

ILLINOIS POLLUTION CONTROL BOARD
May 24, 1990

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| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | PCB 90-37 |
| |) | (Enforcement) |
| NESCO STEEL BARREL COMPANY, |) | |
| |) | |
| |) | |
| Respondent. |) | |

ORDER OF THE BOARD (by J. Marlin):

This matter is before the Board on the March 29, 1990 filing by the Nesco Steel Barrel Company ("Nesco") of a Motion to Strike. The motion requests the Board to strike Counts I and IV of a four count complaint filed by the Illinois Environmental Protection Agency ("Agency") on March 15, 1990. Count I of that Complaint alleges that Nesco operated certain air emission sources between June 6, 1984 and September 8, 1988 without obtaining an operating permit from the Agency. Count IV of the same Complaint alleges that Nesco violated certain provisions of the Board's January 27, 1987 Order (PCB 84-81) granting Nesco a variance from the requirements of 35 Ill. Adm. Code 215.204(j). These provisions concerned imposed reporting requirements and timely execution of a "Certificate of Acceptance and Agreement" regarding the granted variance. The Agency filed its Response to Nesco's motion to strike on April 9, 1990. Nesco filed its reply on April 29, 1990. For reasons set forth below, Nesco's motion is denied in part and granted in part.

Nesco's motion to strike alleges that the Agency failed to notify Nesco of the charges contained in Counts I and IV of the Complaint before it was filed against Nesco. This requirement is contained in Section 31(d) of the Act, which provides in pertinent part:

Notwithstanding the provisions of subsection (a) of this Section, prior to issuance and service of a written notice and formal complaint under subsection (a) of this Section, the Agency shall issue and serve upon the person complained against a written notice informing such person that the Agency intends to file a formal complaint. Such written notice shall notify the person of the charges alleged

Ill. Rev. Stat. 1987, ch. 111 1/2
par. 1031(d)

In support of its position Nesco attached the Agency's Enforcement Notice Letter dated July 14, 1989 to its motion to strike. The letter mentions nothing concerning these two charges.

The Agency's response states that the allegations comprised within Count I were cited in a letter notice sent to Nesco on May 22, 1986. The Agency attached a copy of the letter as an exhibit to its response. An examination of that letter reveals that the Agency did indeed make Nesco aware of the alleged violations nearly four years prior to the filing of the complaint.

COUNT I

Nesco claims the Agency's response is deficient with respect to Count I. According to Nesco, on May 22, 1986, the IEPA sent NESCO a notice, pursuant to Section 31(d) informing the company that it was operating its drum coating lines without an operating permit. At the time NESCO received the "31(d) notice," it was before this Board seeking a variance from the requirements of 35 Ill. Adm. Code 215.204(j) so that it could obtain an operating permit. This variance petition was filed on June 25, 1984 by NESCO's predecessor, Reliable Nesco, Inc., (PCB 84-81). Several amendments to the variance petition were filed, the last on May 12, 1986, some ten days before the "31(d) notice" letter was sent.

On January 27, 1987, the Board granted the variance requested by NESCO. NESCO attached a copy of the January 27, 1987 variance order as Exhibit 1. On July 13, 1987, NESCO applied for an operating permit from the IEPA. The permit application was received July 15, 1987 and was denied on October 13, 1987. The permit denial letter is attached as Exhibit 2.

On October 28, 1987, approximately two weeks after the company's permit application was denied, NESCO filed a permit denial appeal with this Board (PCB 87-166). Then, in August of 1988, after NESCO had submitted a second permit application, counsel for IEPA informed NESCO that the requested operating permit would be granted, but would contain as a condition that the permit denial appeal, PCB 87-166, be dismissed. On August 23, 1988 NESCO filed a Motion to Dismiss its permit denial appeal and on September 8, 1988 this Board dismissed the appeal.

Sometime in late August or early September of 1988, Nesco received its operating permit from the IEPA. The permit recited, "[t]his permit shall become effective upon the date of Board Order dismissing the appeal currently before the Board in PCB 87-166." Nesco attaches a copy of the operating permit as Exhibit 3.

On July 14, 1989 the IEPA sent a second "31(d) notice" to Nesco. The notice did not inform Nesco that the IEPA was considering filing an enforcement action against Nesco for

operating without a permit during the time it sought a variance and appealed the denial of its July 1987 permit application.

On November 27, 1989, the IEPA renewed Nesco's operating permit, extending it to September 5, 1991 (Exhibit 4). On or about March 15, 1990, three and one half months after the issuance of the second operating permit, the IEPA filed the instant complaint against Nesco alleging in part that from June 6, 1984 until September 8, 1988, Nesco operated without the required IEPA permit.

Nesco believes that the totality of the circumstances regarding its efforts to obtain an operating permit and its receipt of permits both before and after the 1989 "31(d) notice" had satisfied and met the concerns of the IEPA raised in its 1986 notice. Nesco states that its belief was supported by two actions of the IEPA. First, the IEPA required Nesco to dismiss its permit denial appeal and thereby waive any protection a successful outcome of the appeal might have provided with respect to the length of time the company was "out of compliance" with the permit requirement. Second, the IEPA's 1989 "31(d) notice" was silent about a permit violation. Because the IEPA did not list a permit violation in the 1989 "31(d) notice", Nesco assumed that the IEPA was satisfied that the company had resolved the matter.

Nesco argues that given the circumstances described immediately above, the 1986 "31(d) notice", no longer served to alert Nesco of the Agency's intentions. In addition, the 1989 "31(d) notice" was silent about any alleged permit violations and therefore failed to alert Nesco to its peril.

Dismissal of permit denial appeal as a precondition to grant of permit does not, absent more, strike the Board as improper. Nor does grant of a subsequent permit vitiate prior violations of the Act. To hold, as Nesco desires, that the Agency's decision to grant Nesco its requested permit somehow bars the Agency from prosecuting prior violations of the Act would impose unintended and undesirable consequences to the Agency's permitting decision. The determination to prosecute and the determination to permit are made under separate grants of authority and are guided by distinct legal principles. See Waste Management, Inc. v. IEPA, PCB 84-41 (consolidated), 60 PCB 173 (October 1, 1984).

Addressing Nesco's second argument, Nesco asserted that it was free to assume the matter of the permit violation had been satisfied because the Agency failed to re-include it as part of the 1989 "31(d) notice" letter. The Board agrees that it certainly would have been useful for the Agency to have re-apprised Nesco of its intentions. However, Nesco has shown no real prejudice by the Agency's omission. We have discovered no legal mandate to re-include prior allegations in any subsequent notice and are reluctant to impose one of our own. The Board, therefore, declines to grant Nesco its requested relief at this time.

COUNT IV

With regard to Count IV the Agency cites our decision in IEPA v. Mervis Industries, Inc., PCB 88-36 (May 5, 1988) as standing for the proposition that actual notice of the allegations through discussions with the Agency satisfies Section 31(d) notice requirements. The response mentions nothing further regarding these alleged discussions.


Following receipt of the Agency's response, Nesco filed with the Board its Reply. As to Count IV Nesco states that the Agency's response is deficient because it fails to give any particulars as to the discussions the Agency claims to have held with Nesco regarding the Count IV allegations nor how these discussions affected the 31(d) notice process. Nesco reiterates that the count should be therefore stricken.

We note that the Agency has provided us with no factual basis to support its assertion that the respondent has actual notice of the allegations comprised within Count IV. The Board agrees with the Agency that substantial compliance with the section 31(d) requirements may be shown in this manner under our holding in IEPA v. Mervis Industries, Inc., supra. In Mervis, however, facts were submitted to the Board upon which it could base a finding of substantial compliance. That is not the case here. Instead, the Agency's contentions are merely conclusory. Therefore, because our examination of the May 22, 1986 enforcement notice letter reveals nothing regarding the allegations contained in Count IV, we must strike it.

IT IS SO ORDERED.

Board Members J. Anderson, J. Dumelle and B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 24th day of May, 1990, by a vote of 4-3.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board