ILLINOIS POLLUTION CONTROL BOARD
May 24, 1979

ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 77-143
PETER D. GIACHINI, Respondent.	)	

MS CAROL M. PEARCE AND MS JILL LESLIE DRELL, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT.

MR. JOHN MURPHY, GIACHINI, MURPHY & MANN, APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by Dr. Satchell):

This matter comes before the Board upon an amended complaint filed on October 13, 1977 by the Environmental Protection Agency (Agency). Respondent Peter D. Giachini was added as a party after discovery indicated he was the beneficial owner of fifty-three acres located near Palatine in Cook County, the area bounded by Dundee Road, Greenview Avenue, Glencoe Street, Portage Avenue, Northwest Highway and the Deer Grove subdivision, which was held by the original Respondent, Maywood-Proviso State Bank, under a trust agreement. The amended complaint alleges that since January 1, 1976 Respondent has allowed open dumping of refuse on land owned by him in violation of Section 21(b) of the Environmental Protection Act (Act) and Chapter 7: Solid Waste Rules and Regulations, including Rule 305, failure to place adequate daily cover of at least six inches of suitable material on all exposed refuse.

Hearings were held upon the complaint on May 18, 1978, June 7, 1978 and February 16, 1979. The Agency presented its witnesses at the first two hearings and Respondent testified at the last. Respondent appeared at the first hearing with counsel, stated that, among other things, he intended to file an interlocutory appeal and walked out. There is no mention of such an appeal in the record. Respondent did not otherwise participate in the first two hearings and did not cross-examine the Agency's witnesses. However, Respondent makes no arguments questioning due process aspects of the hearings.

Mr. Kenneth Bechely, regional manager of the Agency's Land Pollution Office, testified concerning four visits to the site on August 18, 1976, June 9, 1977, October, 1977 and May 17, 1978 (R. 33, 38). He testified that there was a large volume of debris, including construction debris, waste from processing auto interiors and "people garbage" (R. 34). The debris extended two hundred to three hundred feet from the highway into Respondent's property and increased in volume between August, 1976 and June, 1977 (R. 36). The witness had never seen anyone dumping at the site, but testified that it was a tremendous amount of refuse just for people who come by and dump randomly and that it would take a good-sized truck to dump some of the piles there (R. 42, 43). There was no cover of any type on the material (R. 42). Mr. Gilbert Gurber, a zoning inspector for Cook County, testified concerning three visits to the site in June, 1975, October, 1975 and November, 1975 (R. 26). He generally agreed with Bechely concerning the nature and extent of the refuse (R. 27, 28). In June, 1975 he had seen two dump trucks and one bulldozer leveling the earth (R. 28).

The principal factual issue concerned whether the refuse was on Respondent's property or on the state highway right-of-way. Mr. Donald Miller, Survey Unit Engineer, and Mr. Donald Bohlen, Surveyor, both employed by the Illinois Department of Transportation, testified concerning a survey they made of the fifty foot right-of-way line on April 5, 1978 (R. 48, 12). They testified that there was debris and that it was on Respondent's property, as well as the right-of-way (R. 16, 18, 19, 54). Mr. Miller testified also to the lack of cover (R. 54). Photographs were introduced showing refuse located on Respondent's property with respect to the survey flags (Comp. Ex. 7, 8, 10). Two maps were introduced showing an area of refuse six hundred feet across, extending as much as two hundred feet into Respondent's proerty (Comp. Ex. 12A, 18). One of the maps also shows another area of refuse six hundred feet across which extends over three hundred feet from the right-of-way (Comp. Ex. 12A). Mr. Bechely testified that this area had more refuse, but he was unsure whether it belonged to Giachini (R. 39). Respondent did not cross-examine and does not directly argue that this pile is not on his property. He testified that his frontage was nine hundred feet (R. 107), but implies in his brief that his frontage extends to Portage Avenue, a distance of some 1800 feet from Doe Road (R. 18, Comp. Ex. 12A, 18). The map also shows smaller areas of refuse along almost the entire frontage.

Respondent, Mr. Peter Giachini, was the only witness for the defense. He testified that he had never permitted anyone to dump on the property (R. 64). He testified that he had hired or asked two men to watch the site when they passed it on the way to work and that they had never found anyone dumping (R. 64, 98, 104).

He or someone posted "one or two or three" no dumping signs (R. 65, 106). Complainant's Exhibit 2 includes a letter dated July 16, 1973, from Respondent to the Cook County sheriff asking for license numbers of persons seen dumping on the property. Respondent visited the site once a week and had never seen anyone dumping (R. 65, 99, 104). He admits there was a "nominal" amount of dumping on his property prior to September, 1977 (R. 86), denies that there has been any debris dumped since then (R. 89), but says some "material", as opposed to "debris", has been dumped (R. 101, 102).

Section 21(b) of the Act reads: "No person shall . . . cause or allow the open dumping of any other refuse in violation of regulations adopted by the Board." Respondent has testified that he never permitted anyone to dump. However, the photographs, maps and the testimony of the Agency's witnesses clearly establish that refuse has been dumped on a massive scale which involved the use of heavy equipment. The Agency has offered no evidence that Respondent actively permitted this or that he actually caused the dumping. However, the Board has previously held that "allow" includes inaction on the part of a landowner. The Board finds that Respondent's conduct amounts to acquiescence sufficient to find a violation of Section 21(b). EPA v. Dobbekke, PCB 72-130, 5 PCB 219.

Much of Mr. Giachini's testimony concerns drainage. He says that the state raised the highway several years ago, interfered with the natural drainage and created a slough on his property (R. 89-97). He contends the wet area attracts "fly dumpers". This cannot be recognized as a defense. It is not obvious why a wet area would necessarily attract fly dumpers more than a dry area. It is well known, however, that a pile of refuse, such as the one Respondent maintains, tends to attract dumpers.

Respondent's pleadings offer four affirmative defenses. One alleges the failure of the State of Illinois to prevent the dumping by failing to erect a snow fence along the state's right-of-way beside Respondent's property line. Respondent has cited no authority imposing a duty on the state to either erect a snow fence or prevent dumping on property adjacent to highways. Respondent has alleged as a second defense that refuse has also been dumped on the state's right-of-way adjacent to his property. The existence of refuse on another's property is not made a defense by any rule or statute and is not logically relevant to any issue in the violation charged against Respondent. Respondent also attempted to file a counter-claim against the state alleging this. The counter-claim was dismissed by Order of the Board on May 11, 1978, for reasons set forth in the Board's Order of January 19, 1978, in Owens-Illinois, Incorporated v. EPA, PCB 77-288.

Respondent's third and fourth affirmative defenses raise res judicata as a bar to this enforcement action. Respondent's Exhibit 5 is a summons and complaint issued by the Cook County Circuit Clerk, dated March 13, 1974, charging:

> that Peter D. Giachini has on or about June 21, 1973 at Northwest Highway/West of Palatine committed the offense of 6.9 8-3-4 in that he is the beneficiary of land on which landfill operations are conducted without Special Use permit and debris has been dumped on the property. . . .

Respondent's Exhibit 4 is also a summons and complaint which charges similarly that Respondent on or about May 11, 1977:

> committed the offense of violating the zoning ordinance in that he has a landfill and dump in a R-5, Single Family Residence District which is a prohibited use in violation of Article 4 Section 4.57-10 of the Cook County Zoning Ordinance.

Respondent has the burden of proof on the affirmative defense of res judicata. McNely v. Bd. of Education 9 Ill. 2d 143, 151 (1956). Mr Giachini testified that there was a hearing and judgment of dismissal on the merits in each case (R. 81, 88). No other evidence of the judgments appears in the record. Judgments are to be proved by a certified copy. Ill. Rev. Stat. Ch. 51, §13 (1977). However, since the Agency has no objection, the Board will consider Mr. Giachini's testimony as competent evidence. However, the testimony is self-impeaching. Respondent says there was a judgment on the merits in both cases and that they were on the same cause of action as the case at bar. He says that the first and second cause of action are the same as the third. This is the same as saying the first is the same as the third and the second is the same as the third. Therefore, the first is the same as the second and res judicata was a bar to the second judgment also. Respondent does not explain how a judgment on the merits was reached in the second case when res judicata was a defense there also.

Illinois Courts have recognized two forms of res judicata, estoppel by verdict and estoppel by judgment. Hoffman v. Hoffman, 330 Ill 413, 417 (1928). In the case of estoppel by judgment, where a former adjudication is relied on as an answer and bar to the whole cause of action, it must appear that the cause of action is the same in both actions. On the other hand, in the case of estoppel by verdict, the cause of action need not be the same. Where a question has been directly in issue and decided by a court of competent jurisdiction, that issue cannot be relitigated in a future action between the parties on the same or a different cause of action.

Respondent does not mention estoppel by verdict in his brief and the argument is deemed waived. However, since the pleading could be construed as raising estoppel by verdict, the Board will address the issue further. To raise this defense Respondent must point to some issue actually litigated in one of the former actions and demonstrate that the Agency is estopped on that issue in this case. The burden is on Respondent to do this by clear and convincing evidence. The Board cannot determine from the evidence before it what issues were actually litigated in the former actions. For instance, they could have been decided on the issue of ownership, which is admitted here. Therefore, Respondent has failed to meet the burden of establishing estoppel by verdict.

When a former adjudication is relied upon as a complete bar to a subsequent action, the questions to be determined are whether the cause of action is the same in the two proceedings, whether the two actions are between the same parties or their privies, whether the former adjudication was a final judgment upon the merits and whether it was within the jurisdiction of the court rendering it. People v. Kidd, 398 Ill. 405, 408 (1947). The parties do not argue the Circuit Court's jurisdiction and it is assumed there was a final judgment upon the merits. The Agency argues that it was not in privity with Cook County and is not bound by the former judgments. Since there is evidence in the record that there was actual cooperation between the County and the Agency in this case, the Board does not need to address the question of privity in the abstract. The Board finds that they were in fact in privity. Bulk Terminals Co. v. EPA, 29 Ill. App. 3d 978, 331 NE 2d 260 (1975), rev'd on other grounds 65 Ill 2d 31, 357 NE 2d 430, cert. denied 97 S. Ct. 2674. The only remaining question is whether the former judgments were upon the same cause of action. In determining whether the nature of a second cause of action is the same as the prior one, the test is whether the same evidence would sustain both actions. Pillsbury v. Early, 324 Ill. 562, 565 (1927).

The 1974 complaint appears to charge that Respondent owned land on which landfill operations were being conducted without a special use permit. The 1977 complaint charges violation of the zoning ordinance by having a landfill and dump in a single family residence district. Neither complaint mentions the Act or Board Rules. However, res judicata could still be a bar if the evidence to prove the former actions would also sustain a finding on the case at bar. The parties have introduced no evidence into the record of what these ordinances are. The Board must therefore draw upon its general knowledge of the law. In the case before the Board Respondent is charged with permitting open dumping without providing daily cover. The Board assumes evidence concerning daily cover was not necessary in either of the earlier cases. Respondent would have violated the zoning or special use ordinance whether he applied cover or not. It cannot, therefore, be said that Respondent has met his burden of establishing by clear and convincing evidence that the earlier judgments were on the same cause of action.

Assuming, however, that in the abstract the causes of action are the same, they are different because they involve different dates. The earlier complaints charge violations on June 21, 1973 and May 11, 1977, while the Agency's complaint charges a continuing violation from January 1, 1976 on to the date of the amended complaint of October 13, 1977. A new cause of action arises under the Act and Board Rules each day Respondent either allows additional dumping or fails to provide cover. There is testimony that additional dumping occurred between August, 1976 and June, 1977 (R. 36). There was no cover on the refuse on June 9, 1977 and May 17, 1978 (R. 38, 41). The Board therefore concludes that res judicata is no bar because the Agency's complaint relates to a different time period and not the same violation.

Respondent raises for the first time in his reply brief the argument that the Board Rules are inapplicable since he is not operating a solid waste disposal site. The Agency has had no opportunity to respond to this contention, which should have been raised much earlier. It should therefore be deemed waived. However, the Board has previously held Section 21(b) and the Rules applicable in similar cases. EPA v. Dobbekke, PCB 72-130, 5 PCB 219.

Section 33(c) of the Act requires the Board to consider all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits. Respondent has offered no evidence bearing upon reasonableness and the Board finds that he has failed to meet the burden of proof required to establish a Section 33(c) defense. Processing & Books v. PCB, 64 Ill 2nd 68, 351 NE 2nd 865. However, the Board will consider Section 33(c) factors in mitigation in assessing its final Order.

All witnesses, including Respondent, testified to the presence of construction debris on the site (R. 16, 27, 33, 34, 54, 86, 89, 101, 102). Two witnesses said that there was some "people garbage" on the site (R. 27, 34). The Board finds, from the evidence, that the refuse constitutes a serious hazard to public health and safety by promoting rats and other disease vectors by providing food and habitat, and also threatens discharge of leachate into the ground and surface water. The Board finds that there is no social or economic value in open dumping. There is no evidence in the record pertaining to the suitability of the area and priority of location for a dump. It is technically practical to restrict access and to compact the refuse and apply a final cover of suitable impermeable material with readily available equipment.

There is no direct evidence of Respondent's financial condition in the record. However, it appears that he is a partner in the law firm of Giachini, Murphy and Mann, president of the Maywood-Proviso State Bank and owns fifty-three acres of land near Chicago. Prior to the hearing, the Agency posed interrogatories relating to Respondent's financial condition pursuant

to Procedural Rule 313(a)(3). Respondent objected and refused to answer after ordered to do so by the Hearing Officer. As a result, pursuant to Rule 701(c), Respondent is deemed to have admitted that any Order of the Board would be economically reasonable.

The Board therefore finds that Respondent Peter D. Giachini has violated Section 21(b) of the Act by allowing open dumping of refuse in violation of Board Rules, Chapter 7: Solid Waste, Rule 305 by failing to provide adequate daily cover. Respondent has delayed cleaning up the refuse and restricting access for more than three years. This delay no doubt conferred a substantial economic benefit on the Respondent in the form of interest on the money it would have cost to come into compliance. However, the Board cannot estimate from the record before us how much he saved by this delay. The value of Respondent's land may have increased as a result of the dumping. He admits that he actively permitted dumping of clean clay without charge (R. 103). He has obtained an economic benefit in the form of other free fill material. A fine of $1000 is necessary to aid enforcement of the Act by encouraging voluntary compliance. The Board will order Respondent to take specific steps to restrict access to the site because of the extent of dumping which has occurred and the ongoing nature of the violation.

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

ORDER

It is the Order of the Pollution Control Board that:

1. The Board finds Respondent in violation of Section 21(b) of the Act by allowing open dumping of refuse on a site owned by him and failing to place adequate daily cover of six inches of suitable material on all exposed refuse.

2. Within ninety days of the entry of this Order, Respondent shall cease and desist from further violations of the Act and Board Rules.

3. Within ninety days of the entry of this Order, Respondent shall either remove the existing refuse to a permitted landfill or spread and compact it into layers not more than two feet thick and apply a final cover of not less than two feet of suitable, compacted, impermeable cover material.

4. Within ninety days of the entry of this Order, Respondent shall do any and all acts necessary to restrict access to the site along the entire length of his frontage along Northwest Highway.

5. Within forty-five days of the entry of this Order, Respondent shall, by certified check or money order payable to the State of Illinois, pay a civil penalty of $1000 which is to be sent to:

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

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 24th day of May, 1979 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board