

ILLINOIS POLLUTION CONTROL BOARD
May 28, 1987

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) PCB 79-145
)
CELOTEX CORPORATION, and)
PHILIP CAREY COMPANY,)
)
Respondents.)

ORDER OF THE BOARD (by J.D. Dumelle):

On December 5, 1986, the Board entered an order requesting the Illinois Environmental Protection Agency (Agency) to submit a brief on the issues of (1) the existence of the Philip Carey Company and (2) the Board's authority to enter a default judgement against the Philip Carey Company* (Company). The Agency filed its brief on January 5, 1987. On January 6, 1987, Celotex filed a request to respond to the Agency's brief to address matters pertaining to Celotex, which was granted. Celotex filed its brief on February 9, 1986.

Since the filing of those briefs, the Board has undertaken a review of the record to determine the precise status of the Company as to this proceeding. Based on this review and the briefs, the Board hereby finds that the Company is not a proper party to this action and therefore dismisses the allegations against the Philip Carey Company.

In its brief filed on January 5, 1987, the Agency outlines the historical existence of the Philip Carey Company. The Certificate of Amendment to the Articles of the "XPRU Corporation", changing its name to the "Philip Carey Manufacturing Company", was adopted May 24, 1967 and filed with the State of Ohio on June 1, 1967. The Certificate of Amendment to Articles of the "Philip Carey Manufacturing Company", changing its name to the "Philip Carey Corporation," were adopted on February 9, 1968, and filed with the State of Ohio on February 16, 1968. On April 10, 1970, a merger agreement was effectuated,

* Although the Complaint names the Philip Carey Company as respondent, the Agency's brief notes only the existence of the "Philip Carey Manufacturing Company" and subsequently, the "Philip Carey Corporation". The Board, for the sake of clarity will refer to the named respondent as "Company", and will refer to the other entities by their complete names.

merging the "Philip Carey Corporation" with the "Briggs Manufacturing Company", resulting in the "Panacon Corporation." Finally, on June 28, 1972, a merger agreement was effectuated, merging the "Panacon Corporation" with the "Celotex Corporation", resulting in the "Celotex Corporation". Thus, as of April 10, 1970, the Philip Carey Corporation ceased to exist as such.

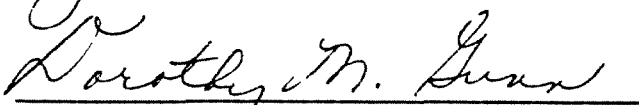
The Agency has neither alleged nor submitted any substantive evidence of wrong-doing by the Philip Carey Company during the time of its existence, i.e. until April 10, 1970. The Agency's complaint alleged that the Philip Carey Company violated the Environmental Protection Act "since at least June 9, 1971" and thereafter. The Philip Carey Company could not have violated the Act since June 1971, because it had ceased to exist over a year earlier. Somewhat inconsistent with the position taken in its Complaint, the Agency stated in its January 5, 1987, brief that Philip Carey Company was named because it held title to the property in question. After April of 1970, however, the Philip Carey Company could not have held title, despite its name remaining on the deed, because it had already ceased to exist. The successor-in-interest to the property, i.e. the true "holder" of title, although not named as such, is Celotex according to the history of succession outlined in the Agency's brief. Therefore, the Philip Carey Company, as such, cannot and should not be named as a proper party to this action.

The Board notes that Celotex has previously been dismissed out of this proceeding. If, by outlining the succession of interests and liabilities in the January 5, 1987 brief the Agency is seeking to impute any liability of the Philip Carey Company remaining from before its merger with Briggs, the Agency has not met its burden of proof. There is no evidence in the record referring to any wrong-doing by Philip Carey Company before 1970.

All allegations against the Philip Carey Company (i.e. Philip Carey Corporation) are therefore dismissed. Finally, the Board notes that with this dismissal and with the dismissal of Celotex, there is no liability to impute to the Jim Walter Corporation. Therefore the motion to amend the Complaint to add the Jim Walter Corporation as a Respondent is dismissed. The Clerk is hereby directed to close the docket in this proceeding.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 28th day of May, 1987 by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board