ILLINOIS POLLUTION CONTROL BOARD
March 17, 1971

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
v.	)	PCB#70-34
	)	
GRANITE CITY STEEL CO.	)	

Opinion of the Board (by Mr. Currie):

Granite City Steel, charged by the Agency with numerous and continuous violations of the Environmental Protection Act, the Air Pollution Control Act, and assorted air pollution regulations ever since 1967, and represented by a bevy of the State's most prominent lawyers, has trotted out a medley of pre-hearing arguments that would destroy the Environmental Protection Act and make protection of the public from pollution virtually impossible. We reject them all and order that the case proceed to hearing without procrastination.

I.

Granite City Steel first argues that the complaint should be dismissed on the ground that the present statute and its predecessor are both unconstitutional. Several arguments are advanced in support of this contention. All of them ignore the fundamental presumption of the validity of a statute. None of them has any merit.

1. Vagueness. The company says that the prohibition of "air pollution" in section 9 (a) of the present Act and in section 3 of the earlier statute is "so vague, uncertain and indefinite that men of common intelligence must guess at its meaning and citizens are not adequately apprised of the conduct prescribed" (motion to dismiss, p. 2). This requires little discussion. "Since the turn of the century", as the Agency's brief tells us (p. 3), "state and federal regulations for the control of smoke and other forms of air pollution have consistently withstood attack on the vagueness issue. The cases to this effect are legion. See Annotation, 'Validity of Regulation of Smoke and Other Air Pollution,' 78 A.L.R. 2d 1305 (1961)." E.g., Department of Health v. Owens-Corning Fiberglas Corp., 100 N.J. Super. 366, 242 A. 2d 21 (1968), aff'd per curiam 53 N.J. 248, 250 A. 2d 11 (1969), and other cases cited in the Agency's brief, p. 7.

The vagueness issue was settled beyond all possibility of dispute by the Illinois Supreme Court's quite recent decision in Metropolitan Sanitary District v. United States Steel Corp., 41 Ill 2d 440, 243 N.E. 2d 249 (1968). There the Court upheld against the charge of vagueness a statute giving the District authority to sue "to prevent the pollution" of certain waters. Even though "pollution" was nowhere defined in the statute, the Court had no difficulty sustaining it, pointing out that the term "pollution" had long since acquired a common meaning in nuisance cases and adding that "such a statutory authorization need not delineate with scientific precision, the characteristics of all types of pollution." As the Court said in upholding a disorderly conduct statute that outlawed "any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace," the legislature "deliberately chose to frame the provision in general terms, prompted by the futility of an effort to anticipate and enumerate all of the methods of disrupting public order that fertile minds might devise." People v. Raby, 40 Ill. 2d 392, 240 N. E. 2d 595 (1968). "Unreasonable," as the Court said in the Raby case, "is not a term that is impermissibly vague."

The cases cited by the company are easily distinguished, as they dealt with statutory terms wholly unknown to the common law or to the industry affected, Parks v. Libby-Owens Ford Glass Co., 360 Ill. 130 (1935); Vallat v. Radium Dial Co., 360 Ill. 407 (1935); Rosemont Bldg. Supply, Inc. v. Illinois Highway Trust Auth., 45 Ill. 2d 243, 258 N.E. 2d 569 (1970).

The validity of the air pollution provisions is further reinforced by the explicit definitions of air pollution in both statutes, which embody numerous elements of the familiar common law of nuisance. To put that law in a statute would not make it unconstitutionally vague. Granite City's argument would, as the Court held in the Raby case, make regulation impossible. The Metropolitan Sanitary District case is squarely in point, and the vagueness argument is frivolous.

2. Delegation. Granite City next argues that the two statutes unconstitutionally delegate legislative authority to this Board in its rule-making functions. Government could not govern if this argument were accepted. Ever since the creation of the Interstate Commerce Commission in 1887, every government in the United States, state or federal, has found it necessary in innumerable instances to give rule-making powers in complex technical fields to administrative agencies. Legislatures are far too busy, and the business of governing is far too intricate and detailed, for any one body to prescribe precisely the particular rules governing every aspect of human behavior that requires regulation. All the legislature can reasonably be expected to do is to set basic policy, subject to certain procedural and substantive safeguards, and exercise its inherent authority by setting aside administrative rules that do not comport with its policy.

Such charters of delegated rule-making authority are common in Illinois as elsewhere. If the company's argument were accepted, we would have to do without many critical functions of the Illinois Commerce Commission (see, e.g., Ill. Rev. Stat. ch. 111 2/3, section 41 (1969), authorizing the Commission to fix "just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices"); the Industrial Commission (see Ill. Rev. Stat. ch. 48, section 137.4 (1969), authorizing the Commission to make rules, e.g.,for "the arrangement and guarding of machinery...to guard against personal injuries and diseases" and for "the prevention of personal injuries and diseases by contact with any poisonous or deleterious materials, dust, vapors, gases or fumes"); the Mining Board (see Ill. Rev. Stat. ch. 93, section 2.12 (1969), giving power to adopt "rules and regulations in connection with new methods of coal mining affecting the health and safety of persons employed in the coal mines"); the Department of Public Health (see, e.g., Ill. Rev. Stat. ch. 111 1/2, section 218 (1969), authorizing "such standards and instructions to govern the possession and use of any radiation source as the Department may deem necessary or desirable to protect the public health, welfare and safety"); the Department of Mines and Minerals (see Ill. Rev. Stat. ch. 104, section 67 (1969) regulations, e.g., "to prevent the pollution of fresh water supplies by oil, gas or salt water," to "prevent fires" in oil and gas fields, "to regulate the spacing of wells," and "to prohibit waste"); and numerous other indispensable bodies with rule-making powers. Granite City is trying to wish away eighty years of constitutional history and leave the state powerless to protect the public welfare.

The cases cited by the company are completely inapposite. Virtually without exception they concern the delegation of wholly unlimited discretion, with no limiting standards whatever, to an executive officer: e.g., the power of the Auditor in licensing currency exchanges to insist on "such other information as the Auditor may require," McDougall v. Lueder, 389 Ill. 141, 58 N.E. 2d 899 (1945); the power to grant exceptions to an advertising ban "such as may be directed by the authority having jurisdiction over such highway," City of Chicago v. Pennsylvania R.R., 41 Ill. 2d 245, 242 N.E. 2d 152 (1968); the requirement that sewage treatment facilities be "of a design and location that is approved by the Health Authority," Krol v. County of Will, 38 Ill. 2d 587, 233 N.E. 2d 417 (1968). In none of these cases had the General Assembly laid down any guidelines to channel the discretion of the authorized officer.[1]

1. City of Kankakee v. New York Cent. R.R., 387 Ill. 31, 56 N.E. 2d 91 (1944), also cited, is based upon the well-known principle of the limited powers of municipalities. Any adverse implications of that decision regarding delegations by the General Assembly were squarely overruled by the Metropolitan Sanitary District case, supra.

The statutes in the present case are vastly different. The Air Pollution Control Act, section 5-1.2, gave the former Air Pollution Control Board authority to adopt "reasonable rules and regulations consistent with the general intent and purposes of this Act." Not only did section 5 of the Act spell out those purposes in some detail as a guide and limitation on the exercise of rule-making power, specifically requiring the Board to consider the technical and economic feasibility of compliance, but section 7 prescribed a number of additional factors which had to be taken into account by the Board. To require any more confining legislative standards than these would in substance require the General Assembly itself to prescribe numbers for the maximum permissible emissions of pollutants, which would impose an impossible burden.

The company wholly misconstrues the Environmental Protection Act, suggesting that section 9 (a) is invalid because it prohibits any discharge of contaminants "so as to violate regulations or standards adopted by the Board under this Act." Granite City professes to read this section as an "unfettered" grant of "discretion to prohibit or penalize any conduct whatever, so long as it involves the discharge of a 'contaminant,' which (as defined in Section 3 (d) of the Act) includes anything whatever" (motion to dismiss, p. 3). But section 9 (a) is not a grant of rule-making power at all; it simply prescribes that it is illegal to violate the regulations. Power to adopt regulations on air pollution is conferred by section 10. As in the earlier statute, this power is expressly limited both by the detailed and careful delineation of statutory purposes in sections 2 and 8 and by the explicit listing of factors relevant to the exercise of rule-making judgment in section 27. In addition, guided by the additional experience gained during seven years under the prior statute, the General Assembly added a detailed list of certain types of regulations that might be prescribed by the Board, including ambient air quality standards, emission standards, permit requirements, episode regulations, etc. The Legislature could hardly have been more specific without adopting numerical standards itself.

In Hill v. Relyea, 216 N.E. 2d 795, 797 (1966), the Illinois Supreme Court recognized, as have countless other courts, that the General Assembly may constitutionally "delegate to others the authority to do those things which the legislature might properly do, but cannot do as understandingly and advantageously" as can an administrative agency. "The constitution merely requires that intelligible standards be set to guide the agency charged with enforcement, . . .and the precision of the permissible standard must necessarily vary according to the nature of the ultimate objective and the problems involved." Ibid. The application of this principle to the two statutes before us is assured by Hill v. Relyea, supra, which upheld authority of a

hospital superintendent to discharge mental patients "as the welfare of such persons and of the community may require, under such rules and regulations as may be adopted by the Department."

The authority in the present case is much more narrowly circumscribed by legislative standards than was that in Hill.

Moreover, the rule-making and adjudicatory authority of this Board and of its predecessor are subject to exacting procedural requirements designed to ensure that parties to Board proceedings are not subjected to arbitrary action. Public notice and public hearings are required, the present Board has adopted detailed procedural rules to further guide the parties in all Board proceedings, and judicial review is provided.

Thus in terms of both criteria laid down by the Illinois Supreme Court in Heft v. Zoning Board of Appeals, 31 Ill. 2d 266, 201 N.E. 2d 364 (1964), the statutes in question pass muster. As in that case, the pollution statutes provide both sufficient substantive standards to guide the Board's judgment and adequate procedural safeguards to avoid arbitrary action. The Heft case essentially overruled Welton v. Hamilton, 344 Ill. 82 (1931), on which so much reliance is placed by the company; in any event the statutes before us contain far more specific substantive and procedural limitations than did the statute in Welton.[2]

It should be added that a growing body of opinion is of the view that what the constitution really requires is not legislative standards but administrative standards: "The court is on sound ground in holding that in unguided discretionary determination in a particular case is undesirable. But the best cure for that is not a nullification of the entire statute; it is a judicially-enforced requirement that the Health Authority must as far as feasible declare the standards and rules that guide its determinations in individual cases....Such a decision....would have accomplished the purpose of the non-delegation doctrine." See Davis, Administrative Law Treatise, 1970 Supplement, Section 2.11. The regulations of the Air Pollution Control Board meet this requirement, and so do the opinions of the present Board, which as required by statute are written in every case we decide. Acceptance of the Davis position, of course, is by no means necessary to sustain the statutes before us, for reasons already given.

2. Both these last points apply equally to the elderly decision in People v. Beekman & Co., 347 Ill. 92 (1932), also cited by the company.

The argument that the power to order a respondent to stop violating the general prohibition of air pollution constitutes an invalid delegation of legislative authority has no merit; the function of the Board in such cases is essentially akin to that of a court on a nuisance case. See the discussion above.

We find Granite City's delegation argument without merit.

3. Substantive due process. The company next puts forward the untenable suggestion that the present Act is unconstitutional in that it outlaws the discharge of "harmless" contaminants which might have an adverse effect in combination with discharges from other sources over which the respondent has no control. In the first place, Granite City has made no showing that its emissions would be "harmless" even in the absence of other contaminant sources and therefore has no standing to attack the provision on this ground. Moreover, even if Pacesetter Homes, Inc. v. Village of South Holland, 18 Ill. 2d 247, 163 N.E. 2d 464 (1960), stands for the unusual and unfortunate proposition that one always has standing to challenge the validity of a law as applied to someone else, the argument fails on the merits. [3] For the statute very expressly provides a defense for anyone who can show that compliance would impose an arbitrary or unreasonable hardship, section 31 (c); in other words the statute does not apply in any case in which its application would be uncontitutional.

As for the suggestion that other sources are irrelevant to the obligations of the company, brief reflection will show that the presence of other contaminants in the air significantly reduces the amount that Granite City Steel may discharge without causing harm. Activities that might be perfectly acceptable in the absence of the acts of others, such as entering an elevator, may be made illegal when others have filled the elevator to its safe capacity. No one has a constitutional right to park in parking space that is already occupied. No one has a contitutional right to be the straw that breaks the camel's back. The company's position would make it impossible to protect the public against the type of pollution that most seriously plagues our big cities: that which results from the cumulative effect of many individually relatively small sources in the same area. Regulation of automotive pollution, for example, would be out of the question.

3. We do not believe Pacesetter stands for any such broad position. That was an overbreadth case under the First Amendment, an area in which courts have been traditionally more willing to examine the validity of laws on their face.

The company's due process argument is rejected.

II.

In a supplementary motion the company asks that the complaint be dismissed for vagueness and for failure to inform the respondent of the charges against it. The company invokes the authority of our decision in #70-4, EPA v. Commonwealth Edison Co. (Feb. 17, 1971), in which we did strike a portion of the complaint on this ground. But there the resemblance between the two cases ends. Edison does not stand for the proposition, asserted by Granite City, that the complainant must plead its evidence. We there threw out an attempt to bring sulfur dioxide emissions into the case on the basis of allegations that gave notice only that smoke and other particulates were in issue.

We expressly upheld the sufficiency in Edison of allegations, like those in the present case, which referred specifically to violations of precise numerical standards. Moreover, as to the violations of the general air pollution provisions of the statutes, the present complaint alleges the particular equipment from which emissions are said to have occurred and, contrary to the company's assertion, specifies the dates of such violations.

The company has already availed itself extensively of the discovery procedures provided by Board rules. If any evidence at trial nevertheless surprises the company, it will be free to argue for its exclusion on that ground at the time. The complaint is sufficient.

III.

We are not yet through. The company further asks that we strike certain portions of the complaint on the ground that no violation of the general air pollution provisions can be found for any equipment that is in compliance with specific regulations. Once again the company asserts this argument prematurely, for it has not shown that its equipment is in compliance with the regulations and thus lacks standing on the issue. Moreover, the company's argument is flatly contradicted by the statute, which in plain English (with a little Latin) states that compliance with the regulations is a "prima facie" defense to a violation of the Act itself (section 49 (e)). Granite City argues that a prima facie defense is a complete defense. To say this is to refute it; every law student knows a prima facie defense is subject to rebuttal, in this case by showing that a nuisance exists despite compliance with the regulation. The prima facie defense provision was a compromise; the original bill contained no provision for a defense, and a proposed amendment that would have given a complete defense was rejected. (See legislative history of Environmental Protection Act, original bill and proposed amendment no. 63).

IV.

The company argues that this Board has no jurisdiction over alleged violations that took place before the effective date of the Environmental Protection Act. The result of such a holding, since the old Boards that once enforced the pollution laws are no longer in existence, would be to create a void in administrative enforcement. Such could hardly have been the intention of the General Assembly in enacting a new and stronger pollution law. And no such conclusion can be drawn from the statute, which went to some pains to preserve liability for past violations by providing, in section 49 (b), that "all proceedings respecting acts done before the effective date of this Act shall be determined in accordance with the law and regulations in force at the time such acts occurred." Obviously it was intended to preserve liability for past violations; obviously, since the old Boards were abolished, it was intended that complaints for such violations be filed before this Board.

As we have already held in EPA v. Cooling, #70-2 (Dec. 9, 1970) there is nothing to the argument that changing the forum in which a case is heard, after the act charged is committed, offends the prohibition against ex post facto laws. The complaint is brought for an act illegal when done, and the penalties sought are those provided for by the law in force at that time. The Illinois Supreme Court has made clear that merely procedural changes such as giving jurisdiction to a different tribunal to apply the same law do not raise constitutional questions when applied retrospectively. See Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673 (1957), upholding retroactive application of the long-arm statute conferring jurisdiction over cases arising from acts done within the state:

> "The law applicable in the State of Illinois is that there is no vested right in any particular remedy or method of procedure. . . .The change 'merely establishes a new mode of obtaining jurisdiction of the person of the defendent in order to secure existing rights which are unaffected by the amendment.' Retrospective application of such a statute creates a problem only if that application operates unfairly against a litigant who justifiably acted in reliance on some provision of the prior law...."

There can have been no such reliance here.

V.

Finally,on Decemver 29, 1970, after this complaint had been filed, the company wrote to the Agency asking for an extension of the Air Contaminant Emission Reduction Program (ACERP) covering its facilities, which had expired by its own terms several weeks before. The Agency, deeming this request an inartfully drawn

variance petition, moved to consolidate it with the pending enforcement proceeding. The company's response was violently negative. For reasons not immediately apparent, but possibly related to the company's challenge to the Environmental Protection Act, the company insisted that what it had filed was not a variance petition, in the teeth of the unmistakable statutory provision that all requirements of the variance title apply to "proposed Contaminant Reduction programs designed to secure delayed compliance with the Act or with Board regulations" (section 38). As we held in EPA v. Commonwealth Edison Co., supra, such a program is a variance because it permits emission in excess of regulation limits and because the statute flatly and deliberately says so.

Granite City contends that the old program, which on its face expired in December, 1970, "remains in effect pending action by the Environmental Protection Agency and the Pollution Control Board on respondent's request for extension of the program" (Respondent's Memorandum, p. 6). The notion that the beneficiary of an ACERP or other variance can obtain for himself an automatic extension simply by filing for it at the last minute--or later--is unsupportable. The only provision for a stay of enforcement upon the filing of a petition is in the case of a new regulation (section 38); other suggested stay provisions were expressly rejected (see legislative history, proposed amendment no. 41). No one is entitled to a variance without "presentation of adequate proof, that compliance...would impose an arbitrary or unreasonable hardship" (section 35), and a variance may be extended only "by affirmative action of the Board", and "only if satisfactory progress has been shown," (section 36 (b)). Section 49 (c) preserves APCB regulations, but no regulation allows automatic extensions or defenses while extension requests are considered, and none would be valid if it did because it would squarely contradict the sections of the statute quoted above.

It is also urged that Board Rule 309, which authorizes consolidation of various claims, does not allow combining a variance petition with an enforcement complaint. No again. The Rule is deliberately all-embracing:

> In the interest of convenient, expeditious, and complete determination of claims, the Hearing Officer may consolidate or sever enforcement, variance, permit or other adjudicative claims. . . .

This language allows consolidation of different kinds of claims involving the same or related subject matter, and it is particularly appropriate in the case of a variance petition and an associated complaint, because of the overlapping evidence and issues.

We have consistently utilized the consolidation rule in such cases, e.g., EPA v. City of Springfield, #70-9; EPA v. Amigoni, #70-15 (Feb. 17, 1971).

The request for extension was therefore properly construed as a petition for variance, and the motion to consolidate was entirely in order. Confronted with the Board's resolution of these issues, the company elected to withdraw its request. That is its privilege; if it doesn't want a variance it doesn't have to have one. The matters relevant to a variance can be presented in defense to the enforcement claim without the necessity for a formal petition (section 31 (c)). But we think the company should understand that it now enjoys no variance, that its ACERP has expired, and that it has no shield against prosecution save any arbitrary or unreasonable hardship that it may be able to prove at the hearing.

VI.

The company objects to the amended complaint on the ground it was also designated as a counterclaim to the variance petition, arguing that Board rules make no provision for counterclaims. We think the filing of a counterclaim is entirely consistent with the Rules and that the absence of specific authorization is immaterial. We have entertained countercomplaints before, e.g., Norfolk & Western Ry. v. EPA, #70-41 (March 3, 1971), and any technical difficulty in so doing can be avoided by treating the counterclaim as a separate proceeding and consolidating it with the pending case under Rule 309. In the present case it is also allowable simply as an amended complaint.

Conclusion

In sum, we find all the company's arguments wholly without merit. The hearing will proceed.

The company's motions are denied.

I, Regina Ryan, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 11th day of March, 1971.