

ILLINOIS POLLUTION CONTROL BOARD
April 20, 1995

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 94-5
)	(IEPA No. 4-94-AC)
)	(Administrative Citation)
JAMES BENNETT and)	
KERRY J. HENSON)	
(Hamilton/Bennett Tire),)	
)	
Respondents.)	

DANIEL P. MERRIMAN, ASSISTANT COUNSEL, APPEARED ON BEHALF OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

JAMES BENNETT APPEARED PRO SE.

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

This matter is before the Board pursuant to a petition for review filed by respondent, James Bennett¹, on March 3, 1994. Mr. Bennett requests review of an administrative citation issued on February 1, 1994 by the Illinois Environmental Protection Agency (Agency). The Agency is vested with the authority to bring such a citation pursuant to Section 31.1 of the Environmental Protection Act (Act) (415 ILCS 5/31.1).

The administrative citation alleges a violation of Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1)), which carries a statutory civil penalty of \$500 if there is a finding of a violation by the Board. For the reasons set forth below, the Board finds that the violation in question has not occurred. Accordingly, this matter will be dismissed.

BACKGROUND

Mr. Bennett resides at a property located at 631 Elm, Hamilton, Hancock County, Illinois (Bennett property). Legal title to the property is held by Mr. Henson.

The Agency, in the person of field inspector Robert E. Figge, initially inspected the Bennett property on June 23, 1993.

¹ Mr. Kerry J. Henson did not file a petition for review, nor did he participate at the hearing in this matter.

On the basis of this June inspection, the Agency on August 28, 1993 issued a Warning Notice to respondents. However, no enforcement action has been undertaken based on the June inspection.

On December 8, 1993 Mr. Figge again inspected the Bennett property. The instant administrative citation was issued to respondents based on conditions at the Bennett property as observed by Mr. Figge on December 8, 1993. The administrative citation asserts that respondents open dumped used tires so as to cause or allow litter in violation of Section 21(p)(1) of the Act². The sole issue before the Board is whether this open dumping resulting in litter existed at the Bennett property on December 8, 1993.

Hearing was held before Board Hearing Officer Deborah L. Frank on May 24, 1994 in Carthage, Illinois. Included in the hearing record is the testimony of Mr. Figge and Mr. Bennett, plus a series of 11 photos taken by Mr. Figge on December 8, 1993 at the Bennett property. No post-hearing briefs were filed.

DISCUSSION

The Act at Section 21(a) sets forth a general prohibition against open dumping by providing that "[n]o person shall cause or allow the open dumping of any waste". The Act at Section 21(p) further provides that open dumping that results in any one of six conditions is enforceable by an administrative citation. The pertinent part of Section 21(p) is subsection (1), which provides for administrative citation authority against open dumping at results in litter:

- p. [No person shall] . . . cause or allow the open dumping of any waste in a manner which

² The assertion of open dumping/litter occurs on a "Tire Disposal Site Inspection Report" form, which is part of the administrative citation filings. This form provides check boxes within which the field inspector may note any of a large number of alleged violations of the Act and the Board's regulations governing management of used tires. The filled-out form for the December 8, 1993 inspection does contain checks next to alleged violations other than open dumping/litter. However, none of these additional alleged violations falls within the scope of matters that may be prosecuted via the administrative citation provisions of the Act. A "narrative" attached to the "Tire Disposal Site Inspection Report" also references several alleged violations that are not subject matter for administrative citations.

results in any of the following occurrences
at the dump site:

1. litter;

* * * * *

The Act does not contain a definition of "litter". However, "litter" is defined in the Litter Control Act (415 ILCS 105/3), and in St. Clair County v. Louis Mund (AC 90-64, August 22, 1991, 125 PCB 381) the Board adopted the definition contained in the Litter Control Act:

"litter" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris . . . abandoned vehicle . . . or anything else of an unsightly or unsanitary nature which has been discarded, abandoned or otherwise disposed of improperly. (415 ILCS 105/3.)

That used tires existed on the Bennett property on December 8, 1993 is uncontested. At issue is whether these tires were open dumped such as to constitute litter, in violation of the open dumping prohibition found at Section 21(p) of the Act.

The majority of the tires, approximately 130 out of a total of 150 tires, were located inside two sheds. (Tr. at 15-16.) The Board reviewed a similar circumstance in IEPA v. Al Seaman (AC 92-86, May 5, 1994). Citing the court's analysis of the terms "open dumping" and "disposal" in IEPA v. IPCB ((5th Dist. 1991), 219 Ill. App.3d 975, 579 N.E.2d 1215, 162 Ill.Dec. 401), the Board in Seaman found that tires in a barn did not constitute "disposal" within the meaning of "open dumping". The Board explained that the Agency must demonstrate how the placement of used tires in a barn could result in waste entering the environment, and that the Agency had failed to do so in that case. In the instant case, the Agency has likewise failed to demonstrate how the tires inside the two sheds were "disposed of improperly" (i.e., how placement of the used tires in this case could result in waste entering the environment). Therefore, the Board finds that the presence of used tires in sheds at the Bennett property on December 8, 1993 does not support a finding of violation of Section 21(p)(1) of the Act.

The remaining portion of the used tires, approximately 20 in number, that were observed on the Bennett property on December 8, 1993, were observed outside. The Board is not persuaded, however, that these 20 tires constitute litter, or that their presence rises to the level of open dumping.

Most of the 20 outside tires were clearly used in landscaping, or had been processed for use in landscaping as items such as planters and tree rings. (E.g., photos #1, #4, and #10.) Mr. Bennett indeed testified that he is involved in a landscaping business. (Tr. at 37.) The Board finds that these tires were not "discarded, abandoned or otherwise disposed of improperly" as of December 8, 1993, and hence that they did not constitute litter as that term is to be interpreted under Section 21(p) of the Act.

CONCLUSION

Based on its review of the record in this case, the Board finds insufficient evidence to sustain a finding of the violation as alleged. The administrative citation will accordingly be dismissed.

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

ORDER

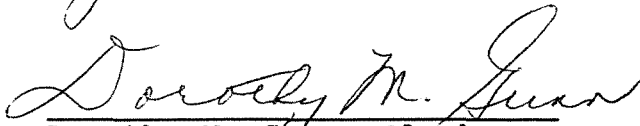
The administrative citation, IEPA No. 4-94-AC, issued to James Bennett and Kerry J. Henson on February 1, 1994, is hereby dismissed. This docket is closed.

IT IS SO ORDERED.

Chairman C.A. Manning and Board Member J. Yi dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "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 20th day of April 1995, by a vote of 5-2.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board