirement. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.520, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 9th day of August 2001 by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board