

ILLINOIS POLLUTION CONTROL BOARD
April 26, 1990

ST. CLAIR COUNTY¹,)
)
 Complainant,)
) AC 89-109
 v.) Docket A & B
) (Administrative Citation)
 GUY MARLIN,) County No. 89-9 SC
 (Fairview Heights)²)
)
 Respondent.)

MR. DENNIS HATCH, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF PETITIONER ST. CLAIR COUNTY.

MR. JAMES J. GOMRIC APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board upon an Administrative Citation filed pursuant to the authority vested in the Illinois Environmental Protection Agency and delegated to St. Clair County pursuant to Section 4(r) of the Illinois Environmental Protection Act ("Act") (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1001 et seq.). The citation was filed June 6, 1989 and alleges that Respondent, Guy Marlin, the owner/operator of a facility located in St. Clair County, Illinois is in violation of Sections 21(q) of the Environmental Protection Act (Act) concerning open burning and dumping. Ill. Rev. Stat. ch. 111 1/2, pars. 1021(q)(1), 1021(q)(2).

A Petition for Review was filed with the Board on July 3, 1989. Hearing was held September 1, 1989 at the St. Clair County Courthouse, Belleville, Illinois. Several witnesses testified concerning this dispute. Mr. Don Brannon, Mr. Michael Mitchell and Mr. John Kraska testified on behalf of St. Clair County. Mrs. Margaret Marlin and Mr. Kevin Sweeney testified on behalf of Respondent, Guy Marlin. Although present at the hearing Guy

¹ The Board has amended the caption of this case from In the Matter of: Fairview Heights/Marlin, to the above in order to properly reflect the Complainant and Respondent.

² The Board wishes to note that Guy Marlin, Respondent, is not a relative of Dr. John C. Marlin, author of this Opinion and Order.

Marlin did not testify. The filing of briefs was waived at hearing in favor of closing arguments.

APPLICABLE LAW

Section 21 of the Act provides, in pertinent part, the prohibition upon open dumping of waste. It states:

Section 21

No person shall:

- a. Cause or allow the open dumping of any waste.

* * *

- q. In violation of subdivision (a) of Section 21, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

1. litter;
2. scavenging;
3. open burning;

* * *

The Respondent was charged with two violations of this Section of the Act; one for violating subparagraph q(1) and the second for subparagraph q(3).

BACKGROUND

Guy Marlin and his wife Margaret Marlin are the co-owners of property in Fairview Heights, Illinois (R. 69). They purchased the property in 1976 from the Small Business Administration (SBA) (R. 69). The property had been used as a mine prior to the SBA acquiring it in bankruptcy. It was then used as a dump by a variety of persons, including St. Clair County, according to Mrs. Marlin (R. 70-71). The Marlins acquired it for use as a salvage yard and later made their home on the property (R. 71). Toward that end, the Marlins had made various improvements to the property, including removing debris from a lake which is situated upon it and removing scrap from the grounds (R. 73-74). The grounds presently contain scrap metal, wood, barrels, brick and concrete, carpeting, soda cans, paper and bottles (R. 84-96).

ALLEGED VIOLATIONS

Don Brannon, Supervisor of the Environmental Protection Program for St. Clair County Health Department, testified on behalf of the County . He stated that in response to a phone call from Mike Mitchell, of the St. Clair County Maps and Planning Department, he accompanied Mitchell to the Marlin property on March 27, 1989, to perform a joint inspection (R. 15-16). Pam Quandt, a trainee from Brannon's office accompanied them. The group found the site contained a home with a lake and salvage yard area to the rear. Seventeen photos were taken of the property and items on it (R. 19-20).

Brannon said he discovered smoldering barrels on the site which contained wire. Holes had been punched in the sides of the barrels (R. 20). In one area of the dump a tree was scorched but no fire was present (R. 21). An inspection of the accumulated debris in the area revealed wood, scraps, two-by-fours and other lumber, construction debris and household waste such as bottles, cans and paper (R. 22). Photos were taken of these scattered piles (Exh. 1-17). Another area of the dump contained roofing shingles and scrap tires (R. 23-24). Brannon said he talked to the Marlins that day. Mrs. Marlin stated that a Mr. Klopmeier had brought some rubble in as fill (R. 26-27, 88). Brannon admitted that he did not know the condition of the property or how the property had been used before the Marlins purchased it (R. 31-32). He also admitted that it is not against the law to burn landscape waste on ones own property (R. 39).

Michael S. Mitchell, testified that he has the job of enforcing zoning ordinances and received the initial complaint about the Marlins (R. 47-48). He drove past the site and observed a salvage yard. He then obtained a search warrant to inspect the property. The inspection revealed accumulated scrap and burned wires in barrels (R. 49, 50). Mitchell did not know the condition or ownership of the property prior to the Marlin's ownership. Mitchell has not viewed the property since the March 27th inspection (R. 58-60).

Mr. John J. Kraska, a contractor from the area, also testified on behalf of the county. He owns one hundred and ten acres of neighboring property (R. 61). He wrote a letter to Mr. Mitchell about the "junk yard" he observed at the Marlin site (R. 64). Kraska observed different types of debris accumulating on the Marlin right-of-way that he had not observed before (R. 65, 67).

Mrs. Margaret Marlin, wife of the respondent, testified on his behalf. Mrs. Marlin stated that during their ownership of the property she and her husband had done much to clean it up (R. 72-74). This was confirmed by a stipulation to that effect entered into by the parties (R. 101-102). She also testified

that after the initial inspection she performed a clean-up of the property (R. 77-78). She stated that instead of the county returning to re-inspect the property as she requested, a Sheriff served them with the administrative citation (R. 78). She denied that her husband operated a burning process to recover scrap wire. She admitted that the wire in the barrel identified by Brannon and Mitchell had been burned but stated that neither she nor her husband had burned it (R. 80). Mrs. Marlin also admitted that Klopmeier was allowed to deposit brick and concrete on the site (R. 88). She testified that the site contained piles of aluminum, barrels, cylinders, water meters, scrap, "rebar", carpeting and cans (R. 90). She contended that after the inspection she and other workers separated these materials into piles and had much of it removed (R. 90-91). Mrs. Marlin testified that Brannon advised her that demolition debris such as concrete and fill from construction could be brought in as long as it was clean (R. 97-98). However, she later admitted that she was told at a pre-enforcement conference that the Illinois Environmental Protection Agency required a permit for that activity. She testified she did not apply for that permit "because we have not allowed anybody to bring a truck of anything in until we find out exactly what the law is concerning it" (R. 98-99).

Kevin Sweeney was the final witness for Respondent. Sweeney is married to Mrs. Marlin's daughter. He lives on the property adjacent to the Marlin's (R. 103). He occasionally works for them (R. 106). He testified that the Marlin's do not burn rubber off wires at that site. He admitted lighting the barrel which was burning on the Marlin property on March 27, 1990, and stated he did this on his own (R. 104). He lit the fire with five or six ounces of gasoline taken from a can "for the cut-off saw" (R. 110). Sweeney admitted that burning the rubber coating off the wire was common practice in the early 70's in order to recover the wire. He believed this was still the proper method when he lit the fire (R. 108). He also stated, "that stuff was partially burned when I first saw it" (R. 110). Sweeney stated that he was not working for the Marlin's on the day he lit the barrels (R. 111).

PRELIMINARY ISSUES

At hearing Mr. Hatch, the attorney for the Respondents, objected to the "jurisdiction" of the Board over this proceeding. He claimed that the caption of the proceedings did not identify the party that the Marlin's believed actually made the initial complaint. That party, it is argued, was no longer interested in the proceeding and therefore the proceeding should not go forward. In an administrative citation proceeding the proper party complainant is the Agency or unit of local government which has been delegated the enforcement role pursuant to Section 4(r) of the Act. (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1001 et seq.) The Board therefore finds that St. Clair

County is a proper party complainant in this cause.

The Hearing Officer also allowed the parties to preserve the question of admissibility of certain testimony through offers of proof. The Respondent wished to introduce evidence regarding the known violative condition of various other properties whose owners did not receive administrative citations from Mr. Brannon (R. 36-38). The Respondent also wished to introduce evidence of the value of the Marlin property as improved through cleaning and scrap removal (R. 81-83) and a newspaper article concerning opinions on the permissibility of dumping concrete in landfills (R. 100). The Hearing Officer reserved the admissibility of this evidence for the Board to determine. The Board finds that none of these matters has relevance to the issue to be decided, namely, whether the violation alleged in the administrative citation occurred and, if so, whether the violation was due to uncontrollable circumstances. This testimony and evidence is therefore stricken.

FINDINGS OF VIOLATIONS

Based upon the evidence before the Board, the Board finds that the respondent Guy Marlin has violated Sections 21(q)(1) and (3) of the Act by causing or allowing open dumping which resulted in litter and open burning at the site.

As we said in our recent decision in Lefton Iron and Metal v. City of East St. Louis, PCB 89-53 (April 12, 1990):

Section 21(a) of the Act provides that "[n]o person shall cause or allow the open dumping of any waste." (Ill. Rev. Stat. 1987, ch.111 1/2, par. 1021(a).) The Act is malum prohibitum so that the owner's lack of knowledge of the dumping is no defense. (Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 851, 308 N.E.2d 829, 836 (5th Dist. 1974.) The owner of the source of the pollution "causes or allows" the pollution within the meaning of the statute and is responsible for that pollution unless the facts establish the owner either lacked the capability to control the source or had taken extensive precautions to prevent intervening causes. (Perkinson v. PCB, 187 Ill. App. 3d 689, 543 N.E.2d 901, 903 (3d Dist. 1989))

The Board considers the derivative prohibitions of subparagraph (q) of Section 21 to be guided by the same principles. The Board notes that the Act provides for defenses to findings of violations in administrative citations cases. First, the Board must find that the alleged violation occurred. Second:

. . . if the Board finds that the person appealing the citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty. Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1031.1(d)(2).

The Respondents, however, have not argued that the violations resulted from uncontrollable circumstances. They primarily rely on the subsequent clean-up efforts as justifying relief from the administrative citation.

DISCUSSION

The record is replete with instances of litter which has accumulated at the site. At least one witness testified that some of it was new, although this conclusion was disputed by Mrs. Marlin. It is apparent that the Marlins allowed construction debris to be dumped upon their property. Evidence that some persons considered this permissible misses the mark as far as establishing a defense to the administrative citation. Therefore, a finding that open dumping at the site resulted in litter and was not due to uncontrollable circumstances is supported by the evidence.

Likewise, the evidence is uncontroverted that Kevin Sweeney, a relative and sometime employee of respondent's, ignited the barrel of wire on the day of the inspection. Although Sweeney stated he was not employed by the Marlins that day, he admitted that he considered burning the wire in the barrel to be the proper way to recover wire, recovery being in furtherance of the salvage yard's purpose. The barrel was vented by slits in its sides, evidence that it was intended to be used for burning. Mr. Sweeney stated the wire in the barrel was already burnt before he lit it. The site also contained trees which were charred, also evidence that some type of burning was conducted on the property. The Board therefore finds that open burning occurred at the site. The respondent's primary defense to this charge -- lack of master/servant relationship -- is not particularly convincing. It is more credible that, given Sweeney's status as family member and sometime employee, the burning was allowed by respondent. Therefore, a finding that respondent allowed open dumping at the site which resulted in open burning is supported by the evidence.

This finding in no way should be construed as implying that a salvage yard cannot operate without violating the open dumping provisions of the Act.

PENALTIES

Penalties in administrative citation actions of the type here brought are proscribed by Section 42(b)(4) of the Act, to wit:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) of Section 21 of this Act shall pay a civil penalty of \$500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Trust Fund to be used in accordance with the provisions of "An Act creating the Environmental Protection Trust Fund", approved September 22, 1979 as amended; except that if a unit of local government issued the administrative citation, 50% of the civil penalty shall be payable to the unit of local government.

Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1042(b)(4).

Respondent will therefore be ordered to pay a civil penalty of \$1,000 based on the two violations as herein found. For purposes of review, today's action (Docket A) constitutes the Board's final action on the matter of the civil penalty.

Respondent is also required to pay hearing costs incurred by the Board and the County. The Clerk of the Board and the County will therefore be ordered to each file a statement of costs, supported by affidavit, with the Board and with service upon Guy Marlin. Upon receipt and subsequent to appropriate review, the Board will issue a separate final order in which the issue of costs is addressed. Additionally, Docket B will be opened to treat all matters pertinent to the issue of costs.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. Respondent is hereby found to have been in violation on March 27, 1989, of Ill. Rev. Stat. 1987, ch. 111 1/2, pars. 1021(q)(1) and 1021(q)(3).
2. Within 45 days of this Order Respondent shall, by

certified check or money order, pay a civil penalty in the amount of \$500 payable to the Illinois Environmental Protection Trust Fund. Such payment shall be sent to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, Illinois 62706

3. Within 45 days of this Order, Respondent shall, by certified check or money order, pay a civil penalty in the amount of \$500 payable to the Landfill Citation Fund. Such payment shall be sent to:

Paul Haas
County Collector
#10 Public Square
Belleville, IL 62220

4. Docket A in this matter is hereby closed.
5. Within 30 days of this Order, St. Clair County shall file a statement of its hearing costs, supported by affidavit, with the Board and with service upon Guy Marlin. Within the same 30 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service upon Guy Marlin. Such filings shall be entered in Docket B of this matter.
6. Respondent is hereby given leave to file a reply/objection to the filings as ordered in paragraph 4 of this order within 45 days of this Order.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987, ch. 111 1/2 par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Member J. Dumelle concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of April, 1990, by a vote of 7-6.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board