

ILLINOIS POLLUTION CONTROL BOARD
March 27, 1986

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) PCB 83-2
)
CHEMETCO, INC., a Delaware)
corporation,)
)
Respondent.)

MS. GWENDOLYN W. KLINGLER, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT.

BELL, BOYD & LLOYD (MS. JOHNNINE BROWN HAZARD, OF COUNSEL) AND SCHAFLY, GODFREY AND FITZGERALD (MR. R. EMMETT FITZGERALD, OF COUNSEL) APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by W.J. Nega):

This matter involves an interlocutory appeal by Chemetco, Inc. (Chemetco) and the Illinois Environmental Protection Agency (Agency) to the Fifth District of the Illinois Appellate Court from an Order of the Illinois Pollution Control Board (Board) entered February 20, 1985 which rejected a third Amended Settlement Agreement submitted by Chemetco and the Agency in the enforcement action in PCB 83-2. (See: Board Order of February 20, 1985 in IEPA v. Chemetco, Inc., PCB 83-2).

In its February 20, 1985 Order rejecting the proposed settlement agreement, the Board certified the following question of law for interlocutory appeal:

"Whether the Board correctly determined that it lacks statutory authority, pursuant to Ill. Rev. Stat. ch. 111-1/2, Sections 1032, 1033 and 1042 as they relate to Board acceptance of stipulations of fact and proposals for settlement in enforcement cases, to issue Opinions and Orders in which any Board findings of violation are precluded by the terms of the stipulation and proposal, but in which respondent is ordered to pay a stipulated penalty and to timely perform agreed-upon compliance activities."

(See: page 10 of Board Order of February 20, 1985 in IEPA v. Chemetco, Inc., PCB 83-2).

The Illinois Appellate Court granted the parties leave to appeal pursuant to Illinois Supreme Court Rule 308 (see: 87 Ill.2d R. 308) and entered a final judgment on January 14, 1986 (Gen. No. 5-85-0143) which vacated the February 20, 1985 decision of the Illinois Pollution Control Board in PCB 83-2 and remanded the instant case back to the Board for further proceedings, consistent with the court's views.

In its January 14, 1986 decision, the Fifth District of the Illinois Appellate Court concluded that "the Board has the statutory authority to accept settlement agreements in enforcement cases where findings of violation are precluded by the terms of the stipulation and proposal but where the respondent is ordered to pay a stipulated penalty and to timely perform agreed upon compliance activities".

Accordingly, the Board will now accept in its entirety the third Amended Settlement Agreement filed by the parties on April 30, 1984.

LEGAL HISTORY OF THIS CASE

This case initially came before the Board on the January 6, 1983 Complaint brought by the Illinois Environmental Protection Agency (Agency).

Count I of the Complaint alleged that, from June 14, 1978 to January 6, 1983, the Respondent intermittently allowed contaminants from its facility into the atmosphere causing air pollution in violation of Rule 102 of Chapter 2: Air Regulations (now 35 Ill. Adm. Code 201.141) and Section 9(a) of the Illinois Environmental Protection Act (Act).

Count II alleged that, from January 1, 1980 until January 6, 1983, the Respondent operated its plant so as to cause emissions of fugitive particulate matter in violation of Rule 102 of Chapter 2 (now 35 Ill. Adm. Code 201.141), Rule 203(f)(1) of Chapter 2 (now 35 Ill. Adm. Code 212.301), and Section 9(a) of the Act.

Count III alleged that, from June 14, 1978 until January 6, 1983, the Respondent operated each of its three 70-ton furnaces in such a manner as to allow particulate emissions into the atmosphere which exceeded the allowable emission rates in violation of Rule 102 of Chapter 2 (now 35 Ill. Adm. Code 201.141), Rule 203(a) of Chapter 2 (now 35 Ill. Adm. Code 212.321), and Section 9(a) of the Act.

Count IV alleged that, from June 5, 1978 until December 12, 1978 and from December 8, 1981 to January 6, 1983, the Respondent operated its three 70-ton furnaces without an Operating Permit from the Agency in violation of Rule 102 of Chapter 2 (now 35 Ill. Adm. Code 201.141), Rule 103(b)(2) of Chapter 2 (now 35 Ill. Adm. Code 201.144), and Section 9(b) of the Act.

The initial hearing on this matter was held on March 4, 1983. The parties filed a Settlement Agreement on March 7, 1983. On April 12, 1983, the parties filed a second Settlement Agreement which was identical in substance to the first Settlement Agreement, but contained some minor language changes which had been read into the record at the hearing and had been requested by the Agency.

On October 6, 1983, the Board entered an Interim Order which rejected the proposed settlement agreement. Deficiencies in the initially proposed stipulation included the fact that: (1) Chemetco did not admit to any violations, but did agree to pay a \$20,000 penalty and to undertake a compliance program; (2) the parties stated that the settlement agreement could be amended if they agreed in writing, but did not state that the Board's approval would be necessary (thereby creating a mechanism by which they could amend the compliance plan without first consulting the Board); and (3) the possibility of carcinogens being released into the atmosphere from arsenic-bearing materials during scrap metal processing operations (thereby possibly jeopardizing the health and safety of individuals who live near the metal reclamation and smelting facility) was not specifically addressed by the parties.

On March 28, 1984, a Joint Motion for Approval of an Amended Settlement Agreement and Exhibits, along with the aforementioned amended stipulation and exhibits, was filed.

On April 6, 1984, a hearing was held and the third Amended Settlement Agreement (Stip.) and various exhibits were admitted into evidence as Parties' Exhibit No. 1. (R. 7-20).*

In the third Amended Settlement Agreement, the parties amended the previous stipulation to meet the Board's concerns. On page seven, paragraph two of the most recent stipulation, Chemetco stated that it "neither admits nor denies the alleged

*Citations to the record (R.) refer to the transcript of the April 6, 1984 hearing. The parties inadvertently filed the proposed settlement agreement before a hearing was held on the amended agreement. The Board will therefore consider the official filing date of the third Amended Settlement Agreement to be April 30, 1984 (the date that the hearing transcript was filed with the Board).

violations", rather than simply denying the violations. The objectionable language on page seven in paragraph four pertaining to amendment of the agreement without prior Board approval has been deleted in the latest stipulation, and the parties have noted that the compliance program was completed on October 6, 1983. (R.3). Additionally, the Agency has indicated that "having investigated the potential for arsenic emissions during operation of Chemetco's process, it has determined that arsenic is driven off only during the heating stage and is therefore captured by the scrubbers and not released during charging and tapping". (Joint Motion, p. 2-4).

On June 14, 1984, the Board entered an Opinion and Order granting the parties' Joint Motion for Approval of an Amended Settlement Agreement and the third Amended Settlement Agreement. However, item #1 of the Board's June 14, 1984 Order included a finding that Chemetco, Inc. had violated Air Pollution Rules 102 (now 35 Ill. Adm. Code 201.141), 103(b)(2) (now 35 Ill. Adm. Code 201.144), 203(a) (now 35 Ill. Adm. Code 212.321), and 203(f)(1) (now 35 Ill. Adm. Code 212.301) of Chapter 2: Air Regulations and Sections 9(a) and 9(b) of the Illinois Environmental Protection Act (Act). Item #5 of the Board's June 14, 1984 Order included a Certificate of Acceptance and Agreement to be bound to all the terms and conditions of the Order to be signed by both parties.

Subsequently, both parties objected to the inclusion of the finding of violation and moved the Board to modify its June 14, 1984 Order by deleting the finding of violation. Chemetco filed its Motion for Modification of the Board's June 14, 1984 Order on July 19, 1984. On August 7, 1984, the Agency filed an Objection to the same Board Order, and on August 13, 1984, Chemetco filed a Response objecting to part of the Agency's motion and reasserted its earlier Motion to Modify the Board's Order.

On February 20, 1985 the Board issued an Order that denied the modifications requested by the parties and that rejected the third Amended Settlement Agreement in its entirety. On its own motion, the Board vacated its Opinion and Order of June 14, 1984 in its entirety and ordered the parties to proceed to an expeditious hearing in this matter within 60 days of the date of the Board's February 20, 1985 Order. Moreover, the Board held that its authority to order payment and/or implementation of a compliance plan is premised on a finding of violation but concomitantly issued a statement (also known as a Certificate of Importance) to allow for immediate interlocutory appellate review of the Board's February 20, 1985 Order pursuant to Illinois Supreme Court Rule 308. (See: Getty Synthetic Fuel Co. v. PCB, 104 Ill. App. 3d 285 (1st Dist. 1982) for Board's authority to issue such a statement).

On March 18, 1985, the Agency filed a Motion for Stay of the hearing ordered by the Board in its February 20, 1985 Order.

On March 22, 1985, the Board entered an Order that granted the Agency's Motion for Stay.

On April 9, 1985, the Illinois Appellate Court (Fifth District) granted both parties' applications for interlocutory appeal.

Subsequently, on January 14, 1986, the Illinois Appellate Court (Fifth District) entered a final judgment (Gen. No. 5-85-0143) which vacated the February 20, 1985 decision of the Board in PCB 83-2 and remanded the case back to the Board for further appropriate proceedings.

COMPANY OPERATIONS

The Respondent, Chemetco, Inc., is a Delaware corporation duly authorized by the Illinois Secretary of State to transact business in Illinois. Chemetco owns and operates a metal reclamation and secondary copper smelting facility (facility) in Hartford, Madison County, Illinois which has a plant site of 108 acres (located about 10 minutes by car north of Granite City, Illinois) which employs 176 people. Chemetco's site is zoned for heavy industrial use and is surrounded by farmland. The nearest houses not occupied by Chemetco personnel are about 1/4 mile from the plant site. An oil refinery, power plant, petrochemical plant, brass mill, and other large industrial facilities are all located within a 10-mile radius of the Respondent's plant. (See: Exhibit 1; R.8).

Chemetco acquires a broad range of copper-bearing raw materials from scrap metal dealers and industry and produces copper cathodes from these raw materials, as well as recovering other non-ferrous metals as by-products. During smelting, refining and processing operations at its plant, Chemetco used three (now four)* 70-ton rotating furnaces equipped with overhead hoods which contain a scrubber system to capture particulate emission. During part of the operations at Chemetco's facility, each of the furnaces are tilted, allowing the emission of odors, dust, and gases (including zinc oxides) to escape beyond the furnace hoods and roof of the plant into the atmosphere.

During Chemetco's processing operations, copper-bearing scrap is smelted and refined. The slag is treated in three (now four) top-blown, 70-ton rotating Kaldo furnaces which are called

*After April 12, 1983, a fourth rotating rotary furnace (i.e., another "converter") came into operation at the Respondent's facility.

"converters". (See: Exhibits 2 and 3). Some particulate emissions from these three (now four) converters are captured by separate hoods and then are ducted to, and cleaned in, separate venturi scrubbers. (Stip. 2-3; R.8-9). Exhaust from this process reaches the atmosphere through three (now four) separate stacks. However, some particulate emissions are not captured by the hoods, ducts, and scrubbers. (Stip. 2; R.9).

The three rotating furnaces and associated air pollution control equipment (including the three venturi scrubbers) are existing emission sources which were constructed and in operation before April 14, 1972. The Agency issued the requisite operating permit for the three furnaces on November 16, 1972 and renewed the permit on June 18, 1974 and April 2, 1976. However, because an Agency inspection on June 14, 1978 indicated possible violations of Rule 103(b)(2) of Chapter 2: Air Regulations (now 35 Ill. Adm. Code 201.144) and Section 9(a) of the Act, the Agency denied permit renewal on July 20, 1978. After corrective measures were taken by the Respondent, subsequent permit renewals occurred on December 12, 1978; July 20, 1979; and September 8, 1980. (See: Exhibit 6).

On February 26, 1981, the Agency received a petition, signed by 52 individuals, which alleged that Chemetco had violated Rule 203(f)(1) of Chapter 2: Air Regulations (now 35 Ill. Adm. Code 212.301) by improper emissions into the atmosphere. (See: Exhibit 7). On March 10, 1981, the Agency notified the Respondent that its inspection indicated apparent violations of Rule 203(f)(1) of Chapter 2: Air Regulations (now 35 Ill. Adm. Code 212.301).

On May 13, 1981, the Respondent put forth a proposal to modify the air pollution control equipment on its three rotating furnaces and to construct a fourth furnace. This proposal was based on various reports from consulting engineers (dating as early as April, 1980) which indicated that it would be possible to design air pollution control equipment which could capture additional particulate emissions from the charging and tapping operations of Chemetco's three furnaces and also introduce a change in the basic process (utilizing four, rather than three, furnaces) to reduce overall particulate emissions from the Respondent's plant.

While negotiations were pending with the Agency, the Respondent submitted permit renewal applications for the three existing furnaces on June 5, 1981. After notice from the Agency on July 9, 1981 that it intended to deny Chemetco's pending permit renewal applications, the Respondent withdrew the applications. On June 16, 1981 and September 10, 1981, Chemetco submitted applications to the Agency for a construction permit for the fourth furnace. However, the Agency deemed these applications incomplete, and sent notices of incompleteness to

the Respondent on July 8, 1981 and October 6, 1981. On December 3, 1981, Chemetco resubmitted its permit renewal application for the existing three furnaces and its construction permit application for the fourth furnace, but withdrew these applications following the Agency's December 30, 1981 notice of intention to deny these permits.

On February 10, 1982, the Respondent again applied for a construction permit for the fourth furnace. On March 22, 1982, the Agency issued Construction Permit No. 119801AAC to Chemetco which authorized the construction of a fourth converter and the concomitant air pollution control equipment. On July 2, 1982, the Respondent applied for a construction permit to retrofit the three existing furnaces. On August 16, 1982, the Agency issued the requisite construction permit which authorized the Respondent to modify and install the necessary air pollution control equipment on Chemetco's three rotating furnaces. (See: Exhibit 6).

During ongoing settlement negotiations, the parties were initially in dispute as to whether or not: (1) Chemetco was lawfully entitled to renewal of its operating permit after the expiration date of December 8, 1981; and (2) the charging and tapping emissions from the Respondent's three furnaces were insufficiently controlled on the dates alleged in the Complaint. (R. 13; Stip. 5). The Respondent has neither denied nor admitted the allegations in the Complaint, but has agreed to improve control of charging and tapping emissions by following an agreed-upon compliance program and schedule involving retrofitting of the three existing furnaces to improve the snorkel hoods and the charging and tapping controls. (See: Exhibits 3 and 5). Additionally, after the completion of the retrofitting program, the Respondent has agreed to conduct the necessary stack tests (and to notify the Agency in advance of the stack sampling so that Agency personnel may witness these tests) along with simultaneous visual observations of the fugitive emissions from the melt shop building to determine compliance. (See: Exhibits 4 and 5).

THE PROPOSED SETTLEMENT AGREEMENT

Although Chemetco has neither admitted nor denied the allegations of the Complaint, the proposed settlement agreement provides that the Respondent agrees to promptly pay a stipulated penalty of \$20,000 into the Environmental Protection Trust Fund. Since the compliance program has already been completed, it appears that all of the issues between the parties that arose in this action are now moot. (R. 3).

In evaluating this enforcement action and proposed third amended settlement agreement, the Board has taken into consideration all the facts and circumstances in light of the

specific criteria delineated in Section 33(c) of the Act and finds the amended settlement agreement acceptable under 35 Ill. Adm. Code 103.180. Pursuant to the remand by the Illinois Appellate Court (Fifth District), the proposed settlement agreement will be accepted in its entirety. The Respondent will, therefore, be ordered to pay the stipulated penalty of \$20,000 into the Environmental Protection Trust Fund.

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

ORDER

It is the Order of the Illinois Pollution Control Board that:

1. The parties' Joint Motion for Approval of the Amended Settlement Agreement is hereby granted. The Board hereby accepts in its entirety the third Amended Settlement Agreement filed on April 30, 1984.
2. Within 35 days of the date of the Order, the Respondent shall, by certified check or money order payable to the State of Illinois and designated for deposit into the Environmental Protection Trust Fund, pay the stipulated penalty of \$20,000 which is to be sent to:

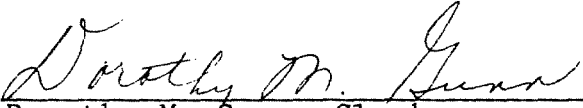
Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, Illinois 62706

3. The Respondent shall comply with all the terms and conditions of the third Amended Settlement Agreement filed on April 30, 1984, which is incorporated by reference as if fully set forth herein.

IT IS SO ORDERED.

Board Member J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of March, 1986 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board