

ILLINOIS POLLUTION CONTROL BOARD  
October 25, 1990

PEOPLE OF THE STATE )  
OF ILLINOIS, )  
 )  
Complainant, )  
 )  
v. ) PCB 90-84  
 ) (Enforcement)  
 )  
WE-TOAST BREAD )  
COMPANY, INC., )  
 )  
Respondent. )

PAMELA CIARROCCHI APPEARED FOR COMPLAINANT

ROBERT MELTZER, ROBERT MELTZER & ASSOCIATES APPEARED FOR  
RESPONDENT

CONCURRING OPINION (by J. Anderson):

As the Board's Opinion of this same day recites, on August 30, 1990, the Board requested additional information from the People, to which Board Members Ronald Flemal and I voted in dissent. The Opinion then states that the Attorney General's October 15, 1990 response "assisted the Board in resolving this matter."

I have concurred here so as to make clear that the reason that I believe that the Attorney General's response was of assistance is because it verifies the views expressed in our earlier dissent as to why the additional information should not have been requested in the first place.

For example, specific questions articulated in the Board's August 30, 1990, request for information still remain unanswered. We still have no idea why Wee-Toast went so long without getting a permit. Nor do we know whether it got the permit after it got a "Section 31(d)" notice (I consider delaying compliance until threatened as an aggravating factor; the response says only that Wee-Toast complied "prior to initiation of the enforcement action." (AG response, p. 5)). If we are to assume that "genuine" efforts toward compliance have been made (AG response, p. 5), what does that mean here? Also, we have no idea of the nature of Wee-Toast's financial difficulty, including the length of time Wee-Toast has been operating at a loss (six months?, six years?). (AG response, p. 5) "Operating at a loss" can mean many things.

As the Attorney General points out, he considered mitigation "in the context of negotiations", (AG response p. 3) including

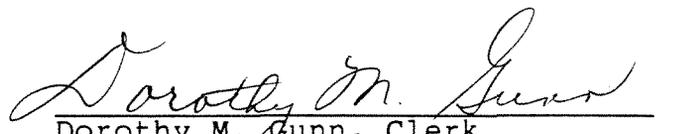
court precedent; he also points out that the penalty was three times what this Board was able to get in the recent Modine case. Modine Manufacturing Company v. Pollution Control Board, 193 Ill. App. 3d 643, 549 N.E.2d 1379 (2nd Dist. 1990). Additionally, he got admissions of the violations (which might here be more important in terms of deterrence than the penalty). In any event, one still can only speculate as to how the Attorney General balanced the factors he selected so as to end up with the \$3000 amount. I don't believe it makes sense -- and it is certainly not fruitful -- to rely on the method of inquiry and response used here; it purports to, but really can't, elicit from the negotiated settlement process the kind of information the Board really needs to determine whether the penalty is appropriate. What if there had been no admissions and thus no findings of violation; how would we evaluate that in relation to a "penalty"? If we have real concerns, we should shift into the full hearing record process and then exercise our own independent judgment.

Most all of us share the belief that our penalties are generally much too low to assure that compliance, not noncompliance, is rewarded; however, I don't believe we should fail to recognize that the Attorney General and we share the same problem, the state courts. With rare exception the courts continue to believe that operating without a permit is no big deal unless the environmental equivalent of bodily injury has occurred. Maybe we need to articulate better the reality of what happens to the system of environmental protection when persons operate outside a permit setting and why it is so important to deter this kind of activity. In any event, I hope that the new "penalty powers" legislation as well as the earlier amendments to Section 33(a) and (c) of the Act regarding compliance will succeed in achieving a turnaround.

It is for these reasons that I respectfully concur.

  
Joan G. Anderson  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 30<sup>th</sup> day of October, 1990.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board