ILLINOIS POLLUTION CONTROL BOARD
March 15, 2007

JOHN and LINDA MARACIC,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 05-212
	)	(Citizens Enforcement – Noise)
TNT LOGISTICS NORTH AMERICA INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by A.S. Moore):

On June 10, 2005, the complainants, John and Linda Maracic (the Maracics), filed a complaint against the respondent, TNT Logistics North America Inc. (TNT), alleging numeric noise violations. The complaint concerns TNT's tire warehouse distribution facility located at 25850 S. Ridgeland Avenue in Monee, Will County. The Maracics now seek to file an amended complaint to also include the allegation of a nuisance noise violation. The Maracics also seek to add two companies as respondents to this case. Because TNT has recently left the facility and retains no control over the facility, TNT moves the Board to dismiss both the original and amended complaints as frivolous.

For the reasons below, the Board accepts the filing of the Maracics' amended complaint, but declines to add new respondents, grants TNT's motion to dismiss, and closes this docket.[1] In this order, the Board will first describe the relevant procedural history of this citizens enforcement action. The Board will then set forth the legal framework for today's decision. Next, the Board discusses the complaints and related pleadings. Lastly, the Board provides its analysis of the issues and renders its rulings.

PROCEDURAL HISTORY

The Maracics initiated this case by filing a complaint against TNT on June 10, 2005 (Original Complaint).[2] On August 5, 2005, TNT filed an answer to the Original Complaint. On September 1, 2005, the Board issued an order accepting the Original Complaint for hearing. During the ensuing 14 months or so, the parties participated in status calls with the hearing officer and engaged in discovery. On November 16, 2006, the hearing officer issued an order setting the case for hearing on December 18, 19, and 20, 2006.

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[1] Three other noise enforcement actions against TNT are also dismissed today. *See* Vincent and Jennifer Neri v. TNT Logistics North America Inc., PCB 05-213 (Mar. 15, 2007); Wayne Haser v. TNT Logistics North America Inc., PCB 05-216 (Mar. 15, 2007); Ken Blouin v. TNT Logistics North America Inc., PCB 05-217 (Mar. 15, 2007).

[2] The Board cites the Original Complaint as "Orig. Comp. at _."

On December 14, 2006, the hearing officer conducted a status conference call with the parties. During the call, the following occurred: the Maracics made an oral motion to cancel the hearing; TNT objected to the motion and represented that it was ready to proceed to hearing; the hearing officer granted the Maracics' motion and cancelled the hearing; and the hearing officer directed the Maracics to seek leave to file an amended complaint and file the amended complaint by January 5, 2007.

Later on December 14, 2006, the Maracics filed a document entitled "Motion to Cancel Hearing and Leave to Refile Amendment to Existing Numerical Complaint" (Motion To Cancel and For Leave).[3] On January 3, 2007, the Maracics filed an amended complaint (Amended Complaint).[4] The hearing officer issued an order on January 4, 2007, memorializing the December 14, 2006 status call.

On January 16, 2007, TNT filed its "Objection to Complainants' 'Amended Complaint,' Motion to Dismiss Complaint as Originally Filed, and Alternative Motion for Reversal of Hearing Officer's Order" (Objection), with an attached affidavit (Affidavit). In a February 1, 2007 order, the hearing officer, with TNT's agreement, extended to February 13, 2007, the deadline for the Maracics to respond to TNT's Objection. On February 5, 2007, TNT filed a "Supplementation of Affidavit" and attached supplemental affidavit (Supplemental Affidavit).[5]

On February 14, 2007, the Maracics' filed a motion seeking to add Key Logistics Solutions and Location Finders, Inc. as respondents to this case (Motion To Add). On February 16, 2007, TNT filed a response to the Motion To Add (Response).[6]

LEGAL FRAMEWORK

Under the Environmental Protection Act (Act) (415 ILCS 5 (2004)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2004); 35 Ill. Adm. Code 103. For enforcement actions not initiated by the State, Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2004); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is "frivolous" if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202.

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[3] The Board cites the Motion To Cancel and For Leave as "Mot. Cancel/Leave at _."

[4] The Board cites the Amended Complaint as "Am. Comp. at _."

[5] The Board cites the Objection as "Object. at _"; the Affidavit attached to the Objection as "Affid. at _"; the supplementation of affidavit as "Supp. at _"; and the Supplemental Affidavit as "Supp. Affid. at _."

[6] The Board cites to Motion To Add as "Mot. Add at _"; and the Response as "Resp. at _."

Section 103.206 of the Board's procedural rules provides:

> a) The Board, on its own motion or the motion of a respondent, may order a person to be added as a respondent if a complete determination of a controversy cannot be had without the presence of the person who is not already a party to the proceeding.
>
> * * *
>
> d) *** If a party wishes to file an amendment to a complaint, counter-complaint, cross-complaint, or third-party complaint that sets forth a new or modified claim against another person, the party who wishes to file the pleading must move the Board for leave to file the pleading.
>
> e) The pleading sought to be filed pursuant to subsection (d) of this Section must:
>
> 1) Set forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding . . . . 35 Ill. Adm. Code 103.206(a), (d), (e).

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See* People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Co., PCB 02-1, slip op. at 1 (Nov. 15, 2001), citing Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991).

THE PLEADINGS

Original Complaint

According to the Original Complaint (filed June 10, 2005), trucking activity at TNT's warehouse distribution facility emits noise in violation of the Board's numeric noise standards. Specifically, the Maracics allege that the noise comes from trucks entering and exiting the facility, trailers being connected, disconnected, loaded, unloaded, and dragged, trailers hitting the loading docks, air brakes, air horns, and diesel engine revving and idling. The Maracics assert that the noise persists 24 hours a day, 7 days a week, 365 days a year. The Original Complaint further states that the noise disrupts the sleep of the Maracics and their child and causes them to not enjoy their "homelife" or "outdoor living." Orig. Comp. at 4.

The Original Complaint alleges that TNT is violating several provisions of the Board's numeric noise regulations: Section 901.102 ("Sound Emitted to Class A Land"); Section 901.103 (Sound Emitted to Class B Land"); Section 901.104 ("Impulsive Sound"); and Section 901.106 ("Prominent Discrete Tones") (35 Ill. Adm. Code 901.102, 901.103, 901.104, 901.106). The Maracics ask the Board to order TNT to "stop the noise so we can go back to the enjoyment of life before the facility came" or alternatively to "relocate facility." Orig. Comp. at 4.

Motion To Cancel and For Leave

In the Motion To Cancel and For Leave (filed December 14, 2006), the Maracics state that they are confirming their request for hearing cancellation made earlier that day and granted during the status call. Mot. Cancel/Leave at 1. The Maracics further state that the their request to cancel the hearing "is made to Leave to Refile to include a Nuisance Complaint which can be documented and filed in addition to the Numeric Complaint that was to be heard next week." *Id*.

Amended Complaint

The Maracics allege in their Amended Complaint (filed January 3, 2007) that TNT is violating Sections 23 and 24 of the Act (415 ILCS 5/23, 24 (2004)). Am. Comp. at 3. The Amended Complaint essentially alleges the same trucking activities and the same duration, frequency, and effects of violations as did the Original Complaint. *Id*. at 3-4. The Amended Complaint also seeks the same relief as did the Original Complaint, but adds alternative requests for enclosing or relocating loading docks and installing a "sound wall." *Id*. at 4.

Objection and Affidavit

In its Objection (filed January 16, 2007), TNT first asserts that the Amended Complaint should be stricken because it was not accompanied by a motion for leave to file the document. Object. at 2-3. Citing the Board's procedural rules (35 Ill. Adm. Code 103.206(d)) and the hearing officer's January 4, 2007 order, TNT argues that the Maracics' were required to seek the Board's leave to file the Amended Complaint because the Amended Complaint sought to set forth a new or modified claim, *i.e.*, adding a nuisance noise claim to the prior numeric noise claim. *Id*. at 3-4.

Even if the Maracics' had moved for leave, TNT continues, the Amended Complaint is frivolous for several reasons. Object. at 4-6. First, TNT argues that Section 23 of the Act cannot be violated because it merely sets forth legislative findings regarding noise. *Id*. at 4. Second, TNT maintains that the alleged violation of Section 24 is also frivolous. The Maracics seek a cease and desist order, TNT states, which relief is beyond the Board's authority to grant under the new circumstances developing at the facility. *Id*. at 5-6. Specifically, TNT presents the Affidavit of TNT's Properties Director, Steve McNeal, who, as of January 16, 2007, attests as follows:

> TNT currently leases and operates a facility located [at] 25850 Ridgeland, Monee, Illinois 60449 ("Facility") . . . .
>
> As of January 22, 2007, TNT will no longer lease or operate the Facility.
>
> Further, as of January 22, 2007, TNT will not have any employees present at the Facility, nor will TNT have any authority or control of any equipment, operations or activities of any new tenant at the Facility.

> Further, as of January 22, 2007, TNT will not have any ability to make any changes in any equipment located at, or any operations or activities taking place at, the Facility.
>
> It is TNT's understanding that as of January 22, 2007, another company, not related in any way to TNT, will begin operations at the Facility. Affid. at 1-2 (¶¶ 3-7); *see also* Object. at 5.

TNT argues that because it will no longer be operating the facility as of January 22, 2007, any cease and desist order would be "ineffective":

> [B]y the time the Board issued any such order, TNT will not be in a position to implement any changes necessary to comply with any such order, and any new operator of the Facility, as a non-party, would not be bound by any such order (which order, in any event, would evaluate only TNT's actions, not the actions of any such new operator). Object. at 6.

According to TNT, because the Original Complaint, like the Amended Complaint, seeks a cease and desist order, the Original Complaint is also frivolous for the same reasons. TNT argues that the Board should therefore dismiss the Original Complaint and the Amended Complaint as frivolous. Object. at 7, 13-14.

Alternatively, should the Board deny the motion to dismiss, TNT appeals the ruling of the hearing officer canceling the hearings and granting the Maracics time to seek leave to file an amended complaint. Object. at 8. TNT argues, among other things, that the Maracics failed to timely file a compliant motion to cancel the hearing, failed to demonstrate that they would suffer material prejudice absent hearing cancellation, and failed to demonstrate that the request to cancel is not the result of their lack of diligence. *Id*. at 9-10.

TNT concludes by stating that it objects to the filing of the purported Amended Complaint and moves the Board to dismiss the Amended Complaint and the Original Complaint as frivolous. Alternatively, TNT moves the Board to reverse the hearing officer and reschedule the hearing on the Original Complaint. Object at 13-14.

Supplemental Affidavit

The Supplemental Affidavit (filed February 5, 2007) sets forth the sworn statements of TNT's Properties Director, Steve McNeal, made on January 31, 2007:

> TNT previously leased and operated a facility located [at] 25850 Ridgeland, Monee, Illinois 60449 ("Facility") . . . .
>
> As of January 22, 2007, TNT is no longer leasing or operating the Facility.

> Further, as of January 22, 2007, TNT no longer has any employees present at the Facility, nor does TNT retain any authority or control over any equipment, operations or activities of any new tenant at the Facility.
>
> Further, as of January 22, 2007, TNT no longer has any ability to make any changes in any equipment located at, or any operations or activities taking place at, the Facility.
>
> As of January 22, 2007, another company, not related in any way to TNT, began operations at the Facility. Supp. Affid. at 1-2 (¶¶ 3-7).

TNT states that under these circumstances, the relief sought by the Maracics would be "unenforceable" and reiterates that TNT seeks dismissal of the Amended Complaint and the Original Complaint as frivolous. Supp. at 1-2.

Motion To Add

The Maracics' Motion To Add (filed February 14, 2007) states:

> We hereby request adding "Key Logistics Solutions" and "Location Finders, Inc." to previously named "TNT Logistics" to our numerical and nuisance complaint. This request is made in order to correctly identify responsible developers, name changes and the like. Mot. Add at 1 (emphasis in original).

Response

In its Response (filed February 16, 2007), TNT states that the Maracics' Motion To Add does not cure the many deficiencies identified by TNT's Objection. Resp. at 2. Most importantly in TNT's view, nothing in the Motion To Add disproves the position that the Board is unable to grant the relief sought by the Moracics. *Id*.

TNT asserts that the Motion To Add suggests that the Maracics believe the operational change at the facility is a "name change only." Resp. at 2. TNT points out, however, that the Maracics have presented no evidence to support such an implication and, in fact, "TNT and the new operator of the Facility are not related in any way." *Id*. at 3. TNT concludes that the Motion To Add does not affect the grounds on which TNT has sought dismissal of this case. *Id*.

BOARD ANALYSIS

In this portion of the order, the Board will discuss and rule on the Maracics' motion for leave to file the Amended Complaint, the Maracics' motion to add respondents, and TNT's motion to dismiss the Amended Complaint and the Original Complaint.

The Board grants the Maracics' request for leave to file an amended complaint adding an alleged nuisance noise violation against TNT. In the Maracics' filing entitled "Motion to Cancel Hearing and Leave to Refile Amendment to Existing Numerical Complaint," which was directed

to the Board, the Maracics state that their request to cancel the scheduled December 2006 hearing is:

> made to Leave to Refile to include a Nuisance Complaint which can be documented and filed in addition to the Numeric Complaint that was to be heard next week. Mot. Cancel/Leave at 1.

It is plain from this document, timely filed on December 14, 2006, that the Maracics were seeking the Board's permission to file an amended complaint to add nuisance noise allegations to their already-existing allegations of numeric noise violations. In turn, the Maracics timely filed the Amended Complaint on January 3, 2007. Following the status call with the hearing officer earlier that day, the Maracics' December 14, 2006 filing fairly put TNT on notice as to what the Maracics' sought to do. The Board will not require more of these *pro se* complainants. The Board accepts the filing of the Amended Complaint.

The Board now turns to the Amended Complaint itself and to TNT's motion to have both the Amended Complaint and the Original Complaint dismissed as frivolous. As noted above, the Amended Complaint alleges violations of Sections 23 and 24 of the Act by TNT. TNT correctly points out that because Section 23 of the Act solely sets forth the General Assembly's findings on excessive noise and states the purpose of the Act's Title VI on noise, Section 23 cannot be violated. The Board has accordingly stricken from complaints as frivolous the alleged violation of Section 23. *See, e.g.,* Beers v. Calhoun (Let It Shine Car Wash), PCB 04-204 (July 22, 2004).

The overarching problem, however, for both the Amended Complaint and the Original Complaint is presented by the affidavits of TNT's Properties Director, Steve McNeal. Mr. McNeal attests that as of January 22, 2007: (1) TNT is no longer leasing or operating the facility; (2) TNT no longer has any employees present at the facility; (3) TNT does not retain any authority or control over any equipment, operations, or activities of any new tenant at the facility; (4) TNT no longer has any ability to make any changes in any equipment located at, or any operations or activities taking place at, the facility; and (5) another company, not related in any way to TNT, began operations at the facility. Mr. McNeal's sworn statements are uncontroverted. The Maracics' subsequent Motion To Add does not dispute that TNT has left the facility and retains no authority over the facility's operations.

Importantly, the only relief that the Maracics have sought in the Amended Complaint and in the Original Complaint has been a Board order requiring TNT either to simply "stop" the noise violations at the facility or to implement specific noise abatement measures for the facility. On September 1, 2005, when TNT was still operating at the facility, the Board issued an order finding that the Original Complaint was not frivolous. Indeed, it is well-settled that the Board has the authority to order a respondent both to cease and desist from further noise violations and to implement specific noise reduction steps. *See, e.g.,* Discovery South Group v. Pollution Control Board, 275 Ill. App. 3d 547, 656 N.E.2d 51 (1st Dist. 1995); Charter Hall Homeowner's Association v. Overland Transportation System, Inc., PCB 98-81 (May 6, 1999).

However, with TNT's departure from, and termination of any control over, the facility, even if the Maracics prove the alleged noise violations, the relief they request is now beyond the

Board's authority to grant. Accordingly, "though the Board's remedial authority under the Act is in no way limited to the relief that a complainant requests," the Board finds that the Original Complaint and the Amended Complaint are frivolous under these new circumstances. Finley v. IFCO ICS-Chicago, Inc., PCB 02-208, slip op. at 11 (Aug. 8, 2002); *see also* 35 Ill. Adm. Code 101.202 ("Frivolous" means "a request for relief that the Board does not have the authority to grant . . . .").

The Board was faced with a very similar situation in Tonne v. Leamington Foods, PCB 93-44 (Apr. 21, 1994). In Tonne, approximately one year after the Board found that the citizens noise complaint was not frivolous and accepted it for hearing, the complainants reported that the respondent, Leamington Foods, was no longer occupying the building and that the refrigeration fans, the alleged noise source, were not operating. *See* Tonne, PCB 93-44 at 1. The Board held:

> The complaint alleges violations of the noise provisions of the Environmental Protection Act . . . and requests the Board to order the respondent to cease and desist from further violations. If after presentation of evidence, the Board were to determine that the operation of the fans caused a violation of the Act, an order could be entered against Leamington Foods requiring Leamington Foods to cease and desist from further violations of the Act. To conform to the Board's order Leamington Foods would be required to modify the operation of the fans to achieve compliance or cease operating the fans. As Leamington Foods is no longer an operator of the refrigeration fans it does not possess the authority to test or modify the refrigeration fans. While the Board could enter an order as requested if a violation were found, the Board believes that because Leamington Foods is no longer in control of the subject property such an order would be unenforceable. Considering the circumstances in this matter, the Board finds that because Leamington Foods has vacated the property, the Board is unable to effectively grant the relief requested in this matter. Where the Board is unable to effectively impose relief, the Board must dismiss the case as frivolous. Tonne, PCB 93-44 at 2; *compare* Pearl v. Bicoastal Corp., PCB 96-265 (Apr. 3, 1997) (denying motion to dismiss citizen complaint as frivolous where respondent vacated the site but complainant sought, among other things, civil penalties).

After filing the Amended Complaint on January 3, 2007, the Maracics, on February 14, 2007, filed their request to add two companies, Key Logistics Solutions and Location Finders, Inc., as respondents to this action. Neither company has sought to file anything with the Board in response. The Maracics' request sets forth no allegations specific to these companies, let alone whether they are operating the facility or violating the Act and Board regulations. The allegations of the Original Complaint and Amended Complaint relate solely to the activities of TNT. Nor do the Maracics allege that either of these companies is related to TNT. In fact, Mr. McNeal has sworn that the company currently operating the facility, whoever that may be, is "not related in any way to TNT."

Based on this record, any claims that the Maracics may have against any new operator of the facility cannot have "arise[n] out of the occurrence or occurrences that are the subject of the

proceeding" against TNT. 35 Ill. Adm. Code 103.206(e)(1). Under these circumstances, the Board denies the Maracics' motion to add the two mentioned companies as respondents to this case, which now lacks any controversy for the Board to decide. *See* 35 Ill. Adm. Code 103.206(a) (Board "may order a person to be added as a respondent if a complete determination of a controversy cannot be had without the presence of the person").

Taking all well-pled allegations as true and drawings all inferences from them in favor of the Maracics, the Board finds that it is clear that no set of facts could be proven that would entitle the Maracics to the relief they seek from the Board against TNT. Accordingly, the Board grants TNT's motion to dismiss the Original Complaint and the Amended Complaint. Having so ruled, the Board need not reach TNT's alternative motion to overrule hearing officer's order canceling the December 2006 hearing.

CONCLUSION

As detailed above, the Maracics properly sought permission to file their Amended Complaint and the Board accepts that filing. However, the only relief requested by the Maracics in the Amended Complaint and the Original Complaint is the elimination of TNT's allegedly violative sound emissions from the tire warehouse distribution facility located at 25850 S. Ridgeland Avenue in Monee, Will County. Because TNT has recently departed from the facility and retains no control over the facility, the Board no longer has any authority to order TNT to reduce noise from the facility, even if the alleged violations by TNT were proven. Under these new circumstances, the Original Complaint and the Amended Complaint are therefore frivolous.

Further, the Maracics make no allegations regarding any activities of the companies they now want to add as respondents, Key Logistics Solutions or Location Finders, Inc. The only alleged violations before the Board are based on the past alleged activities of TNT, which is unrelated to any new operator of the facility.

The Board accordingly declines the Maracics' request to add Key Logistics Solutions and Location Finders, Inc. as respondents to this case, grants TNT's motion to dismiss the Original Complaint and the Amended Complaint, and closes this docket. If the Maracics believe that any new operator of the facility is violating the noise provisions of the Act and Board regulations, nothing in this order precludes the Maracics from filing a new complaint against that entity. Should any such new complaint be brought and result in appellate review of final Board action, today's dismissal will ensure that the record on appeal would not be burdened by the many filings of PCB 05-212.

The Board notes that three other citizen enforcement actions brought against TNT for alleged noise violations from TNT's activities at the Monee facility are also being dismissed today on the same grounds. *See* Vincent and Jennifer Neri v. TNT Logistics North America Inc., PCB 05-213 (Mar. 15, 2007); Wayne Haser v. TNT Logistics North America Inc., PCB 05-216 (Mar. 15, 2007); Ken Blouin v. TNT Logistics North America Inc., PCB 05-217 (Mar. 15, 2007).

ORDER

1. The Board grants the Maracics' motion for leave to file the Amended Complaint and accepts their filing of the Amended Complaint.

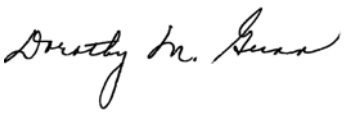
2. The Board denies the Maracics' motion to add Key Logistics Solutions and Location Finders, Inc. as respondents to this case.

3. The Board grants TNT's motion to Dismiss the Original Complaint and the Amended Complaint.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 15, 2007, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board