ILLINOIS POLLUTION CONTROL BAORD
August 5, 1971

Environmental Protection Agency	)	
	)	
v.	)	PCB 71-43
	)	
Lipsett Steel Products, Inc.	)	

J. H. Keehner, Assistant Attorney General of Illinois for the Environmental Protection Agency

R. E. Robertson, for Lipsett Steel Products, Inc.

Dissenting Opinion (by Mr. Kissel):

I agree with the opinion of the Board in that it enters a cease and desist order against Lipsett prohibiting any future open burning of boxcars, but I disagree with the Board in its decision to impose penalties on Lipsett for the six days of burning during 1971. In order to understand my reasoning,a review of this case is necessary.

Originally, Lipsett sought a variance from this Board to permit it the right to burn boxcars with the use of gas fired blowers, which substantially reduced the visible emissions from the burning. Lipsett was operating under an existing ACERP (Air Contaminant Emission Reduction Program) which expired on December 31, 1970. That ACERP allowed Lipsett to open burn a certain number of boxcars every year. Lipsett realized that its ACERP was going to expire, but it also realized that the recycling of boxcars was an important, as well as a moneymaking, activity. As a result, long before the ACERP was to expire Lipsett participated with the industry to sponsor a study by Booz-Allen to find an emission free way of burning these cars. Booz-Allen was given the money, but the ultimate solution which they proposed caused greater emissions than the burning of the boxcars themselves — the building, in which the boxcars were to be burned, itself burned down. Lipsett began then to look for a solution to the problem, and eventually found one. In fact, they not only found a complete, permanent solution, but they found an interim measure - the gas blowers - which substantially reduced the emissions from the burning.

Lipsett tried desperately to get the Environmental Protection Agency to see the permanent solution in operation on the east coast. Actually, the Agency representatives promised to view the operation, and strung Lipsett along with continuing promises. Finally, the Agency said they could't go and told Lipsett that Lipsett would have to file a petition for variance with the Board if the new device was to be approved. Immediately, Lipsett filed the variance petition, but because it was filed in December, there was no chance of having the decision of the Board before the ACERP ran out on December 31, 1971. Lipsett recognized that their variance had been filed too late and in order to make things clear with the Board, Lipsett appeared before the Board asking for a temporary variance until the hearing was held on the variance itself. Lipsett agreed at that time that they would only burn boxcars with the aid of a gas blower device, and only under certain conditions. The Board, however, noted at that emergency hearing on the temporary variance that it did not have the power to grant temporary variances, although since that time the Board has taken somewhat of a different position. See GAF Corporation v. EPA, PCB 71-11S, dated June 23, 1971. Eventually, the Board decided the variance case, and by a 3-2 vote denied the variance. Even before the variance had been decided by the Board, the Agency had filed a complaint against Lipsett for the six days of "open burning" which occurred during 1971 after the ACERP had expired.

The majority of the Board decided to enter a cease and disist order against Lipsett prohibiting Lipsett from doing any more boxcar burning in the open, and to impose a penalty on Lipsett of $6,000, or $1,000 for each day in 1971 during which Lipsett burned. I agree with the decision to impose a cease and desist order solely on the grounds stated in the Dissenting Opinion filed by Dr. Aldrich in the original Lipsett case. (Lipsett Steel Products, Inc. v. Environmental Protection Agency, PCB 70-50, dated March 22, 1971). There both Dr. Aldrich and I agreed that we would grant the variance to Lipsett to allow them to burn boxcars with the use of gas-fired blowers until June 30, 1971. Since the Board decision on the second Lipsett case (this one) was on July 8, 1971, the cease and desist order was totally in accord with my previous position on this matter.

As to the matter of imposing penalities against Lipsett for the six days of burning in 1971, I am completely against that. In imposing penalities against any person or company, I believe the Board should not only look at whether there was a violation of the law or regulations, but also at the good faith, or lack of it, of the person or company against whom the penalty is assessed. In this particular case, while the boxcars were burned in the open, perhaps in violation of existing regulations, the burning was done with the aid of a gas-fired blower which substantially reduced the emissions from burning. We saw the movies to prove that. Therefore, I consider the violations as something less than some of the other boxcar burners we have had before us, who have used no devices to control the emissions. As for the good faith of Lipseet, I think that there is no question on the record of facts presented above that Lipsett has made substantial efforts to control the emissions from boxcar burning. Time and again it was Lipsett who tried to solve the problem. They have done an excellent job in trying to promote the recycking of materials, and we are penalizing them for it. This Board must penalize only those who flagrantly violate the law without any effort to solve their pollution problems. We cannot punish those who have done their best, for if we do, we will find that no one will try.

I, Regina E. Ryan, Clerk of the Board, certify that Mr. Richard J,Kissel submitted the above Dissenting Opinion on the 5th day of August, 1971.