ILLINOIS POLLUTION CONTROL BOARD
February 7, 1991

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 89-156
	)	Docket A & B
	)	(Administrative Citation)
JOHN A. GORDON,	)	(IEPA No. 9758-AC)
Respondent.	)	

MR. WILLIAM SELTZER, ASSISTANT COUNSEL, APPEARED ON BEHALF OF COMPLAINANT

MR. JOHN A. GORDON, RESPONDENT, APPEARED PRO SE

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on an Administrative Citation filed by the Illinois Environmental Protection Agency ("Agency") pursuant to the Illinois Environmental Protection Act (hereinafter "the Act") (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1001 et. seq.). The citation was filed July 13, 1989, and alleges that Respondent, John A. Gordon, the owner and operator of a facility located in Jackson County, Illinois is in violation of Section 21(q)(1) and 21(q)(3) of the Act for causing or allowing open dumping of wastes that result in litter and result in open burning.

A Petition for Review was filed with the Board on July 13, 1989. Hearing was held November 3, 1989, at the Community Center in Carbondale, Illinois. No members of the public were present. Mr. Gerald Steele and Mr. William Ryan testified for the Agency; Respondent offered no testimony. Closing Arguments were made on the record at hearing.

DISCUSSION

Section 31.1 of the Act provides that "[t]he prohibitions specified in subsections (p) and (q) of Section 21 of this Act shall be enforceable either by administrative citation under this Section or as otherwise provided in this Act." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1031.1.) Section 21(p) of the Act applies to sanitary landfills permitted under the Act while Section 21(q) applies to all dump sites. The administrative citation issued against Mr. Gordon alleges violations of subsections (1) and (3) of Section 21(q). Section 21(q) provides that no person shall in violation of Section 21(a) of the Act:

> cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:
>
> 1. litter;
>
> * * *
>
> 3. open burning;

Section 21(a) of the Act sets forth a general prohibition against open dumping by providing that "[n]o person shall cause or allow the open dumping of any waste."

These sections of the Act establish that, in order to seek enforcement by way of the administrative citation process for violations of Section 21(q), the Agency must establish that the person caused or allowed open dumping and must also prove that the open dumping resulted in litter, open burning or other specified conduct at the dump site. If the record demonstrates that such violation occurred then the Board must adopt an order finding a violation and impose the specified penalty unless, "...the person appealing the citation has shown that the violation resulted from uncontrollable circumstances." Section 31.1(d)(2) of the Act. Therefore, the initial inquiry in this case is whether Mr. Gordon's conduct constitutes causing or allowing "open dumping."

Section 3.24 of the Act defines "open dumping" as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.24.) Section 3.31 of the Act defines "refuse" as "waste." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.31.) Section 3.53 defines "waste" as, inter alia, "garbage ... or other discarded material ... ." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1003.53.)

At hearing complainant's witness, William C. Ryan, testified regarding a site inspection he made of Mr. Gordon's facility on May 18, 1989. The facility is called the Jackson County PTL River Terminal. It is a coal-loading terminal where coal from various mines is brought in by truck and loaded onto barges; it also has limited sand and gravel operations. The facility is permitted as coal-mine-related activities through the mine pollution control program of the Agency. The facility is just over fours acres, but Mr. Jackson and Jackson County River Terminal own surrounding land totalling about ten acres. (R. 11-13). Mr. Ryan also provided several photographs of the site inspection which were introduced as exhibits, as well as a site sketch. (Pet. Exs. 1-9). During the inspection Mr. Ryan observed

the dumping of some demolition debris and a pile of some burnt tires. While Mr. Ryan was inspecting the site he observed two trucks, approximately ten ton trucks, dumping demolition debris. Mr. Ryan believes the debris came from the demolition of the post office in Gorham. The debris was characterized as a lot of wood and paper, some old siding, some bricks. Mr. Ryan observed four piles of debris in one area and five piles in another. There were various piles of debris at four different areas within the site, approximately 80 or 90 tons of material in total. (R. 36-64, 85).

In addition, Mr. Ryan observed a pile of burnt tires. Based on his observations Mr. Ryan concluded that the tires were burned, and were burned on-site.

Mr. Gordon did not take the stand to testify, nor did he call any witness on his behalf. He did, however, cross examine witnesses on several issues and posed objections to certain statements of the witnesses. Primarily, Mr. Gordon's questions and objections focused on the basis for a conclusion that he owned the land in question. Mr. Gordon established that the Agency witness Mr. Steele, had not reviewed any deeds, or maps, or property descriptions to support the conclusion that the land was owned by Mr. Gordon. (R. 21-22). He also established that the Agency witness, Mr. Ryan, had never scaled off of any map in the office to determine the property lines or coal-loading permit lines for this facility. (R. 101). In addition, Mr. Gordon raised questions regarding the conclusion that the tires were burned on site, establishing that the witness did not see any fire or smoke during the site inspection. (R. 68-71; 108-111).

Based on the evidence presented, the Board concludes Complainant has demonstrated that open dumping, which resulted in litter, has occurred on the Respondent's property. The undisputed testimony is that Mr. Gordon owns the property upon which the dumping occurred. Mr. Steele of the Agency testified that Mr. Gordon owned the property in question. (R. 13,21,22) This was based on statements made to him by Mr. Gordon and based on the coal loading facility permit Mr. Gordon holds for the facility. (R. 21,22). Mr. Ryan has been inspecting the facility for about ten years and testified that the facility has a current permit for 4.06 acres and a permit application pending for 10 acres which states Mr. Gordon is the owner of the property in question (R. 107-108), and that each of the photographs depicting the various debris piles shows a piece of property included within the 10 acres of the permit application perimeter or within the perimeters of the 4.06 acres of the current permit Mr. Gordon holds. (R. 56-62). Lastly, Mr. Gordon alluded, through questions, to the prospect that the material might be subject to reclamation. He did not provide any testimony that the material was intended for recycling, and did not raise this matter in closing argument. The Board finds that the Agency need not

establish lack of recycling or reclamation capabilities as part of their case in chief. In addition, the Agency here has provided testimony that the operation was not consistent with reclamation or salvage. (R. 125-131).

The Board must now consider whether Mr. Gordon caused or allowed such open dumping. The meaning of the phrase "cause or allow", as used in Section 12(a) of the Act, has been determined by the Illinois Appellate Court, Third District, in Freeman Coal Mining Corp. v. Illinois Pollution Control Board, 21 Ill. App. 3d 157, 313, N.E.2d 616 (1974). In Freeman, the petitioner was an owner of a coal mine that maintained a mine refuse pile. Rainfall upon the pile resulted in an acidic contaminant which washed into an unnamed waterway causing water pollution. Id. at 618. The petitioner argued that it could not be held liable for "allowing such discharges because the discharges were the result of a natural force beyond the control of the petitioner" Id. at 619. In its decision in Freeman, the court restated that the Act is malum prohibitum and no proof of guilty knowledge or mens rea is necessary to a finding of guilt. The court went on to say, that the fact that the discharges were unintentional, or occurred despite efforts to prevent them, is not a defense. The owner of the property that creates the pollution has a duty, imposed by the legislation, to take all prudent measures to prevent the pollution. The efforts by the landowner to control or treat the pollution go to the issue of mitigation, not to the primary issue of liability. Id. at 621. See also, County of Jackson v. Donald Taylor, AC89-258, January 10, 1991; IEPA v. Robert Wheeler, AC 90-42, January 10, 1991; and Perkinson v. IPCB, 187 Ill. App. 3d 689, 546 N.E.2d 901 (1989).

Based on the facts presented in this case and the legal principles outlined by this Board and the Courts, we conclude that Mr. Gordon did "cause or allow" the open dumping described in this proceeding. Therefore, Mr. Gordon is in violation of Section 21(q)(1) of the Act.

The second question is whether the record supports a conclusion that the open dumping resulted in open burning on M Gordon's property. For the reasons stated below, the Board fi that the record supports the conclusion that the tires are on Gordon's property and that the tires are burnt.

The operative provision of the Act, Section 31.1(b), provides:

> Whenever Agency personnel ... on the basis of direct observation, determine that any person has violated any provision...

The statute by its terms does not require that the fire itse observed, but instead that direct observation support a

conclusion that fire occurred at the site. Thus, the Board believes that the Act clearly allows the Agency to prevail on a claim of open burning even where the inspector does not specifically see the burning material or smoke during the inspection. However, the Agency must make some showing that the burning did occur at the facility issued the administrative citation. The question is whether the Agency has made such a factual showing in this particular proceeding. This factual determination must be based on a review of the testimony of Mr. Ryan and an evaluation of the photograph of the burned tires. (Pet. Ex. 2). Mr. Ryan stated:

> Okay. There is absolutely no question in my mind that it [the tires] was burned because there was obvious partially burnt and charred tires in there.
>
> In terms of where it was burned, the indications that I have that it was burned in this area are the presence of ash material amongst the tires, which was different than the ash material in the - - well, the ash that was brought on site from CIPS, which is in the surrounding area. And the fact that some of the tires - - to include one here in the photograph [Pet. Ex. 2] - - showed charred - and ashed - type edges and some of the partially burnt tires showed some protruding steel bands on them, and there was steel bands in concentric rings that, in my opinion, would not have been that perfect or that formed had it been transported to the site and dumped there. So utilizing that information, I drew the conclusion that they were burned on site.
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> (R. 71-72). See also, Mr. Steele's testimony (R. 124-125; 133-134).

Mr. Gordon did not provide any testimony on this issue. As Mr. Gordon has presented no evidence or argument rebutting the evidence presented by the Agency, the Board finds that in this case the Agency has met its burden of proof in demonstrating that the alleged violations occurred. Therefore, the Board concludes that the tires were burned on site and that Mr. Gordon is in violation of Section 21(q)(3) pertaining to open burning.

The final question the Board must consider is whether Mr. Gordon has shown that the violation resulted from uncontrollable circumstances. This is the only showing provided in the statute that allows the Board to excuse any violation. If the Board so finds, then no violation would be found and no penalty imposed. (see Section 31.1(d)(2) of the Act).

The record raises no basis for a conclusion of uncontrollable circumstances. The Board finds that the violations did not result from uncontrollable circumstances. Therefore, Mr. Gordon is in violation of Section 21(q)(1) and 21(q)(3) of the Act.

PENALTIES

Penalties in administrative citation actions of the type here brought are proscribed by Section 42(b)(4) of the Act, to wit:

> In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) of Section 21 of this Act shall pay a civil penalty of $500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Trust Fund to be used in accordance with the provisions of "An Act creating the Environmental Protection Trust Fund", approved September 22, 1979 as amended; except that if a unit of local government issued the administrative citation, 50% of the civil penalty shall be payable to the unit of local government.
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> Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1042(b)(4).

Respondent will therefore be ordered to pay a civil penalty of $ 1000 based on the violations as herein found. For purpose of review, today's action (Docket A) constitutes the Board's final action on the matter of the civil penalty.

Respondent is also required to pay hearing costs incurred by the Board and the Agency. The Clerk of the Board and the Agency will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon Mr. Gordon. Upon receipt and subsequent to appropriate review, the Board will issue a separate final order in which the issue of costs is addressed. Additionally, Docket B will be opened to treat all matters pertinent to the issue of costs.

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

ORDER

1. Respondent is hereby found to have been in violation on May 18,1989, of Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1021(q)(1) and 1021(q)(3).

2. Within 45 days of this Order Respondent shall, by certified check or money order, pay a civil penalty in the amount of $1000 payable to the Illinois Environmental Protection Trust Fund. Such payment shall be sent to:

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

3. Docket A in this matter is hereby closed.

4. Within 30 days of this Order, the Agency shall file a statement of its hearing costs, supported by affidavit, with the Board and with service upon John Gordon. Within the same 30 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service upon John Gordon. Such filings shall be entered in Docket B of this matter.

5. Respondent is hereby given leave to file a reply/objection to the filings as ordered in paragraph 4 of this order within 45 days of this Order.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111½, 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.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 7th day of February, 1991, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board