ILLINOIS POLLUTION CONTROL BOARD
July 22, 1971

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
v.	)	# 71-24
	)	
	)	
HYMAN-MICHAELS CO.	)	

Opinion of the Board (by Mr. Currie):

The Agency charged that Hyman-Michaels had engaged in the open burning of railroad cars on eight occasions in late 1970 at its salvage yards in Venice and in Alton. Two of the eight counts were dropped before the hearing, and another at the close of the evidence (R. 3 , 226). The company has consented to the entry of a cease-and-desist order against future burning (R. 4, 223), but we hold the evidence too meager to justify the imposition of money penalties as requested by the Agency.

Complicating the Agency's case was the fact that some time ago the old Air Pollution Control Board had approved an Air Contaminant Emission Reduction Program (Acerp) that allowed the company to continue burning, at a declining rate, until May 1971. Although we have held that such a program expired in fact after one year (EPA v. Commonwealth Edison Co., # 70-4, Feb. 17, 1971), we have also refused to impose money penalties on those who followed a program in good faith for more than a year, since that Board itself believed it had authority to approve a longer program (EPA v. M.S. Kaplan Co., # 71-50, July 8, 1971). Consequently it is not enough to show that open burning occurred; to justify penalties it must also be shown that such burning was in violation of the terms of the Acerp.

Of the five incidents remaining for consideration after the hearing, two appear quite trivial from the evidence. On December 11 and 15, EPA witnesses testified, they saw "smoldering metal" and a "smoldering" railroad car bed on the company's premises at Alton (R. 53-55). The company denied knowledge of any open burning on those dates (R. 154-55). The use of torches to cut salvageable metal is common at both sites; whether it constitutes open burning every time this practice results in "smoldering metal" is doubtful. But even if there was open burning on these two dates, there was no proof that it was done in violation

of the Acerp. The company was allowed to burn only during "ideal" weather conditions for smoke dissipation, but there was no evidence as to weather on December 11, and December 15 was clear with a wind blowing away from the nearest homes (R. 56). The Agency did not suggest that any other condition was broken, except that a report required by the Acerp had not been filed (R. 215, 225); we do not think the failure to file the report makes every burning incident cause for money penalties, especially since the complaint did not allege the failure to file.

The company conceded that on September 9 at Venice and on December 1 at Alton a railroad car accidentally caught fire in the cutting process (R. 11, 188). There is a duty to prevent and to extinguish fires that is not always satisfied by proof that the fire was not deliberately set (EPA v. Cooling, # 70-2, Dec. 9, 1970). But in the December incident there was no proof that the burning occurred in violation of the Acerp; we know nothing of the weather save that the wind was blowing toward East Alton to the northeast (R. 46). On September 9 there was a south wind of only 4 m.p.h. blowing toward a nearby residential area, so conditions were not "ideal" (R. 16-19); there was a suggestion, though not sufficient proof, that this fire was the cause of a spoiled wash (R. 71). We find a violation on September 9, but, since it was accidental and not repeated, we think no penalty is called for under these narrow circumstances.

The final allegation is the most serious. An EPA witness testified that on September 16 he had observed the burning of six boxcars at the Venice site when there was a light north wind and an overcast sky (R. 32-34). Overcast conditions and low winds are far from "ideal"; the Acerp did not allow such burning. But the question is whether Hyman-Michaels actually burned that day. The company has no record of this incident (R. 199), as it has of days of apparently lawful burning (R. 198, 201). This would not be conclusive alone. But the company points out that its property abuts that of another company that was engaging in open burning during the period in question (R. 44, 192), suggests the witness may have seen burning by that company rather than by Hyman-Michaels (R. 194). The witness marked an x on the map to show the burning site, at a point the company acknowledged as its property (R. 200). But we think there is substantial doubt, given his distant vantage point, whether the burning cars he saw were actually at the point described or a few feet to one side on someone else's property. Given this doubt and the company's general record of complying with the conditions of its Acerp, we think there is too little proof to justify a money penalty in this case.

Finally, there was an effort by EPA to show violations on dates not alleged in the complaint (R. 26). This due process does not allow; a respondent is entitled to notice of the charges it must meet.

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

ORDER

Hyman-Michaels Co. shall cease and desist from the open burning of railroad cars or related equipment at its Alton and Venice premises.

I, Regina E. Ryan, Clerk of the Pollution Control Board, certify the Board adopted the above Opinion this 22 day of July, 1971.