

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | AC 2012-051 |
| |) | (IEPA No. 87-12-AC) |
| NORTHERN ILLINOIS |) | (Administrative Citation) |
| SERVICE COMPANY, |) | |
| |) | |
| Respondent. |) | |

NOTICE

John T. Therriault
Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Peter DeBruyne
Peter DeBruyne, P.C.
838 North Main Street
Rockford, IL 61103

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

PLEASE TAKE NOTICE that I have today caused to be filed Complainant's REPLY TO RESPONDENT'S MEMORANDUM OF LAW IN RESPONSE TO COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT with the Illinois Pollution Control Board, a copy of which is served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Complainant,

Dated: May 2, 2014

Scott B. Sievers
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BY:



Scott B. Sievers
Special Assistant Attorney General

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| Respondent. |) | |

**REPLY TO RESPONDENT’S MEMORANDUM OF LAW
IN RESPONSE TO COMPLAINANT’S MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Complainant, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by and through its counsel, Special Assistant Attorney General Scott B. Sievers, and, pursuant to 35 Ill. Adm. Code 101.500, replies to the Respondent’s Memorandum of Law in Response to Complainant’s Motion for Summary Judgment (“Response”) as follows:

I. NORTHERN’S ARGUMENTS CONCERNING INSPECTOR SHEHANE’S METHODS AND CHARACTERIZATIONS OF TERMS FAIL TO CREATE A GENUINE ISSUE OF MATERIAL FACT, AS NONE EXISTS.

In its Response, Northern makes much of Inspector Shehane’s method in conducting inspections, including the March 14, 2012 inspection that is a subject of the instant action. (*See, e.g., Resp. at 8-10.*) However, Northern fails to identify any provision of the Environmental Protection Act or its regulations that Inspector Shehane allegedly violated or failed to satisfy in any way with her inspection, let alone how that might constitute a legally cognizable defense to the violations Northern faces.

Northern also focuses much attention on Inspector Shehane's testimony during her three hour deposition of her characterizations of various terms, such as open dumping. (*Id.*) Northern has taken great liberties in construing Inspector Shehane's testimony as well. For example, in its Response, Northern asserts that "Shehane stated that a resident placing garbage out for pick up would be enough for her to conclude that the house was an unpermitted landfill," then cites page 33 of her deposition as support. When asked about landfill-related citations, Inspector Shehane actually answered Northern's questions as follows:

What was it that you observed that made you conclude that Northern was operating a landfill?

A. I observed waste on the ground.

Q. Is that enough for you to conclude that there's a landfill there? Because in my mind I can have – we've talked about this. I'm putting my garbage out. It could be waste. Am I included in my house of operating a landfill, or is there something more?

MR. SIEVERS: Objection; vague and compound.

A. That's enough for me to conclude it's an unpermitted landfill.

(Ex. F. (Shehane dep.) at 33.)

Regardless of her testimony, however, Inspector Shehane's characterization of what constitutes "open dumping" or any other term defined in the Act or regulations cannot and does not control over those definitions any more than Northern's conclusory assertions that it did not cause or allow open dumping or the accumulation of water in used or waste tires. Illinois EPA rests its right to summary judgment not upon Inspector Shehane's definitions or discretion in determining whether she observed something meeting those definitions, but instead upon the Act's definitions and the uncontested facts in this action that satisfy the elements of those definitions and of each of the violations alleged. Northern's arguments are simply an attempt to

create a genuine issue of material fact to defeat summary judgment when no such issue exists.¹

II. ILLINOIS EPA DOES NOT CONTEND THAT THE TIRES USED AS SHOCK ABSORBERS VIOLATE SECTION 55(k)(1), BUT THOSE TIRES PHOTOGRAPHED OFF-RIM, CONTAINING WATER, AND NOT FILLED WITH CONCRETE FOR USE AS POLE BASES CLEARLY DO.

In its Response, Northern Illinois Service Company (“Northern”) argues that it could not have violated Section 55(k)(1) of the Act because the tires at issue were not “used tires” but instead “reused tires.” (Resp. at 10-11.) Northern argues that it uses the tires as shock absorbers around hardened equipment used for demolishing structures and concrete slabs. Northern also argues that the tires “were also used as a base for temporary light poles or temporary power at construction sites” and “[t]he tire bases are filled with concrete and thus provide stability for an upright pole which is centered in the tire.” (Resp. 11.)

Illinois EPA does not contest that some tires at the Site were used by Northern as shock absorbers. In fact, Illinois EPA even photographed those tires and attached that photograph as exposure No. 3 to its inspection report, which in turn was attached to the Administrative Citation. But Illinois EPA does not contend that those particular tires were evidence of a violation in the first place, as made clear by the fact that Illinois EPA did not reference them in support of its argument for summary judgment on the Section 55(k)(1) violation.

Illinois EPA also does not dispute that if used, off-rim tires were filled with concrete and used as bases for light or power poles, they would not violate Section 55(k)(1) of the Act. But that is not the evidence in this case. The evidence in this case is that Inspector Shehane observed four large, off-rim tires that appeared worn and damaged; were not covered or protected from the weather; and that no present or future use for these particular tires was apparent. (Admin. Cit.

¹ In referencing Inspector Shehane’s testimony, Northern errs in stating that she said that open dumping depends on whether it is going to be taken away. (Resp. at 9.) In fact, Inspector Shehane testified that “open dumping doesn’t necessarily depend on whether it is going to be taken away.” (Ex. F (Shehane dep.) at 18-19.)

aff. ¶ 4 & inspection report; Ex. E (Shehane aff.) ¶ 7.) Northern Superintendent Will Hoff characterized them as used tires which were not mounted on a vehicle, with some of the tires being worn, some being damaged, but that none of the tires on the site was brand new. (Ex. D (Hoff dep.) at 14:6-15:11.) Inspector Shehane took two photographs documenting water accumulation in the tires. (Admin. Cit. aff. ¶ 4 & inspection report; Ex. F (Shehane dep.) at 77:13-16.) When asked, “[D]id those tires at that time have water in them?”, Northern’s Office Manager and Project Manager Estimator, Paul Munson, testified, “I believe they did, yes.” (Ex. C (Munson dep.) 26:20-22.) Hoff testified the tires subsequently were taken to a tire disposal facility. (Ex. D (Hoff dep.) at 13:7-8.) Thus, Northern’s own employees undercut its argument that the tires were not used and that Northern did not cause or allow the accumulation of water in them.

Northern also attempts to divert this Board’s attention with Inspector Shehane’s testimony concerning a 14-day rule. (Resp. at 10.) In essence, Northern argues that proving a facial violation of Section 55(k)(1) is not enough, as Illinois EPA must also show that more than 14 days had passed since the tires were received at the site.

Section 55(k)(1) of the Act is a statutory provision enacted August 25, 2009, whereas 35 Ill. Adm. Code 848.202 containing the 14-day rule is a regulation promulgated February 14, 1992. As a statutory provision and one enacted long after the regulatory provision, Section 55(k)(1) controls over 35 Ill. Adm. Code 848.202. *See, e.g.*, 35 Ill. Adm. Code 848.103. As Section 55(k)(1) provides no 14-day exception to its prohibition against causing or allowing water to accumulate in used or waste tires, how much time might have passed since the tires were received at Northern’s site is irrelevant.

However, in the event that this Board construes the 14-day provision in 35 Ill. Adm. Code 848.202 as providing a defense to an alleged Section 55(k)(1) violation, it is Northern's burden as the Respondent to prove the elements of that defense and not Illinois EPA's burden to disprove it beforehand. Northern has failed to meet any such burden.

III. EVIDENCE INCLUDING THE TESTIMONY OF NORTHERN'S OWN EMPLOYEES SHOWS THE PILE MATERIALS HAD BEEN DISCARDED AND WERE LATER TAKEN TO A LANDFILL, AND NORTHERN LACKED A PERMIT TO DUMP WASTE ON SITE TEMPORARILY.

In its summary judgment motion, Illinois EPA argued that Northern had violated Sections 21(p)(1) and 21(p)(7) of the Act by causing or allowing the open dumping of waste in a manner that resulted in litter and the deposition of construction or demolition debris at Northern's site. (Mot. for Summ. J. at 8.) In support, Illinois EPA set forth uncontested evidence concerning a pile of materials observed on the ground on Northern's site during Inspector Shehane's March 14, 2012 inspection. (*Id.* at 8-12.) In its Response, however, Northern disputes that the pile of materials constituted waste, as it contends the materials were not discarded and that they had not been disposed of at Northern's site. (Resp. at 17.) The evidence contradicts Northern's position, however.

On March 14, 2012, Inspector Shehane observed a pile of material on the ground and in the yard area of Northern's site. (Admin. Cit. aff. ¶ 4 & inspection report; Ex. E (Shehane aff.) ¶ 8.) The material was not covered or protected from the weather, no present or future use for the material was apparent, and the material appeared to have been discarded and disposed on the site. (Ex. E. (Shehane aff.) ¶ 8; *see also* Ex. F (Shehane dep.) at 65:7-9, 92:8-24.) Hoff testified that Inspector Shehane's photograph of the material pile showed material as he recalled it being on March 14, 2012. (Ex. D (Hoff dep.) at 21:4-13.) In that photograph, Hoff identified PVC pipe;

packing materials for pipe and for fittings; plastic silt fence from excavation sites for erosion control; small pieces of concrete chunks or bricks; packaging and wood materials—"the type of things we get off of our underground sites"—including pallets and dimensional lumber; plastic visqueen. (Ex. D (Hoff dep.) at 23:5-24:15; 25:10-18.) When questioned about Inspector Shehane's photograph of the material pile (Hoff & Munson depositions, Ex. 6), Hoff testified that there were multiple origins of the material, but the origins are "[p]rimarily from our shop and job sites." (Ex. D (Hoff dep.) at 22:7-11.) Hoff testified that it was possible that some of the materials depicted in Inspector Shehane's photograph had been on the Northern site for at least a month. (Ex. D (Hoff dep.) at 26:23-27:12.) Hoff testified that the materials "were set out in the back of a truck and into a pile so that we could dispose of them properly." (Ex. D (Hoff dep.) at 30:9-31:4.)

When Inspector Shehane informed Munson after her March 14, 2012 inspection that there was a pile of debris in Northern's yard, that Northern could not dump it on the ground, and that Northern was not allowed to bring off-site generated waste to the property for disposal and/or further transfer to a disposal site, Munson responded that he had told employees in the past not to dump demolition debris on the ground, "but they don't always listen." (Ex. C (Munson dep.) at 28:12-19; Admin. Cit. aff. ¶ 4 & inspection report.)

After Inspector Shehane completed her March 14, 2012 inspection, Hoff spoke with Munson, and the two agreed to clean up some broken pallets and pipe that were in the yard on the Site. (Ex. D (Hoff dep.) at 11:21-12:16.) Hoff testified that packaging material from Northern's shop, packaging material that had been brought back from job sites, and some scrap pipe brought back from job sites were on the Site. (Ex. D (Hoff dep.) at 12:7-24.) Hoff testified that the materials were hauled to a landfill "shortly thereafter." (Ex. D (Hoff. dep.) at 13:1-6.)

Thus, the evidence shows that the pile that Inspector Shehane observed and photographed comprised materials discarded by Northern upon the ground at its site and thus constituted waste under the Act.

Northern, though, argues that, even if the materials did constitute waste, that Northern did not intend to dispose of them at its site, “but was intended to be taken away to a landfill.” (Resp. at 13.) However, Northern cannot escape a violation for causing or allowing open dumping by claiming it was only temporarily storing its waste upon its site prior to disposing it at a landfill. The pile of material was not contained in a dumpster or a closed container², but simply dumped upon the ground. (Admin. Cit. aff. ¶ 4 & inspection report; Ex. E (Shehane aff.) ¶ 8.) At the time of Inspector Shehane’s March 14, 2012 inspection, neither Northern nor the Site was a sanitary landfill or a waste transfer station permitted to operate by Illinois EPA. (Ex. E (Shehane aff.) ¶¶ 10-11; *see also* Ex. F (Shehane dep.) at 77:2-7.) Consequently, Northern could not take discarded materials from its shop or from job sites and dump that material in a pile on its site, even with the intent to dispose of it at a landfill in the future, as it lacked any permit to do so. Thus, no genuine issue of material fact exists that Northern caused or allowed open dumping on its site when it piled discarded material upon it, even if it intended to ultimately transfer that material to a landfill for final disposal.

² Northern alleges in its Response that “the material was confined or contained to prevent its entry into the environment as shown by the photographs and as testified to by Munson.” (Resp. at 14.) No citation to any such testimony by Munson is apparent in the Response, and the photograph of the waste pile clearly shows that the materials were not confined or contained. (*See* Ex. E (Shehane aff.) ¶ 8.) Consequently, Inspector Shehane noted that the soil could be contaminated. (Ex. F (Shehane dep.) at 67.)

IV. ILLINOIS EPA'S SUMMARY JUDGMENT MOTION IS NOT BASED UPON THE DOWNED TREE LIMBS ON NORTHERN'S SITE.

In its Response, Northern argues that "Complainant Apparently Has Given Up On Its Summary Judgment Intention Regarding Downed [Tree] Limbs" and that "Complainant in its brief has said not one word about the photographs of downed tree limbs on Northern's site." (Resp. at 11.) For a response brief, it is peculiar to respond to what is not in an opponent's brief. Nonetheless, Northern is correct: There is not one word about the photographs of the downed tree limbs on Northern's site in Illinois EPA's summary judgment motion. That is because Illinois EPA did not argue in its summary judgment motion, nor does it argue here, that the downed tree limbs form the basis for its violations against Northern.

V. CONCLUSION

WHEREFORE, the Complainant, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, moves this honorable Board to enter summary judgment in favor of the Complainant and against the Respondent.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Complainant,

Dated: May 2, 2014

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BY:



Scott B. Sievers
Special Assistant Attorney General

Illinois Environmental Protection Agency v. Northern Illinois Service Company
Pollution Control Board No. AC 2012-051

CERTIFICATE OF SERVICE

Scott B. Sievers, Special Assistant Attorney General, herein certifies that he has served a copy of the foregoing **REPLY TO RESPONDENT'S MEMORANDUM OF LAW IN RESPONSE TO COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT** upon:

John Therriault
Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Peter DeBruyne
Peter DeBruyne, P.C.
838 North Main Street
Rockford, IL 61103

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

by mailing true copies thereof to the addresses referred to above in envelopes duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois, on May 2, 2014.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Dated: May 2, 2014

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Complainant,

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