

ILLINOIS POLLUTION CONTROL BOARD
December 14, 1992

VILLAGE OF MATTESON,)
)
 Complainant,)
)
 v.) PCB 90-146
) (Enforcement)
 WORLD MUSIC THEATRE,)
 JAM PRODUCTIONS, LTD. and)
 DISCOVERY SOUTH GROUP, LTD.,)
)
 Respondents.)

ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a motion for reconsideration filed on December 4, 1992, by respondent (Theatre). The Village of Matteson (Matteson) filed a response to the motion on December 9, 1992. Theatre seeks reconsideration of the Board's November 19, 1992 order in which the Board denied Theatre's motion to reset the date for the last allowable hearing. In addition the Board ordered that all hearings in this matter be completed by December 23, 1992.

Theatre insists that it is evident how the Board will rule on the merits of this case. Theatre also believes that no matter what issue comes before it, the Board will rule against Theatre regardless of the evidence, the law or the equities. Theatre argues that this has been true for virtually every motion or issue before the Board throughout the two year history of this proceeding. Theatre continues to contend that there is no urgency to reach a final resolution in this matter. Theatre charges that the Board ignores the importance of this matter to Theatre. Theatre asserts that the draft order presented by the Board may put Theatre out of business.

Theatre also states that Theatre is likely to appeal any order by the Board adverse to Theatre's position. Theatre contends that these hearings are merely being conducted for the record on appeal, and that denying Theatre additional time to present its case will deny Theatre due process of law in contravention of Balmoral Racing Club v. Illinois Racing Board (1992), ___ Ill 2d ___, ___ N.E. 2d ___. Theatre requests that hearings should be continued to some date in January because it cannot prepare adequately or present its case given the present scheduled dates for hearing. Theatre also notes that Country Club Hills has a similar suit against Theatre pending in Circuit Court. On November 25, 1992 Theatre moved to dismiss the suit in Circuit Court as duplicative. Theatre argues that by not allowing additional time for hearings, the Board may prevent Country Club Hills from presenting its evidence in any forum.

Theatre notes that the Board may not be able to respond to the present motion prior to the scheduled hearing on December 16, 1992. If the Board does not address this matter prior to the scheduled hearing, Theatre requests that it be allowed to present its case at a later date.

In response, Matteson notes that Theatre now contends that these hearings are critical when it previously objected to the holding of additional hearings. Matteson also notes that Theatre has failed to file the minimal disclosure requirements for use of expert testimony. Matteson also points out that Theatre requested additional time to prepare for the hearings held during the summer of 1992 but failed to present any witnesses despite a continuance of hearing dates.

Prior to addressing Theatre's request for reconsideration of the Board's prior order, the Board wishes to address several contentions made by Theatre in its motion. In considering the allegations by Theatre it is relevant to consider the procedural history of this matter. A complete history of this matter can be obtained by referencing prior Board orders. This citizen's enforcement action was initially filed on August 2, 1990. The Board held three hearings in December of 1990. The Board issued an interim opinion and order on April 25, 1991, finding a violation by Theatre and ordering Theatre to present the Board with a study on the noise including possible remedies. The Board found the report submitted by Theatre to be inadequate. The Board requested additional information and allowed Matteson to request additional hearings be held. No additional hearing was requested, but due to statements and arguments submitted by Theatre, the Board ordered additional hearings to be held. Hearings were conducted on three dates during 1992.

Discussion

The Board disagrees with Theatre's generalized assertions that the Board has been unfair in this proceeding and has ruled against Theatre despite the facts and law. The Board notes that Theatre has provided no factual support for its assertions. The Board reminds Theatre that the Board has already determined in its interim opinion and order dated April 25, 1991, that Theatre has violated the Board's noise regulations during specific dates throughout the 1990 season. Because of the importance of the issues involved here, the Board has proceeded with great deliberation and has issued many orders. The fact that the finding of violation and efforts to adduce a remedy have been discussed in many orders does not constitute repeated rulings against Theatre on either substance or procedure. The Board announced a generalized statement of a possible remedy (octave band sound monitoring at two locations and sound source reduction as a necessary component of any long term solution) in its April 25, 1991 interim order. (p. 35-37) The Board's August 8, 1991,

order clearly endorsed turning down the volume and instantaneous feed back to control sound levels. The broad outline of the final order contemplated by the Board was articulated on September 12, 1991 at page 7. Finally, a complete draft order was articulated in the order of October 29, 1992. In short, Theatre has had ample opportunity over the approximately 20 months since the interim order to adduce testimony or other evidence on the character of the anticipated remedy.

While the Board has clearly indicated a direction that it contemplates following when issuing its final order, the purpose in presenting a proposed order was to achieve a reasonable remedy. The Board has always and will continue to reach any determination based on the merits of the case as presented in the record before the Board.

As the Board noted in its November 19, 1992 order, Theatre has previously objected to the holding of any additional hearings on the grounds that any additional delays could jeopardize the opening of the 1993 season. The Board is also concerned with providing sufficient time for Theatre to implement any sound control mechanisms that may be required by the Board's final order. The Board further expressed its concern about the ability of Theatre to contract with performing groups for 1993, considering that some sound control provision may need to be incorporated into the contract. The Board is concerned that contracts with performing artists for the 1993 season may require some type of sound control provision in order for Theatre to effectively control sound emissions during 1993. The Board also is concerned with the consequences to Theatre if sound control mechanisms are required that would affect the ability of a particular group with an existing contract to fulfill the obligations of the contract. The Board believes that contracting of groups by Theatre would best be facilitated by an early decision by the Board as to what, if any, sound control mechanism is required. Theatre has previously argued that once the season has begun, it is limited in the actions that it can take due to scheduled performances.

The Board is well aware of the importance of this matter and the possible effects that its decision may have on both the operation of the theater and the residents of the Village of Matteson. It is for this reason that the Board has continually allowed for input from both parties on issues in this matter. In fact, this reasoning was one of the driving forces in presenting the proposed order to the parties to aid in the achievement of a reasonable remedy.

The Board notes that Theatre has previously criticized the Board for not issuing a final order that could be appealed. Now Theatre wishes to delay the issuing of a final order by the Board in order to continue to prepare a record for appeal. The

hearings are necessary to address several issues that remain unresolved in this matter. The purpose of the hearings have been clearly delineated in prior Board orders. The matters to be addressed at hearing are focused on the final order. Considering the history of this matter and the number of prior hearings, the Board does not believe that Theatre has been denied due process of law. The Supreme Court in Balmoral Racing Club v. Illinois Racing Board (1992), ___ Ill 2d ___, ___ N.E. 2d ___, found that allowing Balmoral a one-hour lunch break to consider undisclosed adversarial evidence and prepare a response was inadequate and constituted a denial of due process. To the extent that Balmoral even applies here, the Board believes that Theatre has been provided ample time to prepare and provide opposing evidence on both the violation and the remedy. The Board has provided Theatre with numerous opportunities to present its case and to provide evidence and argument to the Board.

In sum, Theatre has not demonstrated that the Board overlooked fact or misapplied law in its November 19, 1992 order and the Motion to Reconsider is denied.

On one additional matter, Theatre contends that the Board baldly declared in its October 29, 1992 order "that it is evident that there continues to be a noise disturbance from the Theatre." Theatre complains that the Board made this declaration without discussing the testimony, the extensive briefs and the paucity of evidence. This statement was in direct response to the continuing assertion by Theatre that there is no noise problem and if there ever was any noise problem, it has been subsequently alleviated. It is the Board's intention to fully address all testimony, briefs and evidence in its final order. The Board also notes that it made no finding concerning the level of the disturbance or if the evidence supported a finding of a violation of the noise regulations.

While the motion for reconsideration is denied, Theatre has provided some new factual material relevant to the proceeding. In contrast to its prior motion, Theatre has now provided some specific reasons to justify the need for the hearings to be continued. Theatre asserts that it intends to present witnesses from out-of-state who are unable to attend the scheduled hearings. Affidavits stating the inability to testify from three possible witnesses are attached to the motion. However, Theatre has failed to address the Board's concerns over why it is important that a final order be issued in this matter within ample time prior to the start of the 1993 season. Theatre has not presented information on the scheduling of contracts for the 1993 season or an approximate time frame needed to comply with any possible Board order. The Board recognizes that the hearings in this matter were scheduled within a tight timeframe. However the Board continues to maintain that it is important to issue a final order in the early part of 1993 in this matter. The Board

also recognizes that any final order issued by the Board must consider all available information. The Board also realizes that it has an obligation to allow reasonable opportunity for both parties to submit all relevant information in this matter.

The Board will not modify its order of November 19, 1992. The scheduled hearings are to proceed exactly as scheduled. In consideration of the new information presented to the Board and the importance of this matter, the Board will allow the hearing officer to extend the December 23, 1992 hearing deadline in this matter. Since the Board wishes to assure that the parties are allowed to fully present their case, the Board will allow the request for additional hearing time to be presented to the hearing officer. The Board will permit the hearing officer, upon a sufficient showing by either party, to schedule additional hearings beyond the previous deadline and into January of 1993. While the Board will allow hearings to be held up to January 31, 1993, the Board anticipates that the parties will be able to complete all hearings at an early date. Any such showing must include a showing by the moving party:

1) of witnesses who will testify at the later scheduled hearing including the nature of their testimony and their inability to testify at the presently scheduled hearing,

2) that a delay in the Board's issuing its final order will not interfere with that order being followed due to contract obligations or scheduled performances, such a showing could be made by presentation of anticipated contracting and performance schedules, or by a showing of an inclusion of a contract provision noting the possibility of sound control limitations,

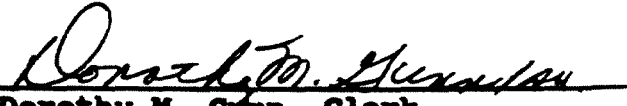
3) that the parties will be able to complete all hearings before January 31, 1993.

However, under no circumstances does the Board wish to continue hearings in this matter beyond January 31, 1993. With the completion of all hearings in January, expedited transcripts, the presentation of final arguments on the record and no final briefs, it is anticipated that the complete record in this matter will be before the Board prior to February 15, 1993. The Board intends to make every effort to proceed in an expeditious manner toward issuing a final order.

IT IS SO ORDERED.

0138-0005

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 14th day of December, 1992, by a vote of 4-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

0138-0006