

ILLINOIS POLLUTION CONTROL BOARD
May 9, 1986

MODINE MANUFACTURING)
COMPANY,)
)
Petitioner,)
)
v.) PCB 85-154
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on an April 21, 1986 request by Modine to Appeal a Hearing Officer Order Denying Motion to incorporate record, an April 24 Agency renewed objection to that incorporation, and a May 7 Reply to that Objection. Modine's May 7 motion to leave to file instanter is granted. In addition to these filings the Board has reviewed the Hearing Officer's April 10 Rulings on Motions and the parties motions and responses to the hearing officer leading to that Order.

This controversy began with Modine's request in paragraph 8 (page 13) of the Petition for Variance seeking to incorporate by reference the entire record in PCB 82-111. The Board's October 24, 1985 Order setting this matter for hearing denied that incorporation stating:

The Board will incorporate all Opinions and Orders from PCB 82-111 into this proceeding by reference. However, any other portion of the record in PCB 82-111 which Modine wishes included in this proceeding must be filed with the Board in the usual manner.

At the time of that Order the Board was fully aware of 35 Ill. Adm. Code 104.123 as well as its prior precedential interpretations. Unfortunately, at some point pragmatism must overrule procedural nicety.

A prior record may be incorporated into a proceeding by reference. However, that incorporation is of little value until the Board physically acquires the documents in question. The multitude of proceedings and limited storage space require the Board to transfer old closed files to long-term storage. The 90 and 120 day statutory decision deadlines imposed on the Board do not necessarily correlate with document retrieval times. As a

result the Board must consciously disregard its procedural rule as impractical. An incorporation rule having validity when the Board had three years of records may lose its validity when the Board has 15 years of old records. Additionally, the Board notes that parties have sought to incorporate prior records which themselves incorporate even earlier records. As a result, the Board simply must abandon the procedural rule and require the parties to physically place such old documents into the current record*, with the exception of old Opinions and Orders which are available for incorporation. It is with this perspective and the necessary confusion it has inflicted on the parties and the hearing officer that the Board must view the present controversy.

The Board holds that any party to a variance proceeding may incorporate such portions of the record of a prior proceeding as it desires, so long as that material is physically presented to the Board. The Board would hope that difficulties of document retrieval not give rise to conflicts resulting in dual submissions comprising nearly all of the prior record. The Board would hope the parties would jointly submit the entire prior record.

When the question of whether the prior record can be introduced at all is removed, the remaining issue centers on whether such documents can be introduced in lieu of actual oral testimony subject to cross-examination or whether such older documents are relevant to deciding if the present variance request should be granted. Unfortunately, those arguments confuse the admissibility of evidence with the burden of proof. The moving party in a variance proceeding has the burden to prove by a preponderance of the evidence that they are presently entitled to the relief they request. If they fail in that burden because the evidence is stale the remedy is not to strike that evidence which has been tendered, but to deny the requested relief. If the opponent believes the evidence is stale, they are free to argue against the requested relief or to introduce evidence of changed circumstances. Of all the difficulties faced by this Board, too much evidence has seldom been a problem.

The Board is acutely aware of the arguments of the Agency and the concerns of the Hearing Officer regarding actual testimony which may be cross-examined and which the many interested citizens may hear. The Board cannot compel Modine or any other moving party to establish any present circumstances. It can only provide an opportunity for the moving party to present such evidence as it sees fit and deny relief if the necessary burdens are not met. The Board notes that it is not

*The Board will attempt to remedy this difficulty in its present review of the procedural rules. See Order of April 10, 1986.

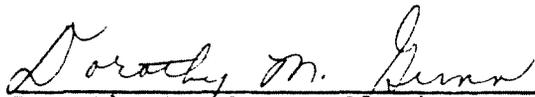
presented with any motions to compel the production of discovery and today's opinion should not be construed as relating to those matters. Additionally, some of these concerns are minimized by Modine making the documentary material available for public scrutiny prior to hearing (Modine's Reply, April 7, paragraph 18).

In summary, the Board overrules the Hearing Officer's April 10 Order relating to incorporation of prior record. The Board apologizes to the hearing officer for any inartful phraseology in the October 24 Order which allowed the conclusion that the Board had ruled on the admissibility of the prior record and that the hearing officer was bound by that ruling (Hearing Officer Order, p. 2).

IT IS SO ORDERED.

Board Member J. Marlin concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 4th day of May, 1986, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board