ILLINOIS POLLUTION CONTROL BOARD
January 10, 1985

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 83-22
STANDARD SCRAP METAL CO.,	)	
Respondent.	)	

PHILIP L. WILMAN, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT; AND

ERICA TINA HELFER (ROSETHAL AND SCHARFIELD) APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board upon a complaint filed on February 23, 1983, by the Illinois Environmental Protection Agency (Agency) against Standard Scrap Metal Co. (Standard Scrap). The Agency alleges that Standard Scrap violated Sections 9(a), (b), and (c) of the Environmental Protection Act (Ill. Rev. Stat. 1983, ch. 111½, pars. 1009) (hereinafter "Act"), and Rules 103, 105, 202, 203 and 502 of Chapter 2: Air Pollution, of the Board's regulations.* Hearing was held on February 29, 1984, at which the parties presented a Stipulation of Facts and a Proposal for Partial Settlement. The settlement agreement was conditioned upon the Board's acceptance of all the terms of settlement. According to Standard Scrap, the testimony and exhibits offered during the remainder of the hearing were for the purpose of mitigating any penalty imposed based on the "economic reasonableness of compliance and the financial ability of the company. (R. 12). On November 21, 1984, the Board entered an Interim Order rejecting the settlement "unless the parties . . . request the Board to determine the case based on the merits as contained in the record presently before it" (Interim Order, p. 2). The basis for that order was that the Board believed that the parties had reserved the right to have a full evidentiary hearing on the

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*Chapter 2 has been codified since this Complaint was filed. For convenience in reviewing the record, the former numbering system is used in this Opinion and Order. The rules as codifed as sections in 35 Ill. Adm. Code are: Rule 103(b)(2)--Section 201.144, Appendix C; Rule 105(a)--Section 201.149; Rule 202(b)--Section 237.102.

penalty imposed <u>after</u> the Board had determined that penalty*.

On December 6, 1984, Standard Scrap and the Agency filed a joint motion for clarification which indicates that the "full evidentiary hearing on the penalty" referred to in the settlement was the February 29, 1984 hearing and not a hearing after Board decision. The fact that the referenced hearing was the February 29, 1984 hearing removes the Board's concerns about the procedural propriety of the settlement. Therefore, the Interim Order is hereby vacated, the motion is in turn denied as moot, and the Board will decide the case on the record before it, including the Stipulation, the record of hearing, and the briefs.

The parties waived closing arguments at hearing and agreed to file briefs (R. 207). The Agency filed a written Closing Argument and Brief on April 20, 1984. Standard Scrap filed its brief on May 18, 1984, to which the Agency replied on June 1, 1984. Although Standard Scrap, at hearing, framed the issue to be one involving the penalty, in its brief it argues that Counts II through V of the Complaint should be dismissed. Therefore, to comply with Section 33 of the Act, the Board will also have to decide whether the Agency, based on the Stipulation and the hearing record, proved that Standard Scrap caused or threatened to cause air pollution as alleged in the Complaint, and, if so, whether Standard Scrap demonstrated that compliance with the Board's regulations would impose arbitrary and unreasonable hardship (Ill. Rev. Stat. 1983, ch. 111½, par. 1031).

Standard Scrap, an Illinois corporation, owns and operates a facility at 4004 S. Wentworth Avenue, Chicago, Illinois for the reclamation of scrap metals, such as aluminum and copper. The reclaimed scrap metal is sold primarily to steel smelters and refiners. The facility contains a gas-fired boiler, a wire burning incinerator and two aluminum sweat furnaces, one of which is currently inoperable (Paragraph 3**). The facility is located in an area devoted to industry, but also includes residential property and public housing. The area where Standard Scrap's

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*The settlement left the determination of a penalty to the Board since the parties, apparently, were unable to reach agreement on that issue.

**The references to Paragraphs are those contained in the Stipulation of Facts.

facility is located is designated as nonattainment for the National Ambient Air Quality Standards for total suspended particulates pursuant to the Clean Air Act, 42 U.S.C. 7401 et seq., in the State of Illinois' Air Implementation Plan at 40 CFR 52.720 et seq. (1983), (Paragraph 8).

In Count I of the Complaint the Agency alleges that Standard Scrap operated its emission sources, i.e. the boiler, the incinerators, and the sweat furnaces, without the operating permits required under Section 9(b) of the Act and Rules 103(b)(2) of Chapter 2: Air Pollution. The Complaint alleges that since February 7, 1974, and specifically on March 30, 1979; January 18, February 26, June 11, July 16, July 29 and December 30, 1980; November 10 and 20, 1981; and March 16 and May 14, 1982, Standard Scrap has operated emission sources, as defined under Rule 101, without operating permits. The parties stipulated that Standard Scrap never had operating permits for the wire burning incinerator or the two aluminum sweat furnaces (Paragraphs 10 and 11). The parties further stipulated that since February 7, 1974 until April 16, 1983, Standard Scrap did not have an operating permit for the gas-fired boiler at the Wentworth facility (Paragraph 9), and that the boiler was operated on March 30, 1979, December 30, 1980 and January 21, 1983 (Paragraph 16).

It is further stipulated that Standard Scrap operates one of the sweat furnaces an average of eight hours a day, three days a week and 40 weeks per year, and that at a maximum it operates on furnace eight hours per day, five days a week and 52 weeks per year (Paragraph 4). It is also stipulated that Standard Scrap operates the incinerator on the average and at the maximum for the same amount of time as the sweat furnace (Paragraph 5).

The inspection report for a February 26, 1980 Agency visit states that the sweat furnace was in operation (Ex. 1). During a June 11, 1980 inspection, the incinerator was observed to be operating (Ex. 2). At a July 16, 1980 inspection, both the incinerator and the sweat furnace were reported to be operating (Ex. 3). The report for a November 20, 1981 inspection attributed to Ronald Kanter, an officer of Standard Scrap, a statement that one aluminum sweat furnace is used when the other was under repair. The inspector also noted that Mr. Kanter responded in the negative when asked whether the facility had any boilers or incinerators, but that the Agency files on the facility indicated otherwise (Ex. 13). After taking opacity readings of the incinerator's stack on May 14, 1982, the Agency field inspector visited the site and was informed that the smoke was caused by not allowing the incinerator to pre-heat sufficiently (Ex. 4). The parties stipulated to these Exhibits 1, 2, 3, 4 and 13 being made a part of the record. (Paragraphs 12, 13, 15, 25.)

The Agency also sent letters dated March 17, May 19, 1980, June 6, July 17, 1980; August 22, December 21, 1981; May 17, 1982 warning the Respondent of the need to obtain operating permits (Ex. 5, 6, 31, 7, 8, 9, 14, 16). The parties stipulated that an Agency inspector delivered permit application forms to Mr. Kanter on March 23, 1982 (Ex. 15, Paragraph 29). The enforcement notice letter, required under Section 31(d) of the Act, was sent on or about December 2, 1982 (Ex. 17). The parties stipulated that these Exhibits should be made a part of the record. (Paragraphs 17, 18, 19, 20, 21, 26, 29, 30, 31.)

Standard Scrap argues that Mr. Kanter was not aware that the Agency required operating permits until 1980 (R. 202, Resp. Brief at page 8) and that during the time of violation Standard Scrap had permits from the City of Chicago (Resp. Ex. A). However, on February 7, 1974 the Board issued an Opinion and Order that Standard Scrap achieve compliance through the installation of an afterburner by June 1, 1974. That Opinion was based on an agreement by Standard Scrap to install them "subject to the issuance of the necessary permits by the Agency and the City of Chicago . . . " (Pet. Ex. B). Since the same directors as those stipulated in this action (Paragraph 2), were the Respondents in that complaint brought by the Agency on May 9, 1973 for the same facility, IEPA v Sam Kanter, Sam Cohen, Benjamin Kanter, d/b/a Standard Metal Company, PCB 73-200; 11 PCB 171, the argument that the current Secretary and Treasurer and a Director of Standard Scrap was ignorant of the law until 1980 is neither a proper defense nor does it mitigate the offense.

Standard Scrap admits that it does not have operating permits for its incinerator or sweat furnaces. However, it argues that it applied twice for permits, but was twice denied the necessary permit (Exs. 10, 12, 20 and 23), and that the Agency denied the permits because operation of the emission sources might cause violation of the Act. The permit denial letters recite more than the Agency's authority under Section 39 of the Act and Rule 103(b) to deny permits on that basis. In response to the first permit application, dated August 8, 1980 (Ex. 10), the Agency sent a letter requesting Respondent to provide data on the type, amount and condition of the material to be sweated and incinerated (Ex. 11). The subsequent denial letter cites Standard Scrap's failure to provide this minimal information required under Rule 103(b)(3) as the reason for denial (Ex. 12). Standard Scrap did not appeal the Agency's decision, and did not apply for permits for a second time until March 9, 1983, after this enforcement action had been filed (Ex. 21). At that time the Agency issued an operating permit for the boiler (Ex. 23), but denied the operating permits for the other emission sources because the information submitted about the incinerator was insufficient to determine compliance with Rule 203(a), and that submitted about the sweat furnace indicated emissions in amount exceeding the allowable under Rule 203(a). Again, Respondent did not appeal (Ex. 23).

Although the parties have in effect stipulated to violation of the operating permit requirements of the Act and regulations, the Board believes it necessary to recite the facts to support the penalty, to find violations, and to order Standard Scrap to obtain the necessary operating permits. The Board finds that Standard Scrap operates its emission sources routinely as stipulated, and that at least on June 11 and July 16, 1980, and on May 14, 1982, Respondent operated its incinerator without the necessary operating permit; that it operated one aluminum sweat furnace on February 26 and July 16, 1980 without the necessary operating permit; and that it operated its gas-fired boiler without the necessary operating permit between February 7, 1974, and until April 16, 1983, specifically on March 30, 1979, December 30, 1980 and January 21, 1983. Since Standard Scrap is in the business of reclaiming metal, and has stipulated that it routinely operates its incinerator and one aluminum sweat furnace, the Board finds that these emissions sources were operated on days additional to those listed. Since Standard Scrap has been issued an operating permit for its boiler, the Board need only order that the Respondent cease and desist operation of the operable sweat furnace and the incinerator until the necessary operating permits are issued by the Agency.

Count II alleges that Standard Scrap violated Section 9(a) of the Act, which prohibits causing or threatening to "allow the discharge or emission of any contaminant into the environment . . . so as to violate the regulations or standards adopted by the Board under this Act" [Ill. Rev. Stat. 1983, ch. 111½, par. 1009(a)], in that emissions of smoke and particulate matter from Standard Scrap's sources exceeded the 30 percent opacity standard contained in Rule 202(b) of Chapter 2. Rule 202(b) provides in pertinent part that:

> No person shall cause or allow the emission of smoke or other particulate matter from any other emission source into the atmosphere of any opacity greater than 30 percent.

On July 16, 1980 two Agency engineers stopped to inspect the Standard Scrap facility on their way to a scheduled inspection at another facility because while driving on the Dan Ryan Expressway they observed heavy, voluminous smoke being emitted from a stack, which at first they had thought to be caused from a fire. Upon arrival, Mr. Kanter explained that the incinerator's afterburner had malfunctioned. Photographs taken by the inspectors clearly depict smoke being emitted from Standard Scrap's incinerator stack at an opacity greater than 30 percent (Ex. 3). On May 14, 1982, another Agency inspector took visible emission readings of the incinerator stack between 8:00 and 8:15 A.M. During this time the opacity ranged between 0 and 100 percent. Pictures taken by the inspector again clearly depict the heavy smoke and particulates being emitted from the stack, further documenting the readings contained in the Visible Emission Recording Form

(Ex. 4). This inspector visited the facility after taking the readings. While traveling from the observation point to the facility, the inspector continued to observe smoke being emitted. Upon arrival, the inspector was informed by Mr. Kanter that the smoke was caused because the incinerator had not been "pre-heated for a long enough period" (R. 103).

At hearing Erica Karp, a professional social worker, testified that while driving southbound on the Dan Ryan Expressway on the morning of January 18, 1980, her vision was so obstructed by black smoke coming from the west side of the highway that she was blinded by it and could only hope not to be in a car collision. When she cleared the smoke, she observed the smoke to be coming from a stack and observed Standard Scrap's name on a building right by the stack. She admitted to not being able to ascertain for certain whether the stack was Standard Scrap's (R. 38-42). Another witness, Philip Vadeboncoeur, an executive at another company located diagonally across the street from the Standard Scrap facility, observed black smoke coming from Respondent's incinerator stack at about 8:30 in the morning on December 14, 1983 (R. 19). The witness further testified that his company's employees have been made ill by the smoke sucked into his building due to breezes or the doors being opened for ventilation in the summer, and that he has had to send some of them home. He could not count the number of times over the last ten years that this has occurred (R. 24-25). On cross examination, the witness testified to having observed smoke emitted from other facilities in the neighborhood and that on occasion has complained to the neighboring facilities and the City of Chicago Department of Air Pollution (R. 26-29).

According to Respondent's own admissions to Agency inspectors, heavy smoke, which was visible from the Dan Ryan Expressway, was emitted from the incinerator's stack on at least two occassions. Mr. Vadeboncoeur's testimony also supports a finding that at least on December 14, 1983, the incinerator's stack emitted black smoke. Respondent's argument that other neighboring facilities emitted black smoke does not change the fact that its stack's emissions were greater than allowed by regulation, and endangered the health of persons in the vicinity. The facility's proximity to the Dan Ryan Expressway and the fact that Standard Scrap's emissions threaten to obscure the driving visibility as documented by the pictures (Exs. 3 and 4), and most likely as testified to by Ms. Karp, further aggravates the violations. Respondent cannot diminish the effect of these incidences by claiming that the facility is in a heavy industrialized area. The Board finds that in operating its incinerator, Standard Scrap has violated Rule 202(b) and Section 9(a) of the Act.

Count III of the Complaint alleges that Standard Scrap violated Section 9(a) of the Act and Rule 105(a) of Chapter 2. In pertinent part, Rule 105(a) prohibits:

> the continued operation of an emission source during malfunction or breakdown of the emission source or related air pollution control equipment if such operation would cause a violation of the standards or limitations set forth in Part 2 of this Chapter, unless the current Operating Permit granted by the Agency provides for operation during a malfunction or breakdown. No person shall cause or allow violation of the standards of limitations set forth in Part 2 of this Chapter during startup unless the current Operating Permit granted by the Agency provides for violation of such standards or limitations during startup.

The Agency alleges that in allowing the continued operation of the incinerator on July 16, 1980 and May 14, 1982, when on both occasions Mr. Kanter admitted to the Agency inspectors that the afterburner had malfunctioned or had not been sufficiently preheated prior to startup, the resulting emissions caused the opacity rule, Rule 202(b), and Rule 203(a) (discussed under Count IV, infra p. 8) to be violated.

As already discussed under Counts I and II (supra, pp. 4 and 5), Mr. Kanter informed the respective Agency inspectors on July 16, 1980, and May 14, 1982, that the black smoke was due to the afterburner malfunctions on the first date, and insufficient pre-heating on the second date (Ex. 3 and 4). On both occasions, the inspectors described opacity greater than 30 percent, and the Board has held these to be in violation of Rule 202(b). Furthermore, the incidence of black smoke observed and experienced by Mr. Vadeboncoeur and his employees have been found to be in violation of Rule 202(b).

The Respondent argues that on the first occasion, the incinerator was shut down and the wire was removed to burn outside of the incinerator; the second incident is not explained. On the first occasion, the inspectors observed the violation at the minimum for ten minutes, the approximate length of time it took to take pictures. The inspectors also documented significant amounts of fugitive smoke being emitted from the doors, sides, and back of the incinerator, as well as from the stack (Ex. 3). On the second occasion, the inspector observed black smoke while driving to the facility, and that he observed the thick smoke to have cleared while at the facility's office (R. 102, Ex. 4). The Board finds that the Respondent did continue to operate the incinerator on both dates during its malfunction and during startup which caused violations of Rules 202(b) and 203(a), and, therefore, finds Respondent to have violated Rule 105(a).

Count IV of the Complaint alleges that Respondent violated Rule 203(a) of Chapter 2 which prohibits emissions of particulate matter in any one hour period to exceed the allowable emission rates contained in that rule. At Paragraph 6 and 7 of the Stipulation presented by both parties, it was agreed that the actual emission rate from the sweat furnace, as calculated on or about November 16, 1982, was 0.815 pounds per hour (lbs/hr). The allowable rate under Rule 203(a) is 0.55 lbs/hr. The actual emission rate from the incinerator, as calculated prior to September, 1982 was 4.85 lbs/hr (Paragraph 7); the allowable is 0.68 lbs/hr. The parties have stipulated that both emissions sources are operated routinely, and have stipulated to actual emissions greater than allowable under Rule 203(a). Therefore, the Board must conclude that Respondent violated Rule 203(a) on those dates the inspectors observed the sources operating February 26 and July 16, 1980, and on the dates the incinerator malfunctioned--July 16, 1980 and May 14, 1982, and whenever else the Respondent operated these sources.

Count V alleges that Respondent violated Rule 502(a), which prohibits open burning, and violated Section 9(c) of the Act which states that no person shall:

> Cause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the open burning of any refuse in any chamber not specifically designed for the purpose and approved by the Agency pursuant to regulations adopted by the Board under this Act . . .

On July 16, 1980, the Agency inspector reported seeing a load of burning wire insulation outside of the incinerator (Ex. 3). Respondent argues that the wire was removed due to the malfunction of the incinerator, and squelched within "a matter of seconds" (R. 181-182). If it took such a short period of time to douse the burning wire, it is surprising that it was still burning when the inspectors arrived at the site, or that the inspector reported the incident. Nevertheless, the Board finds that Respondent did not violate the open burning prohibitions contained in Rule 502(a) and Section 9(c) of the Act, because the incident was not for the purpose of reclaiming or disposing of the wire. The intent of the Act is to prohibit intentional or negligent actions.

The Agency asked the Board to assess a penalty of $50,000 for the violations found to aid in the enforcement of the Act (Agency Brief, p. 1). To support, in part, that amount, the Agency introduced testimony that the Respondent had saved approximately $104,500 as of December of 1983 by not installing the afterburner required by the Board's 1974 order (R. 49). This figure was arrived at based on a computer program developed and adopted by the United States Environmental Protection Agency (40

(R. 67, App. A). According to the Agency's witness the computer program used is designed to take financial data and perform calculations to demonstrate the difference between installing pollution control equipment by one date and installing the same equipment at a later date (R. 51-52). The data used is as follows: the initial date that installation of the afterburner was to take place; the estimated cost of the afterburner at that time; the prevailing rate of inflation for the relevant time period; the discount rate, based on Standard Scrap's average return on stockholder's equity; the interest rate on Standard Scrap's long-term debt; Standard Scrap's marginal income tax rate; the investment tax credit rate; Standard Scrap's capital structure; and the depreciation life of the afterburner equipment (R. 52-59). Three sources provided the data used: Stipulated documents, such as Standard Scrap's financial statements; information reasonably relied on by economists to perform this type of calculations, such as interest rates found in Moody's Bond Record; and information supplied by the Agency's field officers (R. 56: 91-94; Ex. 29A-29I; Comp. Ex. A). The $104,000 estimate was offered as cost savings, not as "a measure of economic reasonableness of ability to pay" (R. 74). The witness acknowledged that he never determined respondent's financial ability to install the afterburner agreed to under the 1974 stipulation and order, or Respondent's financial ability to pay a penalty (R. 75).

Respondent argues that this figure was based on theoretical figures and unsubstantiated costs. Respondent claimed that the $30,000 cost of an afterburner reduced to $13,000 in 1974 dollars, used by the witness "as theoretical" because the witness did not ascertain what an afterburner would have actually cost in 1974 (Resp. Brief p. 11) The witness explained that obtaining a 1974 cost figure would have been difficult, since most vendors are reluctant to quote today's costs (R. 77). The $30,000 figure used was, however, the lower of two cost estimates obtained by the Respondent from a vendor in July of 1983. Notably this and the other cost estimates were obtained after this action was brought (Exs. 24-28; R. 53-54). The Agency cannot be faulted for using reasonable methods for determining the actual cost in 1974, the year Respondent's directors had agreed to install the afterburners. If the Respondent had information indicating the $13,000 figure was incorrect, it was not offered into evidence.

The Respondent also complained that the witness did nothing to verify the actual cost of operation and maintenance. The witness stated that he had used figures given him by an Agency field officer purportedly representing reasonable operation and costs, a range of $23 to $25 an hour in 1975 adjusted down to 1974 dollars (R. 77, 54). The Respondent did not offer any different figures. Respondent also argues that the witness did not use the actual useful life figure for the afterburner. The witness acknowledged that he could not obtain the same for this particular company, and used an average contained in an IRS

ment, as recommended by the USEPA (R. 82). Finally, the Respondent argues that the witness did not use the tax bracket Standard Scrap was in during the relevant years, or the actual method of calculating depreciation used by Standard Scrap. (Resp. Brief, p. 11; R. 69; 58-59.) However, the witness did use the top rate over the last ten years for corporate income, 48 percent (R. 78), and used seven years depreciation life, the minimum allowed to take the maximum investment tax credit. This coupled with a 10 percent tax credit represented the minimal of savings (R. 81). Aside from Respondent's objection that the estimated cost savings do not take into account Standard Scrap's financial ability to install the afterburner, Respondent's arguments serve only to indicate that the cost savings estimated was conservative. As for Standard Scrap's ability to pay for the afterburner, the Agency does not have a duty to prove that in the affirmative or the negative. That burden falls to Repsondent, and would serve only to mitigate any penalty for findings of violation of a 1974 Board Order and subsequent violations of the Act and Board regulations.

Respondent presented testimony that it could not afford to install pollution control equipment due to the severe financial condition of the company (Exs. 29, 30; R. 130-138, 183). Presumably this evidence was offered to prove that compliance would impose arbitrary or unreasonable hardship in accordance with Section 31(c) of the Act. While the Board accepts that it may now be or may have been in the recent past difficult for Standard Scrap to finance installation of the necessary controls at the sweat furnace, there is no evidence that was the case in 1974 when Standard Scrap agreed to and was ordered to install the equipment. Furthermore, the cost of pollution control equipment is recognized as a necessary cost of doing business when the business utilizes sources from which the uncontrolled emissions endanger public health and safety. The Respondent did not prove that operating these sources without or with malfunctioning pollution control equipment does not endanger the same, or that uncontrolled emissions do not contribute to the nonattainment status for the ambient air quality standards, which are established federally and by the state to protect public health. Therefore, the Respondent did not prove that installing and maintaining proper controls, i.e. compliance with the applicable regulations, imposes an arbitrary or unreasonable hardship on Respondent. Since there is no evidence that the control requirements are unnecessary in this case to serve the purposes of the Act, the regulations, including the national and state ambient air quality standards, Respondent has failed to prove why Standard Scrap should not be required to comply with the same.

As requested by the Respondent, and in accordance with Section 33(c) of the Act, the Board in making its determination will consider the criteria set out therein. First, the fact that Respondent has failed to have operating permits for its three

emission sources between 1974 and 1983, does not merely evidence that Respondent violated the permitting requirements of the Act and Board regulations, which are one mechanism for monitoring pollution, but also demonstrates that Respondent ignored a Board order adopted in 1974 pursuant to Respondent's agreement with the Agency. In so doing, Respondent continued to operate its emission sources with malfunctioning equipment and without controls and in such a manner as to emit pollutants on at least three occasions which endangered the public's health and safety.

Secondly, while a concern such as Standard Scrap does have social and economic value in that it employs persons and serves the steel manufacturing industry, those communities are better served by a facility utilizing controlled emission sources. Likewise, while the area where Standard Scrap is located is populated with heavy industry and, therefore, well suitable to such a concern, this is not to say that it can be operated without proper pollution controls. In fact, one neighboring employer testified that Standard Scrap's emissions interfered with the health of its employees to the extent that work was interrupted. While the operation may be suited to the area, if properly operated, it is not so suited if it is operated without controls. Finally, afterburners are technically feasible and economically reasonable methods of controlling sweat furnaces and incinerators. No evidence to the contrary was presented. The Respondent only proved that for it, it poses a difficult financial burden to install and maintain the equipment necessary to comply with the regulations adopted to protect public health and welfare.

At page 24 of its Brief, the Respondent reminded the Board the functions of the Agency and the Board are not only to determine "the existence of pollution but more so to render advice and assistance to polluters and potential polluters to assist them to comply with the requirements of the [Act]". Lonza, Inc. v. Illinois Pollution Control Board, 21 Ill. App. 3d 468, 315 N.E. 2d 652, 653 (3rd Dist., 1974). The settlement agreement reached by Respondent's directors and the Agency in 1974 and the subsequent Board order of February 7, 1974 ordering the installation of the afterburner and imposing a penalty of $200, as agreed to by the parties, were the beginnings of a series of efforts "to advise" the Respondent of the means of preventing pollution. The Respondent did not abide by the agreement and Board order; did not thereafter comply with the regulations adopted by the Board for the specific purpose of uniformly establishing the means for achieving and maintaining healthy air quality; and did not become involved in the permitting scheme established by the Act and Board regulations until 1980, and even then did not satisfactorily inform the Agency of the type and amount of pollution emitted from its sources to obtain the necessary permits. The permitting program is a principal method of informing owners and operators of pollution sources about what is required by them to

comply with the regulations intended to prevent pollution. Therefore, failure to have permits is more than a technical violation.

Not only did Respondent fail to independently comply with the regulations, but Standard Scrap also continually ignored the Agency's efforts to bring the facility into compliance. Over a period of three years, the Agency repeatedly warned the Respondent of the possible violations. In addition to letters pertaining to pending permit applications, letters were sent to the Respondent dated March 17, 1980 (Ex. 5), May 19, 1980 (Ex. 6), July 17, 1980 (Ex. 7), December 21, 1981 (Ex. 14), and January 20, 1983 (Ex. 19) outlining the problems. The Agency twice met with Respondent to discuss compliance, first on June 20, 1980 (Paragraph 19) and next on January 18, 1982 (Ex. 18), after the Section 31(d) notice of violations letter had been sent. Respondent did not act on this meeting or the letter sent on January 20, 1983 summarizing the same until after this action had been filed. According to the Stipulation, an Agency inspector told Mr. Kanter that he was willing to help the Respondent gather the information necessary for the permit applications on December 30, 1980 (Paragraph 24). Another Agency employee sent the application forms at Respondent's request on December 23, 1981 (Paragraph 27), and delivered forms in person on March 23, 1982 (Paragraph 29; Ex. 15).

Respondent asserts that the Agency is improperly concerned with punishment, quoting the Court in Lonza:

> The Act's purpose is to protect the environment of the State of Illinois. It was not enacted primarily to punish polluters but rather to protect, enhance and restore the environment by eliminating, lessening and preventing pollution (315 N.E. 2d at 653). (Resp. Br. p. 25.)

The Board rejects this argument. In spite of extensive Agency notification, warnings, and assistance, there was little or no corrective response from Standard Scrap after the Board decision in 1974 on the first complaint and before this action was filed in 1983. Not only did Respondent's refusal to comply with the Board's order of 1974 and failure to diligently pursue the necessary permits frustrate the Act's purpose quoted above, but Respondent's operations endangered the health and property of those persons in and passing through the vicinity of its facility.

Having found that installation of the necessary control measures and obtaining the necessary permits is not arbitrary or unreasonable, and having considered the factors set out in Section 33(c) of the Act, the Board will order Respondent to cease and desist operating the incinerator and operable sweat furnace until it has complied in full with the February 7, 1974 Board order involving this same facility and obtained the necessary operating

permits from the Agency for its incinerator and operable sweat furnace. Posting a performance bond as provided in Section 33(b) of the Act will not be required because that Respondent will not be be able to operate the sources until the defects are cured.

Finally, having held Respondent guilty on Count I since 1974, on Count II at least three times, on Count III at least twice, and on Count IV, Respondent is liable under Section 42(a) of the Act for a civil penalty of no more than $10,000 for each violation, and additional maximum of $1,000 for each day the violation continued. Rather than impose a penalty of $10,000 for each of the violations and assessing $1,000 for each day Respondent operated without permits, the Board will require the Respondent to pay $30,000. This amount is based on the facts that the Respondent admittedly operated its emission sources without operating permits since 1974; operated routinely both the incinerator and the aluminum sweat furnace at more than the respective allowable emission rates; and routinely operated the aluminum sweat furnace without the pollution control equipment it agreed and was ordered to install in 1974. The Agency established that the Respondent saved in the range of $100,000 by not fulfilling its agreement, which may have only cost it $13,000 at the time. Finally, the three times the Agency inspectors and a citizen witnessed the incinerator malfunctioning in and of themselves could justify a $30,000 penalty. Since these violations were incidentally witnessed by the Agency inspectors in passing on the Dan Ryan and due to complaints, it is likely that malfunctioning occurred more often, as testified to by the citizen witness, Mr. Vadeboncoeur.

The Board recognizes that Respondent may now have financial problems, which on the whole, are unrelated to the environmental requirements and costs for operating such a business. That unfortunate predicament can only serve to mitigate the size of the penalty. Those problems can neither excuse Respondent's repeated violations of the law resulting in harm to public health and environment, nor obviate the need to correct the environmental violations.

The Order requires payment of the penalty within 90 days of the date of this Order. However, the Board will consider modification of the payment date upon receipt of an agreed motion from the parties specifying an extended payment plan.

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

ORDER

The Board finds Respondent, Standard Scrap Metal Co.,

In violation of the Board Order, Paragraphs 2 and 3, in the matter of IEPA v. Sam Kanter, Sam Cohen, and Benjamin Kanter, d/b/a Standard Scrap Metal Company, PCB 73-200 (11 PCB 171). That Opinion and Order is Attachment A to this Order;

2) In violation of Section 9(b) of the Environmental Protection Act (Ill. Rev. Stat. 1983, ch. 111½, par. 1001 et. seq.) (Act) and Rule 103(b)(2) of Chapter 2: Air Pollution in that it operated its gas-fired boiler without an operating permit since February 7, 1974 until April 16, 1983, and operated its incinerator and aluminum sweat furnace without operating permits since February 7, 1974 at least up to and including February 29, 1984;

3) In violation of Section 9(a) of the Act and Rule 202(b) of Chapter 2: Air Pollution on July 16, 1980 and May 14, 1982, and December 14, 1983;

4) In violation of Section 9(a) of the Act and Rule 105(a) of Chapter 2: Air Pollution on July 16, 1980 and May 14, 1982;

5) In violation of Section 9(a) of the Act and Rule 105(a) of Chapter 2 as related to the emissions for its incinerator and aluminum sweat furnace; and

6) Not in violation of Section 9(c) of the Act and Rule 502(a) of Chapter 2: Air Pollution as alleged in Count V of the Complaint.

The Board, therefore, orders that Respondent, Standard Scrap Metal Co., shall

a) Cease and desist from operation of its incinerator until the necessary operating permit is obtained from the Illinois Environmental Protection Agency;

b) Cease and desist operating either of its aluminum sweat furnaces until Paragraph 3 of Attachment A is complied with and until the necessary permits are obtained from the Illinois Environmental Protection Agency; and permanently shut down the inactive aluminum sweat furnace by January 21, 1985;

c) Install temperature gauges on each afterburner with an interlock that prevents operation unless the afterburner temperature is at least 1400 degrees Fahrenheit, and take all steps necessary to ensure adequate pre-heating of each afterburner prior to charging. These requirements are to be made conditions of the operating permits issued by the IEPA; and

d) Within 90 days of the date of this Order pay a penalty of $30,000 for the violations of the Act and Regulations as described in this Opinion and Paragraphs (1) through (5) of this Order. Payment shall be by certified check or money order made payable to the State of Illinois, Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois, 62706.

IT IS SO ORDERED.

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 10th day of January, 1985 by a vote of 5-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board