

ILLINOIS POLLUTION CONTROL BOARD
April 6, 1989

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) PCB 86-27
)
MODINE MANUFACTURING)
COMPANY, INC.,)
)
Respondent.)

MESSRS. MICHAEL JOHN MAHER* AND MICHAEL K. OHM, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT;

MESSRS. ROY M. HARSCH AND DANIEL F. O'CONNELL APPEARED ON BEHALF OF THE RESPONDENT MODINE MANUFACTURING COMPANY, INC.

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on a remand from the Illinois Appellate Court Second District (Court). Modine Manufacturing Company v. Pollution Control Board and Environmental Protection Agency, No. 2-88-0176 (2d Dist. 1988). The Court affirmed in part and reversed in part a February 4, 1988 Order of this Board upholding the Illinois Environmental Protection Agency (Agency) in both Counts of its two count complaint alleging that Modine Manufacturing Company (Modine) had violated sections of the Environmental Protection Act (Act) and related Board Air Pollution regulations related to operation without a permit (Count I) and exceeding allowable particulate air emission limits (Count II). The Board included a cease and desist order and imposed a penalty of \$10,000.

The Court reversed the Board on Count II, holding that the Board should have dismissed the Agency's "complaint alleging that Modine violated Section 9(a) of the Act by exceeding particulate air emission limitations". (Court Order p. 12); the Court agreed with Modine that the Agency, during the last of three pre-

* The Board notes that Mr. Maher, formerly a member of the Board's staff subsequent to his employment as an Assistant Attorney General, took no part in the deliberations in this matter.

enforcement conferences, had entered into an enforceable oral contract not to enforce against Modine for actions alleged in Count II.

The Court then upheld the Board on its finding of violation regarding Count I, operating without a permit, holding that there was no oral contract or estoppel. In so saying, the Court took special notice of the following testimony by Mr. Fahl, Modine's Supervisor of Environmental Engineering:

"Subsequently, the [EPA] informed Modine that Modine would not need to file a variance request for excess particulate emissions during the phase-out period for the Alfuse process". (Court Order, p. 8)

The Court made three points about this testimony: first, the Agency did not promise to take no enforcement action for operation without a permit; second, even if such a promise were implied, it would not be enforceable under contract law because the event was subsequent to the pre-enforcement meeting with the Agency when the oral contract was formed, and no evidence existed of another contract that included the Agency's variance statement; and third, the elements of promissory estoppel were not established - there was no unambiguous promise and Mr. Fahl did not testify that Modine relied on the subsequent Agency statement (Court Order p. 8,9).

The Court then explained its remand as follows:

"Although the PCB said that Modine's operation without a permit for more than two years would alone warrant a \$10,000 penalty, the PCB did not indicate that a penalty in that amount would have been imposed in the absence of the particulate emission limitation violations. We therefore remand this cause to the PCB for a determination of the appropriate penalty for Modine's operation without a permit. Since the penalty may be modified on remand, we will not consider at this time Modine's issue challenging the propriety of the penalty imposed. (Court Order, p. 12)

The Board statement to which the Court refers is contained in the following paragraph of the Board's Order:

Based upon its consideration of the factors set forth in Section 33(c) of the Act and other matters as stated in this Opinion, the Board finds that a penalty of \$10,000.00 for the above cited violations is warranted in

this case. As stated above, Modine operated its facility for a period of over two years after its permit expired and for at least four years after the initial noncompliant reading was reported. This was inexcusable. For this violation alone a \$10,000 penalty is warranted.

The Board then stated:

Modine's good faith arguments are considerably under-cut by its failure to do anything to operate lawfully. The little weight that can be given to Modine's good faith arguments serves to mitigate against the finding of a more substantial penalty. Under these circumstances, the Board believes that imposition of a greater penalty would not aid in the enforcement of the Act.

The above statements were the culmination of almost three pages of Board consideration of the factors set forth under Section 33(c) of the Act, factors which the Board must consider when determining penalties.

While the Board suggests that the above language did identify the Count I violation as the reason for the \$10,000 penalty, the Board, pursuant to the Court's directive, has revisited the penalty issue so as to assure that only Count I is considered. In so doing, the Board has reconsidered the Section 33(c) factors and has again reviewed the only two post-hearing documents filed by the parties, the Agency's Post Hearing Memorandum of Law (filed September 9, 1987) and Modine's Post-Hearing Brief, filed November 6, 1987. The Board notes that both the Agency and Modine argued the penalty issue as related to Count I.

Regarding the lack of a permit, the facts are not at issue; Modine was twice denied a permit in 1983, and from October 31, 1983, when its existing permit expired, until January 24, 1986, Modine operated without a permit.

The Board will first revisit the Section 33(c) factors. The first consideration under Section 33(c) is the character and degree of injury to or interference with the health, general welfare or property of the public. With Count II no longer at issue, any considerations affecting the penalty involve the Count I violation only. The Board does consider that the degree of interference with the public health, welfare or property is considerable for operating without a permit, particularly given the circumstances of this case.

When a permit program is established, each permit and its contents become a first line mechanism by which the requirements of the Act and related Board regulations are effectuated, facility by facility, (see also Illinois Environmental Protection Agency v. Trilla Steel Drum Corporation, PCB 86-56, June 25, 1987, modified August 6, 1987).

A person has no authority to operate without a required permit; it is a threshold requirement and the Board has long emphasized its special importance:

We have often stated that enforcement of the permit provisions ... is essential to the environmental control system in Illinois. It is rare indeed when a permit violation does not call for at least some monetary penalty.

Illinois Environmental Protection Agency v. George E. Hoffman & Sons, Inc., PCB 71-300, 12 PCB 413, 414 (May 29, 1974):

There are certainly no rare circumstances here. As will be discussed later, the circumstances in this case call for more than "at least some monetary penalty".

The second consideration under Section 33(c) is the social and economic value of the pollution source. The Board does consider the source of significant social and economic value insofar as the plant manufactures condensers and evaporators and has a significant employment; however, operating without a permit significantly reduces social and economic considerations when assessing a monetary penalty.

The third consideration under Section 33(c), the suitability of the location of the site was not separately addressed; consideration of the location per se is not a particularly relevant consideration for assessing a penalty for operating without a permit.

The fourth consideration is the economic reasonableness and technical feasibility of reducing the pollution. Modine demonstrated that it was economically reasonable and technically feasible to reduce the pollution. The problem was time. From a Count I perspective, and assuming that time was a justifiable limiting factor, the Board finds no merit in considering this factor in a light favorable to Modine, since Modine failed to

seek variance relief from the Boards standards so it could take the time in a lawful permit setting.*

In again reviewing Modine's arguments in its post-hearing Brief, the Board again can find no stand-alone reason why Modine made no effort to remedy its permit problem for over two years. Instead, Modine seeks to excuse its inaction by linking its violation of Count I to its efforts to cure its emission problems.

For example, Modine states:

Any penalty imposed in this case could only serve to punish Modine for cooperating with the Agency instead of litigating through variance and permit appeal proceedings. (Modine Br. p. 19)

Modine also states:

The fact that this case involves a period where Modine operated without a permit does not mean that it would be appropriate to impose a penalty. Modine's failure to have an operating permit as alleged in the complaint was a direct result of the technical difficulty in bringing the scrubber into compliance. (Modine Br. p. 25)

Modine also states:

The Agency agreed to Modine's compliance plans each time there (sic) were revised.

* The Board notes that Section 33(c) has been amended twice during the pendency of this proceeding to add two new Section 33(c) factors: Section 33(c)(5) includes "any economic benefits accrued by a noncomplying pollution source because of its delay in compliance with pollution control requirements". P.A. 85-358 (HB 0345) eff. 9/11/87. This effective date occurred in the middle of the post-hearing briefing schedule. Section 33(c)(6) includes "any subsequent compliance". P.A. 85-1041 (HB 3425) eff. 7/13/88. This effective date occurred after the Board first ruled on the case. Because the appellate court directed the Board to reconsider the penalty for Count I based on the record as it existed, the Board has given the former factor little weight and does not believe the latter factor can properly be considered now. The Board does note, however, that even if the new factors were to be fully considered, that consideration would not be favorable to Modine.

Therefore, the goals of the permit program were met. (Modine Br. p 25; emphasis added)

Modine also states:

The Board should not listen to the Agency's faulting of Modine for not seeking a variance. The Agency told Modine not to seek a variance. T.90. This was a good way to proceed. The Agency and Modine concentrated their efforts on achieving compliance rather than litigating. This type of cooperative effort should not be discouraged by imposing a penalty to punish Modine for not litigating. (Modine Br. p. 32)

What Modine appears to be arguing, in essence, is that it ought to be able to, with impunity, do nothing to comply with one regulation until it comes into compliance with another.

What is particularly disturbing about this argument is that that "one regulation" involves the requirement to have a permit. This requirement is not less important when one is out of compliance with standards than when one is in compliance; that would be an absurd conclusion. Modine knew full well that its facility was required to have a permit. Modine knew about the variance process and knew that a variance petition was a route available to it for temporary relief from operating without a permit following the Agency's permit denials. Modine chose instead to view its interaction with the Agency to stave off an enforcement action as an effort sufficient to bypass any further actions whatsoever for over two years to operate lawfully.

This mind-set is totally unacceptable. It turns the system upside down. As the Court correctly stated, a decision not to bring an enforcement action rests with the Agency, not the Board (Court Opinion, p. 11); however, an Agency decision to accept Modine's compliance plans does not vest the Agency with the power to grant a variance to cure Modine's permit problems. Modine's assertion that "Therefore the goals of the permit program were met" is disingenuous and totally mistaken. Section 35(a) of the Act specifically vests authority in the Board to grant variances "beyond the limitations prescribed in this Act, whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." The irony in all this is that had Modine, early on, presented its compliance plan and asserted its good faith arguments sufficient for an arbitrary or unreasonable hardship showing in a variance petition, enforcement litigation would not have taken place at all.

In a very real sense, the Court's directive to the Board to consider the penalties for the permit violation without being distracted by the mitigating considerations related to the particulate emission violations makes this Board's penalty considerations that much more to the point.

Section 42(a) of the Act provides for a penalty not to exceed \$10,000 for said violation and an additional penalty not to exceed \$1,000 for each day the violation continues.

The length of time Modine was in violation of the permit requirement could of course be an added component in assessing the penalty. However, the Board believes that assessing the full statutory penalty for the violation itself will be sufficient deterrence, particularly since it will most clearly target the intolerable aspects of this case. The Board does not wish to blur in any way that which is so fundamentally unacceptable about this case and which needs to be forcefully deterred. The Board wishes to deter Modine and any other like-minded member of the regulated community from believing that it is an acceptable strategy to violate the permit requirements in the Act and Board regulations simply because they have persuaded the Agency to defer enforcement action.

In summary, the Board can find no mitigation for Modine's operating without a permit. On the contrary, Modine's failure to act and its underlying mind-set are so egregious that the Board determines that a \$10,000 penalty is necessary to aid in the enforcement of the Act; it is specifically imposed for Modine's operating without a permit, in violation of Section 9(b) of the Act and 35 Ill. Adm. Code 201.141 and 201.144.

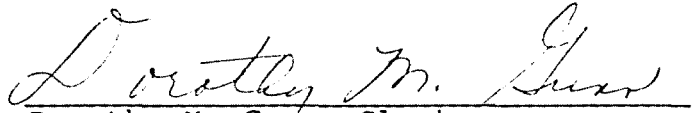
This Opinion constitutes the Board's supplemental findings of fact and conclusions of law in this matter. The Board's February 24, 1988 Order is hereby affirmed in its entirety except that the holding that Respondent has violated Section 9(a) of the Act and 35 Ill. Adm. Code 212.322 is stricken.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 1/2 par. 1041, provides for appeal of Final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

R. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion and Order was adopted on the 6th day of April, 1989, by a vote of 6-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board