

ILLINOIS POLLUTION CONTROL BOARD
May 20, 2004

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 03-51
)	(Enforcement - Air)
DRAW DRAPE CLEANERS, INC., an)	
Illinois corporation, AMERICAN DRAPERY)	
CLEANERS & FLAMEPROOFERS, INC., an)	
Illinois corporation, and RICHARD ZELL,)	
an Illinois resident,)	
)	
Respondents.)	

ORDER OF THE BOARD (by J.P. Novak):

The Board today addresses the answer to an amended complaint and affirmative defenses filed by Draw Drape Cleaners, Inc. (Draw Drape), American Drapery Cleaners and Flameproofers, Inc. (ADCAFI), and Richard Zell (Zell) (respondents) and a motion filed by the Office of the Attorney General (complainant) to strike affirmative defenses. For the reasons discussed below, the Board grants the complainant's motion to strike the affirmative defenses, which are virtually identical to those stricken by the Board in February 2003.

The Board will first summarize the procedural background of the case and the affirmative defenses. Next, the Board will briefly summarize the complainant's motion to strike. Finally, the Board will discuss the reasons for today's decision.

PROCEDURAL BACKGROUND

Respondents operate a petroleum solvent dry cleaning operation located at 2235-2239 West Roscoe Street, Chicago, Cook County. On October 15, 2002, the complainant filed an eight-count complaint against Draw Drape. The complainant alleged that Draw Drape violated various provisions of the Environmental Protection Act (Act), the Board's air pollution regulations, and Draw Drape's Federally Enforceable State Operating Permit (FESOP). The complainant further alleged that Draw Drape violated these provisions by emitting volatile organic material through uncontrolled operation of its equipment.

On December 17, 2002, Draw Drape filed an answer to the complaint and raised five affirmative defenses (First Answer). On January 16, 2003, the complainant filed a motion to strike or dismiss Draw Drape's affirmative defenses (First Motion to Strike). On February 20, 2003, the Board issued an order striking all five of Draw Drape's affirmative defenses. On August 21, 2003, the Board granted the complainant's motion for partial summary judgment, finding that Draw Drape had violated the Act and the Board's regulations as alleged in counts

IV, V, VII, and VIII. In the same order, the Board directed the parties to proceed to hearing on the remaining counts and on remedy and penalty issues.

The complainant filed an Amended Complaint for Civil Penalties (Amended Complaint) on December 20, 2003. The Amended Complaint adds as respondents ADCAFI and Zell. The complainant filed an Amended Notice of Filing for the Amended Complaint on January 20, 2004. On March 2, 2004, respondents filed an Answer to the Amended Complaint (Second Answer). In their Second Answer, respondents raised five affirmative defenses. Except for non-substantive corrections, the five affirmative defenses raised in the Second Answer are virtually identical to those raised in the First Answer. On April 15, 2004, the complainant filed its Second Motion to Strike or Dismiss the Respondents' Affirmative Defenses (Second Motion to Strike). Respondents have filed no response to the Second Motion to Strike.

AFFIRMATIVE DEFENSES

The respondents' five affirmative defenses are summarized below, and each will be referred to by the number assigned it by the respondents in their Second Answer.

Respondents' first affirmative defense is that in 1994 a fire at respondents' plant damaged or destroyed part of the physical plant and equipment including a dryer identical to Dryer #2. Respondents further allege that the damaged dryer was installed in the 1960s and, pursuant to the Act, was "grandfathered in" and did not require a permit.

Respondents' second affirmative defense is that, since Dryer #2 replaced an identical dryer damaged in the 1994 fire, Dryer #2 has mainly been used to ready drapes for pressing by "fluffing." Respondents further state that the process of fluffing does not emit VOMs into the environment. Finally, respondents state that, during the past year, Dryer #2 has been used only for fluffing and has not emitted VOMs into the environment.

Respondents' 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 needed for its operation. Respondents further state that, when a recovery dryer of the proper size became available in March 2002, respondent ordered the new recovery dryer immediately. Respondents further state that the manufacturer accepted its order in May 2002 and delivered the new Dryer #3 in late September 2002. Finally, respondents state that Dryer #3 is now being installed and that Permit #02030079 has been obtained for its operation.

In their fourth affirmative defense, respondents state that they have always operated the plant below the emissions allowed under its FESOP permit #95100005. Respondents further state that they would have to emit an additional 1,000 gallons per year to reach the emissions allowed under its FESOP.

In their fifth affirmative defense, respondents state that their operations are unique in that their process commercially flame proofs drapes in a cost-effective manner that triples the lives of the drapes. Respondents further state that the State of Illinois has approved their operations for

use by schools and related entities and that the State “lists Respondent’s operations as a source on the State’s Web site.” Second Answer at 21.

MOTION TO STRIKE

In its Second Motion to Strike, the complainant incorporates the text of its First Motion to Strike into its Second Motion to Strike. Second Motion to Strike at 2. In doing so, the complainant argues that “[a]ll of the arguments in Complainant’s First Motion to Strike pertaining to Respondent Draw Drape also pertain to Respondents ADCAFI and Zell in this Second Motion to Strike.” *Id.* The complainant further “requests that the Board follow its holding in its February 20, 2003 order striking all five of Draw Drape’s affirmative defenses with respect to the identical affirmative defenses in the Second Answer.” *Id.* at 3.

DISCUSSION

As the Board stated in its February 20, 2003, order, in an affirmative defense the respondent alleges “new facts or argument 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). 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).

As the Board also stated in its February 20, 2003, order, 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, 630-31, 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).

In response to the first affirmative defense, the complainant incorporates from its First Motion to Strike the argument that the amended complaint does not refer to a dryer installed in the 1960s and that any issue raised with regard to it is not relevant to the amended complaint. As it stated in its February 20, 2003 order, the Board finds that respondents’ first affirmative defense does not allege “new facts or argument 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 a dryer identical to Dryer #2 was “grandfathered in” and did not require a permit, it is not relevant to allegations of violations with regard to Dryer #1 and Dryer #2. Accordingly, the Board strikes the respondents’ first affirmative defense.

In response to the second affirmative defense, the complainant incorporates from its First Motion to Strike the argument that respondents simply do not address VOM emissions from Dryer #2 before late 2001. As it stated in its February 20, 2003 order, the Board finds that respondents’ second affirmative defense does not allege “new facts or argument 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 Dryer #2 had emitted no VOM during a one-year period, the second affirmative defense does not address emissions alleged to have occurred before that time. Accordingly the Board strikes the respondents' second affirmative defense.

In response to the third affirmative defense, the complainant incorporates from its First Motion to Strike the argument that respondents' need for Dryer #2 for their operations is not relevant to the violations alleged. The complainant further argues that the amended complaint does not address Dryer #3, making any affirmative defense with regard to Dryer #3 irrelevant. As it stated in its February 20, 2003, order, the Board finds that respondents' third affirmative defense does not allege "new facts or argument 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). Both the professed need for Dryer #2 and the installation of Dryer #3 are not relevant to violations alleged in the Amended Complaint. Accordingly, the Board strikes the respondents' third affirmative defense.

In response to the fourth affirmative defense, the complainant incorporates from its First Motion to Strike the argument that it is not clear whether respondents are referring to VOM emissions. The complainant states that VOM is not specifically mentioned in the fourth affirmative defense and that FESOP references to VOM emissions are expressed in tons/year and not in gallons/year. As it stated in its February 20, 2003 order, the Board finds that respondents' fourth affirmative defense does not allege "new facts or argument 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). It is not clear whether the respondents refer to emissions of VOM because VOM is not mentioned in the fourth affirmative defense. Also, since the complainant does not allege a violation of the solvent use limits, the reference to gallons of solvent per year is not relevant. Accordingly, the Board strikes the respondents' fourth affirmative defense.

In response to the fifth affirmative defense, the complainant incorporates from its First Motion to Strike the argument that the unique nature of respondents' business does not excuse it from compliance with the Act, Board regulations, or federal regulations. As it stated in its February 20, 2003, order, the Board finds that respondents' fifth affirmative defense does not allege "new facts or argument 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 the respondents' business does not excuse it from compliance with the Act, Board regulations, or federal regulations. Accordingly, the Board strikes the respondents' fifth affirmative defense.

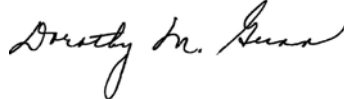
While the Board today strikes the five affirmative defenses raised by the respondents in their Second Answer, it may be appropriate for respondents to raise some of these matters at hearing. Where issues such as compliance history may be relevant to the Board's consideration of various factors under sections 33(c) and 42 (h) of the Act, respondents are free to address them at hearing.

CONCLUSION

The Board grants the motion to strike respondents' affirmative defenses and directs the case to proceed expeditiously to hearing on the remaining counts and on remedy and penalty issues.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 20, 2004, by a vote of 5-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board