

FBEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT NORTHERN ILLINOIS SERVICE COMPANY’S BRIEF IN RESPONSE TO COMPLAINANT’S POST-HEARING BRIEF

Respondent Northern Illinois Service Company (“Northern”), by and through its counsel, Peter DeBruyne, P.C., responds to complainant’s Post-Hearing Brief as follows:

I. INTRODUCTION: THE CASE IN A NUTSHELL

Northern, a construction and demolition contractor, houses approximately 40 of its vehicles at the 35 acre site (“site”) in question. At the site, Northern also engages in recycling asphalt and reinforced concrete with upwards of 15,000 tons of such materials waiting for recycling. On the date of the inspection which resulted in the citation, March 4, 2012, the site was zoned general industrial with a special use permit to recycle and store materials outside.

In its construction and demolition operation and in its restoration and maintenance of its site, Northern uses equipment and supplies such as traffic cones, plastic pipe, brick, stone, pallets, vis-queen, silt fence, and dimensional lumber. Northern regularly removes this material to a landfill once it is no longer useful. It does so on a regular basis. Northern routinely takes construction and demolition debris from worksites directly to landfills. It does not take those materials back to its site. The materials cited by complainant as waste resulting in litter and construction debris occupied approximately four ten thousandths of the site’s area and materials

such as this, although routinely present and then removed from the site, heretofore have not drawn any complaint from any governmental authority or any neighbor.

At times Northern will be in possession of some number of large and small tires on its site. It uses them for spare tires for its equipment, base stands to be filled with concrete for lamp and power poles on worksites, and shock absorbers for its demolition work. Again, no one has complained about Northern's possession of its tires at the site nor its use of the tires. Northern has other equipment at its site which routinely collect water in the event of rain.

A person regularly disposing of used equipment and supplies from its own premises to a landfill has not accumulated waste resulting in litter or construction debris. A person regularly employing "reused" tires as equipment in its business has not caused or allowed water to accumulate in used or waste tires.

Complainant has failed to prove its case.

II. RELEVANT FACTS OVERLOOKED BY COMPLAINANT.

A. The Methodoloy Of Inspector Donna Shehane.

Inspector Donna Shehane ("Shehane") only became a member of the complainant's clean construction and demolition debris unit after the relevant March 14, 2012 inspection date. It was only after that date that she received training consisting of field experience with respect to clean construction and demolition debris. (Tr. at 56:18-22; 58:4-18). Regarding her training by complainant as an inspector, Shehane could not recall if she was instructed to ask questions when she visited a site (Tr. at 59:1-4). Her only question of Northern was directed to Paul Munson ("Munson") respecting the purpose of the mastic barrels on the site. When Munson told Shehane the mastic barrels were supplies of the company, she decided not to make the mastic barrels the subject of her report (Tr. at 51:14-24; 52:1-16) because they were company supplies. She asked no questions regarding the tires she photographed on the site nor did she make any inquiry as to

the length of time the tires had been on the site nor their source (Tr. at 53:1-7). Shehane's conclusions in her inspection report resulted solely from her visual experience on March 14, 2012 and Munson's answer to her question about the mastic barrels (Tr. at 60:5-10).

Shehane's practice at complainant prior to her visit to Northern on March 14, 2012 was to issue a warning to allow the person to come into compliance before a citation was issued (Tr. at 60:11-20). She had issued a warning to Northern in December 2011, and, upon her return to Northern in March 2012, had been furnished with receipts from landfills and tire disposal companies showing that Northern had come into compliance with her warning of December 2011 (Tr. at 68:18-24; 69:1-16). Despite her practice and Northern's demonstrated compliance, she bypassed a warning and chose to issue a citation to Northern (Tr. at 71:8-23; 72:1-5).

Regarding the pile of material depicted in complainant's Exhibit E, Shehane concluded the materials were "discarded" only because they were jumbled and haphazard and not organized (Tr. at 45:13-22). She stated that because the materials in Exhibit E were not in a dumpster or roll off container it was a "disposal situation" (Tr. at 75:24, 76:1-10) even though she knew of no law or regulation requiring storage in a dumpster or roll off container (Tr. at 75:24, 76:1-10). When given an example of a two by four pile of waste wood which would be taken to a landfill in three weeks, she stated she did not know whether or not she would issue a citation. (Tr. at 91:19-24; 92:1-18). She stated that open dumping resulting in disposal does not include a time period and there is some discretion for inspectors in that. (Tr. at 93:3-17). Shehane did admit that it appeared to her that there was an intent on the part of Northern to dispose of the material depicted in complainant's Exhibit E because it had been piled together and she assumed it would be disposed of at a proper place. (Tr. at 77:9-22).

When asked what in the pile could leach into the ground or water supply, she circled a small pile of what she alleged was soil in complainant's Exhibit E but admitted that she did not

know its origin, asked no questions with respect to origin, and did no further investigation or chemical test. It was all observation (Tr. at 62:21-24, 63:1-7, 63:8-10). Regarding whether the materials in complainant's Exhibit E were construction or demolition debris, either general or clean, Shehane testified she reached that conclusion just based upon observation, Northern's existence as a construction and demolition contractor and Munson's statement to her that he tried to tell the guys not to dump demolition debris. (Tr. at 54:1-10; 54:11-21; 56:1-8; 79:17-24; 80:1-6; 80:7-12).

As noted regarding her inspection with respect to water in the tires, she testified that Northern violated 415 *ILCS* 55(k)(1) solely on the basis of her photographs, complainant's Exhibits B and C (Tr. 40:9-17). The photographs don't show any water (Tr. 33:12-13; see complainant's Exhibits B and C). Though Shehane testified she observed tires that were off rim and worn, she did not identify those observed tires as the tires in complainant's Exhibits B and C (Tr. at 23:1-22). She told Northern's Munson there was water in tires but she said this to him while she was speaking to him in the office and not identifying the tires she was referencing (Tr. 26:15-24; 27:1-5). Shehane explained that the purpose of 415 *ILCS* 55(k)(1) was to prevent the breeding of mosquitos though she admitted she had lived in Northern Illinois her whole life and had never seen a mosquito in March (73:8-21).

At the time of her inspection Shehane had received no complaints from anyone that Northern was causing any problem under the law nor was she aware of any complaint brought by any other governmental unit for nuisance or some similar offense (Tr. at 57:10-24). Complainant's Exhibit A, Shehane's inspection checklist from her March 14, 2012 visit, documents that Shehane spent only 20 minutes at the site (Page 1 of complainant's Exhibit A). During this time, Shehane made two office visits with Paul Munson and sandwiched her inspection of the premises between the two office visits.

B. Facts Relevant To Alleged Violations (1) And (2) In Citation.

Northern's Munson testified he was a project manager and estimator but his work was only office work (Tr. at 97:10-16). He has no supervisory authority over any Northern employee who may have deposited materials depicted in complainant's Exhibit E (Tr. at 109:14-19). He has no responsibility for any activities of Northern occurring outside of his office nor any responsibility for work that goes on outside at the site. (Tr. at 107:1-21). He gives no instructions to people who work at the site as William Hoff ("Hoff") from Northern has that responsibility (Tr. at 107:1-24; 108:1-2). When Shehane visited the site on March 14, 2012, she did not ask him to come outside and view the pile (Tr. at 109:10-13) and he just assumed there was a pile based upon Shehane's statement (Tr. at 110:5-13). His remark about employees dumping demolition debris was "off of the cuff" because Shehane had been in during the previous year and talked to Munson about a pile in the yard which she found offensive (Tr. at 110:8-9). Munson was not aware of the materials or the pile depicted in complainant's Exhibit E prior to Shehane's visit (Tr. at 109:5-13). Munson did know and stated that the material in the pile was not demolition debris as he had been to demolition sites and the material in the pile did not look to be what he had seen in demolition debris (Tr. at 113:6-20). Munson identified the materials in the pile as standard stuff Northern used such as pallets and leftover materials from job sites.

Hoff, Northern's superintendent for nine years, has a civil engineering degree from Purdue. He manages field operations, which includes scheduling and engineering, and supervises as many as 30 employees in the summer (Tr. 116:1-22). Whereas Munson is responsible for the office, Hoff runs the field operations (Tr. 116:9-18).

The vast majority of Northern's vehicles are serviced at the site and all of them use tires (Tr. at 118:2-13). With respect to Northern's recycling operation, it accepts concrete, asphalt,

brick, block and masonry materials for recycling and there can be as much as 15,000 tons of material on site waiting to be recycled (Tr. at 130:23-23; 131-15). Hoff estimated the size of the pile depicted in complainant's Exhibit E at 25 by 30 feet while the entire site was 35 acres (Tr. at 139). Northern has never had a complaint from any neighbor about the storage of tires or materials such as is depicted in complainant's Exhibit E (Tr. at 151:1-6).

Hoff was present at the site on the inspection date of March 14, 2012 but did not accompany Shehane during her inspection (Tr. at 118:14-22). He was familiar with the contents of the material in the pile depicted in complainant's Exhibit E. He testified that all of the material in the pile was the property of Northern (Tr. at 139:7-10). It was not demolition debris (Tr. at 140:1-7). There was nothing in the pile that came from a building that was demolished (Tr. at 142:2-10). Hoff pointed out that Northern's work off-site could break up concrete and run into things such as pavement, dirt, underground piping, and metal. There was nothing like that in the pile depicted in complainant's Exhibit E (Tr. at 142:16-24, 143:1). The pile did not contain anything that came from a building or something underground brought back to the site; it was Northern's own equipment or supplies (Tr. at 145:11-16). While Northern generates debris from its demolition, excavation or other construction activities (Tr. at 156:20-24), its practice is to take that demolition debris to a landfill or recycling facility and to bring the concrete and brick back to its own recycling facility (Tr. at 157:8-14).

Hoff described with particularity the materials in the pile and their source. He identified the vis-queen as plastic sheeting which was used to cover concrete from a pour at the site just prior to March 14, 2012 (Tr. at 123:8-23; 124:8-11). The concrete form boards in complainant's Exhibit E also came from the concrete pour at the yard (Tr. at 124:8-11). The silt fence in complainant's Exhibit E came either from the site itself as Northern was doing earthwork along its boundary (Tr. 126:10-15) or from a project site (Tr. 126:10-15). The material in the pile was

identical to that Northern stores at its site: storm sewer pipe, PVC pipe, aggregate material for road base, brick and block used in the construction of storm and sanitary sewers, lumber used for concrete form boards, rebar re-enforcement wire mesh (Tr. at 132:13-23). The pile contained two fence posts cleared from a fence line at the site, pallets which had wire mesh or rebar delivered on them for a concrete pour, a box on the right side of the pile having dowel bars which are used to join different parts of pavement, concrete brick on the bottom of the photo used to set wire mesh in the center of a concrete slab (Tr. at 144:2-14). The concrete bricks probably resulted from work on the site (Tr. at 144:20-22). The pipe pieces depicted in complainant's Exhibit E came back from a job site but there are portions of pipe which are stored on the west side of the property. If too many small pieces are accumulated, they are no longer useful (Tr. at 145:24, 146:1-13). Northern buys and uses the piping material in constructing sewers (Tr. at 146:14-21).

Hoff explained Northern's Exhibits 4 and 5. Northern's Exhibit 4, bates stamped 503-539, are business records of respondent (Tr. at 158:24, 159:1-6) and are invoices and dumping tickets from the Veolia Environmental Services Landfill and from a recycling facility (Tr. at 158:6-17). Northern uses codes to indicate source, with code "990" being its general yard, the site in question, and code "998" being its recycling facility at the yard. Other numbers come from sites other than that in question (Tr. 164:14-21). Northern's Exhibit 5 summarizes the dumping and landfills from the yard and the recycling plant. Hoff testified that the materials such as depicted in complainant's Exhibit E were taken to a landfill as a regular pattern and the material pictured in complainant's Exhibit E was taken to a landfill on a long trailer (Tr. at 165:7-24, 166:11-13). The pallets depicted in complainant's Exhibit E could have been taken to a landfill if the pallet was delivered to a worksite; if the landfills were closed, the materials such as the pallets depicted in complainant's Exhibit E could be stocked in the yard until enough was

available to justify a load to be removed to a landfill (Tr. at 166:14-24, 167:19-24, 168:1). Nothing depicted in complainant's Exhibit E could be blown or otherwise carried onto someone else's property by natural elements such as wind or water (Tr. at 168:19-22). The soil identified by Shehane in complainant's Exhibit E was probably scraped up from Northern's site (Tr. at 172:14-15). Shehane testified that she asked no questions with respect to the source of the soil nor did she know its source (Tr. at 62:13-15, 21-24; 63:1-10).

Shehane did not observe in the pile depicted in complainant's Exhibit E any food related waste, sludge from a waste treatment plant or from a water supply treatment plant or from an air pollution control facility, nor any wall coverings from plaster. Nor could she tell if the wood was painted or treated (Tr. at 80:13-24, 81:1-15) or whether any of the other materials contained contamination (Tr. at 62:13-20).

C. Facts Relevant To Alleged Violation (3) In Citation.

Shehane testified that a tire storage site has 14 days from date of receipt to prevent water accumulation (Tr. at 38:23-24, 39:1-6). The "narrative inspection report document" incorporated in complainant's Exhibit A noted with respect to tire storage: "Mr. Munson stated that he had not yet submitted the registration form and \$100 annual fee for 2011, but would submit them shortly. . . ." On the inspection date, March 14, 2012, Shehane spoke to Munson in the office after her inspection and told him there was water in tires (Tr. at 26:15-24, 27:1-5). Munson confirmed this conference took place in the office and he later saw water in some tires in the yard (Tr. at 104:17-24, 105:1-2). There is no evidence in the record regarding what tires Munson was observing with water and specifically whether those tires were complainant's Exhibits B and C. Shehane cited Northern for a violation of 415 *ILCS* 55(k)(1) solely on the basis of the complainant's Exhibits B and C. (Tr. 40:13-17). While Shehane admitted that she did not issue a citation regarding water in tires on a previous occasion because she did not know if the tires had

been there for more than 14 days (Tr. at 64:9-24; 65-66; 67:1-7), she did issue the citation with respect to the tires depicted in complainant's Exhibits B and C though she did not know how long the tires had been in place on the ground. (Tr. at 73:1-16).

Hoff testified that the tires depicted in complainant's Exhibits B and C were present on the inspection date, March 14, 2012 (Tr. at 133:7-23). Hoff explained that Northern had three uses for the tires depicted and for other tires on its premises: 1) As spares for its six and seven wheel loaders; 2) As bases for light and electrical power (Tr. 134:12-24); 3) In demolition where the larger tires are attached to hardened steel balls for shock absorption (Tr. 135:1-13) and where the smaller tires are used as shock absorption on the roofs of buildings (Tr. 135:15-24). Hoff explained that complainant's Exhibit D depicted a large semi-tractor tire attached to a wrecking ball for shock absorption as he testified (Tr. at 136:7-19). Hoff noted that "everybody" uses tires for shock absorption and bases for light poles and power (Tr. at 137:4-16). He also added that Northern had pieces of equipment in the yard other than tires capable of gathering snow and water (Tr. at 137:17-24, 138:1-5).

III. ARGUMENT

A. Inspector Shehane's Investigatory Methodology Led Her And Complainant To Erroneous Conclusions.

On March 14, 2012 Shehane had not as yet had the benefit of EPA training regarding the assessment of clean construction and demolition debris. Her explanation as to her conclusion on construction and demolition debris was based solely on observation and not questioning. Given her two office conferences with Munson on the inspection date, it is reasonable to conclude that her actual inspection time while taking photographs of a 35 acre site lasted no more than ten minutes. She admitted that she asked only one question, that regarding the barrels of mastic, when similar questions would have elicited information negating the alleged violations.

Though courts have noted that prior use or origin of a substance is relevant to establish that a substance is a “waste.” *Jerry Russell Bliss, Inc. v. EPA*, 138 Ill.App.3d 699, 92 Ill.Dec. 911 (5th Dist. 1985) (138 Ill.App.3d 699, 706), Shehane displayed no curiosity as to the prior use of any materials she cited and her knowledge was that of “guess” and “assumption.”

Shehane did not follow her prior protocol nor her explanation of EPA processes. Shehane on previous occasions had issued warnings to Northern and then had accepted receipts from landfills and tire disposal units as satisfaction so that no citation was issued because Northern had come into compliance. When Shehane issued a warning in December of 2011 and subsequently visited on March 14, 2012, Northern displayed compliance by submitting to her receipts from landfills and tire disposal units; yet, she still issued a citation even though the previous materials had been removed.

The Pollution Control Board (“Board”) has noted, with respect to whether material is or is not “waste,” “Critically, there is no evidence of how long the tanker has been present at the Site . . . (Board considers ‘the considerable length of time (the material) has remained deposited’”; (*City of Chicago Department of Environment, Complainant v. Speedy Gonzalez Landscaping, Inc., Respondent* AC 06-39, etc., 2009 WL 788636, at p. 27). There is no evidence from complainant as to how long any of the materials cited by Shehane had been located at the Northern site.

Though Shehane asserted that the materials depicted in complainant’s Exhibit E were in a “disposal situation” because they were not contained in a dumpster or roll off container, this is not the law.

“The Board cautions Hawkins that a person may consolidate waste outside of his barn as long as the site where he consolidates it does not become a disposal site that does not fulfill sanitary landfill requirements . . . In other words, a person need not place the waste directly into containers, as long as the waste is disposed of properly before the area where it is stacked because a disposal site.” (*County of*

Madison, Complainant v. Vernon Abert, Respondent, AC 91-55, 1992 WL 404137 (Ill.Pol.Control.Bd. 1992), at p. 3).

Indeed, Shehane contradicted herself when she admitted that waste wood placed on the ground for three weeks would not necessarily result in a citation because open dumping under the law does not include a time period and inspectors have discretion. Perhaps there is discretion but to exercise it inspectors have to ascertain the facts and not issue citations blindly.

Shehane's inspection techniques also are questionable in view of the definition of "open dumping" at 35 Ill. Adm. Code 810.03 which expresses the clear implication that confinement or containment of waste or a plan to move it militates against a finding of "disposal."

"If the solid waste is accumulated and not confined or contained to prevent its entry into the environment, or there is no certain plan for its disposal elsewhere, such accumulation will constitute disposal."

The Board itself adverted to this in *Abert*, supra, where it noted: ". . . However, the definition goes on to state that in order to be litter, the waste must be discarded, abandoned, or otherwise disposed of improperly. Abert testified that he intended to dispose of the waste properly by taking it to a landfill . . ." (*County of Madison, Complainant v. Vernon Abert, Respondent*, AC 91-55, 1992 WL 404137 (Ill.Pol.Control.Bd. 1992), at p. 4).

The "disposal" definition at 35 Ill. Adm. Code 810.103 also includes the requirement that the solid waste or a constituent "may enter the environment by being emitted into the air or discharged into any waters, including the ground water . . ." When asked about this possibility, Shehane could only come up with a circling of what she thought was soil depicted in complainant's Exhibit E but she admitted she asked no questions with respect to it, did not know its origin, and did no investigation nor chemical test. In short, total guesswork.

Her photographs of water in the tires show no water, and thus Shehane's exhibit rebuts her testimony. Her further lack of curiosity as to the use of tires in Northern's business led her and complainant to incorrect conclusions.

B. Complainant Has Failed To Prove Its Alleged Violations (1) And (2) Of Its Citation.

1. Complainant's Allegations Invoke Critical Legal Definitions.

The complainant has the burden of proof. 415 *ILCS* 5/31.1(d)(2). The complainant has alleged that Northern "caused or allowed the open dumping of waste in a manner resulting in litter," "in a manner resulting in deposition of general construction or demolition debris: or clean construction or demolition debris," and "caused or allowed water to accumulate in used or waste tires. . ."

The relevant parts of the definitions of these terms in the law as follows. "Open dumping" is defined at 415 *ILCS* 5/3.305 as the:

"consolidation or refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill."

In turn, "disposal" is defined at 35 Ill. Adm. Code 810.103 as:

The discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste into or on any land or water or into any well such that solid waste or any constituent of the solid waste may enter the environment by being emitted into the air or discharged into any waters, including groundwater. If the solid waste is accumulated and not confined or contained to prevent its entry into the environment, or there is no certain plan for its disposal elsewhere, such accumulation will constitute disposal.

"Waste" is defined in relevant part at 415 *ILCS* 5/3.535 as:

"Waste" means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, . . .

“Litter,” the definition of which is construed by the Board identically with its definition under the Litter Control Act, 415 *ILCS* 105 et. seq, states in relevant part:

“‘Litter’ means any discarded, used or unconsumed substance or waste. ‘Litter’ may include, but is not limited to . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly.” (415 *ILCS* 105/3(a)).

The relevant parts of the definitions of general construction or demolition debris and clean construction or demolition debris, are, respectively:

“Non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads limited to the following . . .” (415 *ILCS* 5/3.160(6)).

and

“Uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed or other asphalt pavement, or soil generated from construction or demolition activities.” (415 *ILCS* 5/3.160(6)).

“Reused tires” are defined at 415 *ILCS* 5/54.08 as a:

“Used tire that is used again, in part or as a whole, by being employed in a particular function or application as an effective substitute for a commercial product or fuel without having been converted.”

2. Complainant Failed To Prove There Was “Open Dumping” Because There Was No “Disposal.”

The gist of the evidence was that Northern on a regular basis and as part of a plan takes materials such as depicted in complainant’s Exhibit E to a landfill and in fact took the materials depicted in Exhibit E to a landfill for disposal. Respondent’s Exhibit 5 shows materials trucked from Northern’s site to a landfill on February 9 and March 16, 2012. Though the ALJ disallowed evidence of disposal after March 14, 2012, it is clear from respondent’s Exhibit 5 that Northern regularly removes such material to a landfill. It is also instructive to note that materials were generally under 20 tons and required only

one or two loads. They occupied four ten thousandths of the 35 acre site, probably less than the area of a leaf on a residential lawn. Simultaneously, Northern maintained completely legally 15,000 tons of materials such as asphalt, reinforced concrete, etc. to be recycled in its recycling plant. The scale and content of this "waste pile" is insignificant.

Shehane herself testified that she assumed the materials she cited would be disposed of at a proper place. Because the "disposal" definition excludes from its operation materials confined to prevent entry into the environment or where there is a certain plan for their disposal elsewhere, the materials cited by complainant were not disposed of at the Northern site. There was no violation. A cursory view of the pile depicted in complainant's Exhibit E shows that the material was "confined" by the way they were piled and by the solidity of the material so deposited. As noted by this Board, in citing *E.P.A. v. Pollution Control Bd.*, 162 Ill.Dec. 401579, 219 IllApp.3d 975, at 219 Ill.App.3d 978 (5th Dist. 1991), removal of materials to another site for dissipation into the environment means that the original site is not a "disposal" site. *People of the State of Illinois, Complainant v. CSX Transportation, Inc., Respondent*, PCB 07-16, 2007 WL 2050813 (Ill.Pol.Control.Bd. 2007), at p. 18. As noted above, this Board adverted to the reality that materials, even if "waste" are not automatically "disposed of" if placed on the ground. "In other words, a person need not place the waste directly into containers, as long as the waste is disposed of properly before the area where it is stacked becomes a disposal site." See *Abert*, supra. Contrary to Shehane disposal does not occur when materials are placed on the ground.

Hoff's testimony re removal of the materials depicted in complainant's Exhibit E and regarding disposal of other materials as well as respondent's Exhibits 4 and 5 show a plan and practice of Northern removing such materials to landfills. As noted previously,

the Board takes into account the intent of the accused to dispose of waste properly in deciding whether or not a situation amounts to disposal. Though complainant did not inquire and offered no proof as to how long the materials in question were on the ground, respondent's Exhibit 5, the summary, likely demonstrates the materials that had accumulated over less than 30 days. As noted in *Gonzalez*, supra, how long alleged waste materials had been at a site is critical to a finding of disposal and complainant provided no evidence here. The complainant has failed to prove a violation.

3. The Material Depicted In Complainant's Exhibit E Is Not "Waste" Or "Litter" Because It Was Not "Discarded."

In relevant part as noted above, "waste" is defined as:

"any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, . . ."

Shehane testified that what was depicted in complainant's Exhibit E was not garbage, sludge from a waste treatment plant, water supply treatment plan or air pollution control facility. More importantly, the material was not "discarded." Under the EPA, the definition of "litter" is that used under the Litter Control Act, 415 *ILCS* 105 which states at 415 *ILCS* 105/3(a):

". . . any discarded. . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly."

The plain fact is that Northern did not discard, abandon, or dispose (see above) the materials depicted in complainant's Exhibit E at the time of Shehane's inspection. Again, as noted by this Board in *Abert*, supra, at *County of Madison, Complainant v. Vernon Abert, Respondent*, AC 91-55, 1992 WL 404137 (Ill.Pol.Control.Bd. 1992), at p.

4, “However, the definition goes on to state that in order to be litter, the waste must be discarded, abandoned, or otherwise disposed of improperly. Abert testified that he intended to dispose of the waste properly by taking it to a landfill . . .” This Board has recognized that materials can be placed on the ground and later taken to a landfill and they are not “discarded, abandoned, or otherwise disposed of” just because the materials are on the ground at the alleged perpetrator’s site. Here Hoff testified and the written evidence shows that the materials such as those depicted in complainant’s Exhibit E are routinely removed to a landfill as were the materials depicted in Exhibit E. There was more here than a witness’s stated intent; there was solid written evidence of removal. Contrarily, complainant produced no evidence on this point. The stubborn fact remains that the materials depicted in complainant’s Exhibit E were used supplies and equipment of Northern, had never been objected to by any neighbors or any governmental authority, were identical to materials Northern stored and was zoned to store on its site for use, occupied a ridiculously small area of Northern’s property, and otherwise would pass without objection by any reasonable person when tasked with discovering “waste” in an area zoned for industrial uses. Complainant has overreached in alleging this violation.

Further, while Northern concedes the evidentiary burden under the Litter Control Act is different from that required of complainant under the EPA, it remains relevant that the Litter Control Act provides an exception from prosecution for the depositing of litter at 415 *ILCS* 105/4 if “the person is the owner . . . and does not create a public health or safety hazard, a public nuisance, or a fire hazard . . .” Here there was no complaint from anyone regarding the alleged “waste” on Northern’s site and no insinuation that it created a public health or safety hazard, a nuisance, or a fire hazard. Section 6 of the Litter Control Act, 415 *ILCS* 105/6, provides there is an exception to the accumulation of

litter upon an owner's land if the litter cannot be "blown or otherwise carried by the natural elements onto the real property of another person." Shehane's photographs along with Hoff's testimony that the materials could not be blown about or otherwise carried demonstrate that Northern fits into this exception.

4. The Materials Depicted In Complainant's Exhibit E Were Neither General Nor Clean Construction Debris.

Shehane asked no questions as to the source of the materials depicted in complainant's Exhibit E and merely guessed as to the source. Hoff testified precisely to the source, that being supplies and equipment, albeit used, of Northern. Hoff also noted that he was familiar with general and clean construction debris and that type of material, as shown by Northern's Exhibit 4 and as testified to by Hoff, were routinely taken from worksites directly to landfills. Because the definitions of general and clean construction debris state "resulting from the construction, remodeling, repair, and demolition . . ." and "generated from construction or demolition activities," the materials depicted in complainant's Exhibit E do not qualify because they did not "result" nor were they "generated" from activities but rather were supplies and equipment of Northern which existed totally apart from the use to which they were put. In addition to this, the common sense of the definitions of general construction or demolition debris and clean construction or demolition debris demonstrates that what is meant is the refuse from building and roads that were once a part of the building or roads and now no longer are. Equipment and supplies of the contractor do not count.

C. Complainant Has Failed To Prove Its Alleged Violation (3) Of Its Citation.

Remarkably, complainant's prime proof of Northern's violation of 415 *ILCS* 55(k)(1), the photographs of the tires, do not depict any water in the tires. While the citation alleged "used" or "waste" tires, in fact these tires fit the definition of "reused" as much as they were used as tools and supplies in Northern's business, i.e. as spares, bases for lamps and power stands, and shock absorbers in demolition activities. See complainant's Exhibit D for an example. Because Shehane asked no questions, the use to which the tires were put were not apparent to her. As "reused" tires, complainant has failed to prove its allegation (3) that water was allowed "to accumulate in used or waste tires" Furthermore, in connection whether used tires stored outside were to be considered openly dumped or constitute litter, this Board has noted that the use to which the tires are put by the owner is relevant. This Board noted in *Illinois Environmental Protection Agency, Complainant v. James Bennett and Kerry J. Henson (Hamilton/Bennett Tire), Respondents*, AC 94-5, 1995 WL 250467 (Ill.Pol.Control.Bd. 1995), at p.2:

. . . The Board is not persuaded, however, that these 20 tires constitute litter, or that their presence rises to the level of open dumping.

Most of the 20 outside tires were clearly used in landscaping or had been processed for use in landscaping as items such as planters and tree rings. (E.g., photos #1, #4 and #10.) Mr. Bennett indeed testified that he is involved in a landscaping business. (Tr. at 37.) The Board finds that these tires were not "discarded, abandoned or otherwise disposed of improperly" as of December 8, 1993, and hence that they did not constitute litter as that term is to be interpreted under Section 21(p) of the Act.

It is the same here. The tires were not litter and were not openly dumped. Instead, they were equipment of the company not falling under the purview of 415 *ILCS* 55(k)(1).

Complainant did not prove how long the tires had been on the ground so even if there were proof of water in the relevant tires, complainant's Exhibits B and C,

complainant has not proved its historical fourteen day rule. Shehane accepted Munson's explanation that Northern's application as a tire storage site was on the way. March is not mosquito season. Other equipment on the site also hold water which could breed mosquitos. The complainant has failed to prove a violation under 415 *ILCS* 55(k)(1).

IV. CONCLUSION

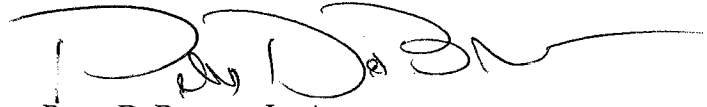
Regarding alleged violations (1) and (2) in the Citation, surely the complainant has no practice of ringing doorbells of Illinois residents to check their backyard projects. If such were the practice, the complainant may discover on occasion an Illinois resident who had just completed building a birdhouse from a kit and had left on the ground the cardboard box package which had contained a tube of glue, wood for the birdhouse, and a small paint can. The inspector may also find next to the cardboard box the used paint can, the emptied tube of glue, and unnecessary wood pieces. Though these materials, tools and supplies employed by the resident in the construction of the birdhouse, were used, it is unlikely that the inspector would issue a citation, especially if the resident informed the inspector upon questioning that he intended to remove the materials (occupying one square foot of his yard) in the next regular and weekly collection of garbage. Yet, on a larger scale, that is exactly what complainant has done here. The Citation should never have been issued.

Regarding the reused tires, equipment used by a contractor in its operation should never be mislabeled by the complainant and shoehorned into 415 *ILCS* 55(k)(1). Again, the complainant has distorted the Act so that Illinois demolition contractors cannot employ tires as tools which is the common practice. Again, the Citation should never have been issued.

Northern respectfully requests that the Citation be dismissed and that it be awarded costs and attorney's fees.

NORTHERN ILLINOIS SERVICE COMPANY,
Respondent,

By Peter DeBruyne, P.C.

By 
Peter DeBruyne, Its Attorney

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CERTIFICATE OF SERVICE

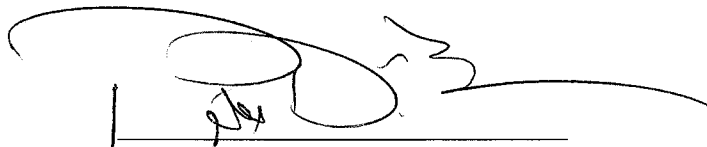
Peter DeBruyne hereby certifies that he has served a copy of the foregoing RESPONDENT NORTHERN ILLINOIS SERVICE COMPANY'S BRIEF IN RESPONSE TO COMPLAINANT'S POST-HEARING BRIEF upon:

John T. Therriault (E-Filed)
Clerk of the Board

Bradley P. Halloran
Hearing Officer
Brad.Halloran@illinois.gov

Scott B. Sievers
Special Assistant Attorney General
Scott.Sievers@illinois.gov

by e-filing true copies thereof with the Assistant Clerk of the Illinois Pollution Control Party and via e-mail from Rockford, Illinois to the designated e-mail address of record of the attorney after 12:00 p.m. on the afternoon of October 20, 2014.



Peter DeBruyne