

ILLINOIS POLLUTION CONTROL BOARD
February 20, 2003

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 03-51
) (Enforcement – Air)
DRAW DRAPE CLEANERS, INC.,)
an Illinois corporation,)
)
Respondent.)

ORDER OF THE BOARD (by M.E. Tristano):

On October 15, 2002, complainant, the People of the State of Illinois (complainant), filed an eight-count complaint against Draw Drape Cleaners, Inc. (respondent). The complainant alleged that respondent violated various provisions of the Environmental Protection Act (Act), the Board's air pollution regulations, and its Federally Enforceable State Operating Permit (FESOP). The complainant further alleged that respondent violated these provisions by emitting volatile organic material through the uncontrolled operation of its equipment. On December 17, 2002, the respondent filed an answer to the complaint and five affirmative defenses. On January 16, 2003, the complainant filed a motion to strike or dismiss defendant's affirmative defenses.

For the reasons stated below, the Board strikes the respondent's affirmative defenses.

BACKGROUND

Respondent operates a petroleum solvent dry cleaning operation located at 2235-2239 West Roscoe Street, Chicago, Cook County. The eight-count complaint against the respondent alleged various violations of the Act, the Board's air pollution regulations at 35 Ill. Adm. Code 201 and 218, and federal regulations made enforceable under Section 9.1(d) of the Act. Briefly the eight counts included:

- Count I: Complainant alleged that respondent emitted volatile organic material (VOM) into the atmosphere from the plant's Dryer #1 (installed in 1980 and is in use) and Dryer #2 (installed in 1996 and in use).
- Count II: Complainant alleged violation of the volatile organic material emission standards for petroleum solvent dry cleaners.
- Count III: Complainant alleged respondent failed to conduct adequate testing on Dryer #1 and Dryer #2.

- Count IV: Complainant alleged respondent constructed a “new emissions source,” Dryer #2, without a permit in 1996.
- Count V: Complainant alleged respondent operated an emissions source, Dryer #2, without a permit since 1996.
- Count VI: Complainant alleged respondent violated FESOP condition 5 which stated: “The Permittee shall comply with the standards, operating practices, inspections and repair of leaks, and the testing and monitoring requirements for petroleum solvent dry cleaners as specified in 35 Ill. Adm. Code 218.607 through 218.610.”
- Count VII: Complainant alleged Dryer #2 was a non-solvent recovery dryer and lacked a cartridge filter in violation of 1982 requirements.
- Count VIII: Complainant alleged respondent failed to perform an initial flow rate test on Dryer #2 after its 1996 installation.

STANDARD

In an affirmative defense, the respondent alleges “new facts or arguments that, if true, will defeat . . . [complainant’s] claim even if all allegations in the complaint are true.” People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 2-613(d) provides, in part:

The facts constituting any affirmative defense... and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint,... in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.” 735 ILCS 5/2-613(d)(2002).

A valid affirmative defense gives color to the opposing party’s claim but then asserts new matter which defeats an apparent right. Condon v. American Telephone and Telegraph Co. 210 Ill. App. 3d 701, 569 N.E.2d 518, 523 (2nd Dist. 1991), citing The Worner Agency Inc. v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984). A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. “Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken.” International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630-631, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing Rapraeger v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989).

First Affirmative Defense

Respondent’s first affirmative defense is that in 1994, a fire at the facility damaged or destroyed part of the physical plant and equipment including a dryer identical to Dryer # 2. The

respondent alleges it was installed in the 1960's and, pursuant to the Act, was grandfathered in and did not require a permit.

The complainant responds that in the complaint there was no reference to respondent's dryer that it installed in the 1960. The complainant argues that the issue that the respondent raises is irrelevant to the complaint.

Discussion

Respondent's first affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegation in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). Even if the dryer which was identical to Dryer #2 was damaged or destroyed, and was "grandfathered in," and did not require a permit, this is irrelevant to violations alleged concerning Dryers #1 and #2. The Board strikes the first affirmative defense.

Second Affirmative Defense

Respondent's second affirmative defense is that since Dryer #2 replaced an identical dryer damaged in the 1994 fire, Dryer #2 has been mainly used to ready drapes for pressing by "fluffing," and has been so used exclusively for the past year. Respondent argues the process of fluffing does not emit VOM into the environment. During the past year, Dryer #2 has been used only for fluffing and has not emitted VOMs into the environment.

Complainant alleges that in the complaint, Dryer #2 was installed in 1996. Complainant argues that respondent's second affirmative defense does not address VOM emissions from Dryer #2 prior to late 2001.

Discussion

Respondent's second affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). Even if no VOM have been emitted into the environment during the past year, the second affirmative defense does not address VOM emissions from Dryer #2 prior to late 2001. The Board strikes respondent's second affirmative defense. Respondent is free to address these matters at hearing.

Third Affirmative Defense

Respondent's third affirmative defense is that Dryer #2 was installed after the 1994 fire because there was no recovery dryer available at that time in the size respondent needed for its operation. When a recovery dryer the proper size became available in March 2002, respondent ordered the new dryer immediately. The manufacturer accepted respondent's order in May 2002, and delivered the new dryer (Dryer #3) in late September 2002. Respondent states Dryer #3 is being installed and respondent has obtained a permit to operate Dryer #3.

The complainant responds that respondent's claim that it may have needed Dryer #2 for its operations is irrelevant to the allegations of noncompliance with the Act, the Board's regulations, and the federal regulations. In addition, complainant argues the complaint does not address Dryer #3, so any affirmative defense regarding Dryer #3 is also irrelevant.

Discussion

Respondent's third affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). Whether it may have needed Dryer #2 for its operations is irrelevant to the issue of noncompliance with the Act. The installation of Dryer #3 is also irrelevant on the issue of past noncompliance with the Act, the Board's regulations, and the federal regulations. The Board strikes respondent's third affirmative defense. Respondent is free to address these matters at hearing, as they may be relevant to the Board's consideration of various factors under 33(c) and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2002).

Fourth Affirmative Defense

Respondent's fourth affirmative defense is that it has always operated its plant below the emissions allowed under its FESOP permit. Respondent states it would have to emit an additional 1,000 gallons per year to reach the emissions allowed under its FESOP.

Complainant responds that it is not clear whether respondent is referring to emissions of VOM because (a) VOM is not mentioned in the fourth affirmative defense; and (b) reference to VOM emissions in the FESOP are expressed in ton/year and not in gallons/year. If respondent is referring to gallons of solvent per year, then the fourth affirmative defense is irrelevant as complainant does not allege a violation of the solvent usage limits in the FESOP at Section 4a. In addition, complainant alleges violations of the standards for petroleum solvent dry cleaners in terms of VOM per dry weight articles cleaned.

Discussion

Respondent's fourth affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). The complainant is correct in that it is not clear whether the respondent is referring to emissions of VOM because VOM is not mentioned in the fourth affirmative defense and reference to VOM emissions in the FESOP are expressed in tons/year and not in gallons/year. The complainant does not allege a violation of the solvent usage limits in the FESOP at Section 4a. Therefore, if the respondent is referring to gallons of solvent per year, then the fourth affirmative defense is irrelevant. But, respondent may address compliance history at hearing, as it may be relevant to various factors under 33(c) and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2002).

Fifth Affirmative Defense

Respondent's fifth affirmative defense is that its operations are unique in that its process commercially flame proofs drapes in a cost effective manner that triples the life of the drapes. Respondent asserts that the State of Illinois has approved respondent's operations for use by schools and related entities and lists respondent's operation as a source on the state's website.

Complainant argues that the unique nature of the respondent's business does not excuse it from compliance with the Act, the Board's regulations, and the federal regulations at issue in the complaint.

Discussion

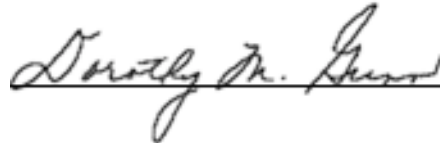
Respondent's fifth affirmative defense does not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). The unique nature of respondent's business does not excuse it from compliance with the Act, the Board's regulations, and the federal regulations at issue in the complaint. The Board strikes this affirmative defense. Respondent is free to address these matters at hearing, as they may be relevant to the Board's consideration of various factors under 33(c), and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2002).

CONCLUSION

The Board grants the motion to strike respondent's affirmative defenses. This case shall proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 20, 2003, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board