ILLINOIS POLLUTION CONTROL BOARD
October 4, 1978

PEOPLE OF THE STATE OF ILLINOIS and ENVIRONMENTAL PROTECTION AGENCY, Complainants, v. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware corporation; MICHIGAN CHEMICAL CORPORATION, a Delaware corporation; RED BALL MOTOR FREIGHT, INC., a Delaware corporation; HULCHER EMERGENCY SERVICE, INC., an Illinois corporation; CITY OF MORRIS, ILLINOIS, a municipal corporation; and ALBERT PFAFF d/b/a PFAFF CONSTRUCTION, Respondents.	)	PCB 76-107

MR. JEFFREY S. HERDEN AND MS. CAROL PEARCE, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS AND THE ENVIRONMENTAL PROTECTION AGENCY.
MR. JOHN L. PARKER, PARKER & HENSS, APPEARED ON BEHALF OF CONSOLIDATED FREIGHTWAYS CORPORATION.
MR. WILLIAM C. LATHAN APPEARED ON BEHALF OF CONSOLIDATED FREIGHTWAYS CORPORATION.
MR. STEPHEN CORN, CRAIG & CRAIG, APPEARED ON BEHALF OF MICHIGAN CHEMICAL CORPORATION.
MR. J. RICHARD CHILDERS, PETERSON, ROSS, RALL, BARBER & SEIDEL, APPEARED ON BEHALF OF RED BALL MOTOR FREIGHTS, INC.
MR. WILLIAM J. HANLEY, SORLING, NORTHRUP, HANNA, CULLEN & COCHRAN, APPEARED ON BEHALF OF HULCHER EMERGENCY SERVICE, INC.
MR. FRANK J. BLACK, BLACK & BLACK, APPEARED ON BEHALF OF CITY OF MORRIS.
MR. JOHN ROOKS, HYNDS & HYNDS, APPEARED ON BEHALF OF ALBERT PFAFF D/B/A PFAFF CONSTRUCTION.

OPINION AND ORDER OF THE BOARD (by Mr. Young):

On June 3, 1976, the People of the State of Illinois and the Environmental Protection Agency filed a five-count Amended

Complaint against six Respondents, Consolidated Freightways Corporation of Delaware (Consolidated), Michigan Chemical Corporation, Red Ball Motor Freight (Red Ball), Hulcher Emergency Service, Inc., and Albert Pfaff d/b/a Pfaff Construction. The Amended Complaint alleged air pollution violations as defined by Sections 3(b) and 3(d) in violation of Section 9(a) of the Environmental Protection Act (Act) against Respondents, Michigan Chemical, Red Ball and Consolidated for causing or allowing bromine emissions to be discharged to the ambient air of this State from a Consolidated carrier while in transport on Interstate 55 - US Highway 66 approximately two miles north of Dwight, Illinois. The Amended Complaint further alleged that Respondents Consolidated and Hulcher caused or allowed refuse and other debris collected at the site of this occurrence to be disposed of at a landfill site without an Operating Permit as required by Rule 202(b) and in violation of Section 21(f) of the Act. Respondent Consolidated is also charged with violating the Rule 310(b) provisions of Chapter 7 prohibiting the disposal of hazardous or liquid wastes and sludges without authorization by a permit. Charges against Respondents Morris, Illinois, and Albert Pfaff alleged violations of Rules 202(b) and 310(b) of Chapter 3 and Sections 21(b) and (e) of the Act for operating a landfill site without a permit and by accepting hazardous or liquid wastes and sludges without a permit.

Before reviewing the substantive matters of this case, the Board must find, as a matter of law, that it, as any judicial or quasi-judicial body, has jurisdiction over subject matter which is concurrently controlled or regulated by federal safety regulations, here the U.S. Department of Transportation's "Hazardous Material Regulations" (49 CFR 170-79, 397). Hazardous materials, which are subject to these portions of Title 49 of the Code of Federal Regulations, come under the jurisdiction of the Board pursuant to Sections 5 and 31 of the Act when sufficient charges are raised alleging violations of the enforceable provisions of the Act or the Rules adopted thereunder. In this case, there is no conflict between our Act and Rules concerning the alleged air and waste disposal violations and the federal transportation safety requirements on packaging, marking, labeling, documentation and transportation of hazardous materials. The Supreme Court has upheld a similar distinction in Huron Portland Cement v. Detroit, 362 U.S. 440 (1976) where local air regulations were held valid against a harbored vessel subject to federal marine regulations. The Supreme Court found that state regulations manifest of its police power are not pre-empted unless there is overlap between the federal regulation and the enactment by the state or local body. Huron Portland Cement Co. (Ibid.), 446. Other Supreme Court decisions have indicated that state regulations are superseded only where the conflict is so "direct and positive" that the two cannot "be reconciled or consistently stand together." Kelly v. Washington, 302 U.S. 1, 10 (1937). More recently, the Supreme Court held that for pre-emption the state regulation must be "absolutely and totally repugnant

and contradictory." Goldstein v. California, 412 U.S. 546, 553 (1973).

Four hearings were held on this matter from June 7, 1977, through June 10, 1977, which generated a lengthy record of 756 transcript pages, and subsequently, numerous motions and responses were filed by the parties Complainants and the Respondent Consolidated. The motions to be considered with this Opinion include: Complainants' Motion for Costs, August 17, 1977, and Consolidated's Response, August 24, 1977; Consolidated's Opposition to Stipulations and Proposal for Settlement, September 8, 1977, and Complainants' Response, September 20, 1977; Consolidated's Motion to Correct Hearing Officer's Errors, September 13, 1977, and Complainants' Response, September 20, 1977; and Consolidated's Motion to Dismiss of September 13, 1977, and Complainants' Response dated September 20, 1977. The Board will consider these motions as each becomes material to the issues in question in this matter.

MOTION TO DISMISS PARTIES' MICHIGAN CHEMICAL, RED BALL, & HULCHER

At the beginning of the June 7, 1977, hearing, Complainants entered motions to dismiss Michigan Chemical Corp. (R. 124), Red Ball Motor Freight, Inc. (R. 140) and Hulcher Emergency Services (R. 251) on the basis of insufficient evidence against the respective parties. On August 11, 1977, Complainants formally filed before this Board a Motion to Dismiss the above Respondents. Consolidated responded in opposition to this Motion on August 17, 1977. After considering this matter, the Board granted Complainants' Motion on August 18, 1977, to dismiss Michigan Chemical, Red Ball, and Hulcher as parties Respondents to this action.

STIPULATIONS & PROPOSALS FOR SETTLEMENT CITY OF MORRIS & ALBERT PFAFF

During the June 7, 1977, hearing, the Complainants entered into the record Settlement Agreements for the Board's consideration with Respondent City of Morris (R. 16-23) and Respondent Albert Pfaff (R. 36-44). The Stipulations and Proposals for Settlement were also filed with the Board on June 21, 1977. Respondent Consolidated objected to their entry at the hearing (R. 32) and moved to strike paragraphs 5 and 6 of the Morris Stipulation (R. 34); Consolidated also submitted comments on the Stipulation from Albert Pfaff (R. 48-9). On September 20, 1977, Consolidated filed a Motion in opposition to the above Settlement Agreements and in its Motion to Correct Errors made by Hearing Officer, dated September 13, 1977, Consolidated

claimed that the presentation of the above Settlement Agreements surprised and materially prejudiced Consolidated's right to a fair and impartial hearing. Respondent Consolidated thereby claimed that it was improperly denied several motions for continued discovery by Hearing Officer.

Beginning with Consolidated's claims concerning the termination of discovery and against the introduction of the Settlement Agreements at the hearing, the Board cannot find how Settlement Agreements to which Respondent Consolidated was not a party would affect its rights at hearing or entitle Respondent to an extension of discovery. Complainants' statement that Stipulations are not binding on other parties (R. 30) happens to be correct. The testimony and comments offered to this record by Respondents not party to the Settlement Agreements are of no interest to the Board unless the offerings are within the scope of the Procedural Rules. For consideration under Procedural Rule 331(b), the testimony of interested persons will be limited to the nature of the alleged violation and its impact on the environment together with the views on the proposed Stipulation and Settlement.

CITY OF MORRIS

The City of Morris is a municipal corporation which owns a tract of land used as a landfill site in the Southeast Quarter of the Southwest Quarter of Section 35, Township 35 North, Range 7, East of the Third Principal Meridian in Grundy County, Illinois.

Morris stipulated that it hired Albert Pfaff to operate their landfill in August, 1972, for an annual salary of $1200 plus all gate receipts. In November, 1973, the Board in PCB 73-107, 10 PCB 9, found the City of Morris in violation of the landfill permit provisions of the Act; the City was fined $400 and was ordered to obtain the permits from the Agency. The Stipulation indicates that the Agency issued Morris a development permit on December 31, 1973, but that Respondent did not acquire the required operating permit until July 30, 1977, after the Illinois Attorney General filed suit for an injunction on August 15, 1975, and after this Amended Complaint was issued against Morris (Stip. 3).

Since commencement of this action, Morris has taken measures for greater control over this landfill. From August 16, 1976, to March 28, 1977, a Morris representative has made daily inspections of the site to ensure that the operation was in compliance with the requirements of the Rules and the Act. On March 28, 1977, Morris assumed operations of the landfill site using its own employees (Stip. 4, 5).

In paragraphs 5 and 6 of the Settlement, Morris and Complainants stipulate to a certain chain of events which exposed the City to liability under the Board Rules and the Act. Paragraph 5 states that a Consolidated tractor-trailer combination was involved in an occurrence, a bromine spill, which caused

Consolidated to hire Hulcher to clean up the spill. Parties further agree that Hulcher transported the bromine material and other debris to the Morris landfill for disposal and covering. Paragraph 6 states the wastes were deposited after April 12, 1977, without the prior knowledge of Morris. The parties stipulate that these statements show violations of Rule 202(b)(1) of Chapter 7 and Section 21(e) of the Act for operating its site without the necessary permits, but that Rule 310(b) of Chapter 7 should be dismissed with prejudice (Stip. 3, 5).

The Board will accept these stipulated facts only for the purposes of this Settlement Agreement. Factual statements in paragraphs 5 and 6 pertaining to other parties have bearing in this matter only insofar as each fact involves the Respondent Morris.

The Board finds that the stipulations between parties sufficiently show that City of Morris was in violation of the permit requirements in Rule 202(b)(1) of Chapter 7 and Section 21(e) of the Act from November 8, 1973, through July 30, 1976. The Board will dismiss the alleged violation of Rule 310(b) of Chapter 7 for want of a factual showing that Morris accepted the bromine material at its landfill site after April 12, 1976. The Section 21(b) violation prohibiting open dumping will also be dismissed; the Board has consistently held that an operating permit violation does not constitute a violation of Section 21(b) of the Act. Paw Paw, PCB 75-358, 21 PCB 301; Flowers, PCB 75-408, 22 PCB 131.

In considering the Section 33(c) factors of the Act, the Board finds that the landfill has social and economic value which is presently a suitable site for the City of Morris. However, the potential for air and water pollution or other environmental harm cannot be balanced against the economic value or the convenience of unpermitted use of this site in light of the technical practicability or the economic reasonableness for operating the Morris landfill site in compliance with the provisions of the Act and the Board Rules. Accordingly, the Board will assess the stipulated penalty of $750.00 for violations found herein.

ALBERT PFAFF d/b/a PFAFF CONSTRUCTION

The other Stipulation and Proposal for Settlement submitted for consideration at the June 7, 1977, hearing involved certain allegations against the Respondent, Albert Pfaff for operating a solid waste management site in violation of Rule 202(b)(1) of Chapter 7 and Section 21(e) of the Act and for causing or allowing the acceptance of hazardous or liquid wastes in violation of Rule 310(b) of Chapter 7 and Section 21(b) of the Act.

Respondent Albert Pfaff was engaged by the City of Morris in August, 1972, to operate the Morris landfill site located in Grundy County for an annual salary of $1200.00 plus all the gate receipts (Stip. 1, 4).

In paragraphs 5 and 6 the parties stipulate to certain facts regarding the occurrence on April 12, 1976, involving a Consolidated tractor-trailer combination. Paragraph 5 states that the Consolidated carrier spilled approximately 200 quarts of bromine at a location on I-55 approximately two miles north of Illinois Route 47. Subsequently, Respondent Pfaff stipulated that Consolidated hired Hulcher to clean up the bromine. Hulcher applied lime and water, collected the bromine material and other debris, and transported it to the Morris landfill in Grundy County. In paragraph 6 the parties agree that Pfaff accepted bromine material and other debris at the Morris landfill from persons working under the direction and control of Consolidated (Stip. 2, 3).

During the June 7, 1977, hearing, Consolidated objected to Respondent Pfaff's stipulation to background facts in paragraph 5 and to his characterization in paragraph 6 of material disposed at the Morris site as bromine material (R. 48-49). In a formalized Objection filed September 8, 1977, Consolidated claimed that the stipulated facts are pure hearsay and unsupported conclusory statements improperly admitted into the record.

Consolidated's objections are without merit. The stipulated facts by the very text of the Settlement Proposal are limited to the parties in question (Stip. 1, 2). Factual statements in paragraphs 5 and 6 have bearing in this matter only as each fact describes a chain of events and conduct which caused Respondent Pfaff to be in violation of the Act or Rules. The Board will therefore dismiss Consolidated's objections as irrelevant to the Settlement Agreement before us.

In view of these stipulated facts, the parties agree that the alleged violations of Rule 202(b)(1) should be dismissed with prejudice. Complainants state that the stipulated facts clearly show that Respondent Pfaff violated Rule 310(b) of Chapter 7 and Section 21(b) of the Act. The Respondent Pfaff does not admit to these violations, but offers no evidence to refute the factual statements in the Settlement Proposal.

The Board accepts the Stipulation and Proposal for Settlement submitted by the Complainants and Respondent Pfaff and finds that the stipulations sufficiently show that Respondent Albert Pfaff accepted hazardous or liquid material in violation of Rule 310(b) of Chapter 7 and Section 21(b) of the Act. The

allegations against Respondent Pfaff of violating Rule 202 (b)(1) of Chapter 7 and Section 21(e) of the Act will be dismissed with prejudice.

In assessing a penalty for these violations, the Board has reviewed the provisions in Section 33(c) of the Act. Based on this record the Board finds that the landfill site has social and economic value suitable for the needs of the City of Morris. However, the value of the landfill site cannot be weighed against potential environmental harm resulting from unpermitted use of the site. Under these circumstances the Board will assess the stipulated penalty of $750.00 for violations found herein.

CONSOLIDATED FREIGHTWAYS

Before considering the merits of the case against Consolidated, the Board will deal with a proliferation of procedural matters including the offers of proof in the record, the objections to exhibits and the many objections and motions to strike submitted by the parties Complainants and Respondent Consolidated which appear in the record and are derived from Consolidated's Motion to Correct Errors Made by Hearing Officer at the Hearing filed September 13, 1977.

Offers of Proof submitted to this record include the expert testimony of Consolidated's witnesses Mr. Stanley Sedivy (R. 602-5, 652) and Mr. Guy Cutler (R. 586). Also submitted to the record was Complainants' Offer of Proof of Mr. Marvin Runyon (R. 552).

It is within the discretion of this Board to determine whether the subject is a proper one for expert testimony and whether the witness is qualified by special knowledge and skill. Gibson v. Healy Bros. and Company, 109 Ill.App.2d, 342 (1969). In this case, the Board will accept the testimony of Mr. Stanley Sedivy as an expert on the physical and chemical effects and responses of packing and packaging materials used in this bromine shipment. However, we will reserve our determination on whether Mr. Sedivy's technical testimony serves as a competent defense.

The Board will reject the Offer of Proof by Mr. Guy Cutler on the basis that this witness was not qualified in law so as to provide competent legal conclusions. While it is proper for Mr. Cutler to describe the conduct of Respondent pursuant to specified rules and regulations, legal conclusions and determinations of fact are matters which rest with this Board.

The Board will dismiss Complainants' Offer of Proof of Marvin Runyon since any supplement to Interrogatories submitted on the third day of hearings would surprise and prejudice the Respondents to this proceeding.

Exhibits received into this record from Complainants include Exhibits 1, and 3 through 8, and 10. Respondent Consolidated Exhibits 1, 2, 4, 5, 6, 7 and 8 were admitted into the record, Exhibit #3 was rejected in full, and Exhibits #9 and #10 were rejected but submitted by Respondent as Offers of Proof. Consolidated objected to the admissibility of Complainants' Exhibits #1, and #3 through #8 and #10; Complainants objected to Consolidated's Exhibits #3 through #6.

In reviewing Respondent's objections to Complainants' Exhibits #1 and #3 through #8 and Exhibit #10, Consolidated's accident report, the Board will sustain Hearing Officer's ruling accepting Exhibits #1 and #3 through #8 into evidence, but we will reverse Hearing Officer's decision to accept Complainants' Exhibit #10 on the basis that the Complainants failed to establish a proper foundation as required by Supreme Court Rule 236 for the admission of a business record as an exception to the hearsay rule.

Complainants' objections to the exhibits submitted by Respondent included objections to Exhibit #3, a resume of Mr. Sedivy's qualifications; Exhibit #4 a bromine bottle; Exhibit #5 its cap; and Exhibit #6 Complainants' objection limited to pictures not taken by Mr. Sedivy. The Board will accept the Hearing Officer's ruling and admit Respondent's exhibits into evidence.

Consolidated also submitted Interrogatories Exhibits #7 through #10 to prove chain of possession of the packing and packaging materials (Exhibit #7) and to serve as admissions by the party responding to the Interrogatories (Exhibit #8-10). The Board will reject all offerings of Interrogatories for failure to show pursuant to Procedural Rule 313(c) that exceptional circumstances prevented the responding parties from appearing at this hearing.

We have reviewed certain exceptions raised in the record and in the Motions by the parties Complainants and Respondent Consolidated. The Board will uphold the Hearing Officer's ruling which:

Denied Consolidated's Motion for Continuance (R. 14-15).

Overruled Consolidated's objection to examination of Complainants' Witness Mr. Shankle as an adverse witness (R. 55-56).

Overruled Consolidated's objection to testimony on the basis that Mr. Shankle had personal experience with spilled bromine (R. 66-67, 69-70, 73).

Sustained Complainants' objections to Consolidated's questions (R. 74, 75, 77).

Sustained Complainants' objection to Consolidated's question concerning compliance with U.S. DOT regulations (R. 103-104).

Denied Consolidated's Motion to Strike the drop test testimony of Mr. Shankle (R. 113-14, 123-24).

Overruled Consolidated's objection to a question of Michigan Chemical (R. 114-15).

Overruled Consolidated's Motion to Strike testimony of Mr. Shankle (R. 122-23).

Denied Consolidated's Motion to Strike affidavit of Mr. Wallace.

Sustained Complainants' objection to Consolidated's question (R. 160).

Overruled Consolidated's objection to Complainants' question (R. 193).

Overruled Consolidated's Motion to Strike testimony of Mr. Bean (R. 238-9).

Denied Consolidated's Motion for Continuance (R. 258-62).

Sustained Hulcher's objections to Consolidated's questions (R. 249, 249-51).

Sustained Complainants' objections to Consolidated's questions (R. 313-14, 323(3), 324-346).

Overruled Consolidated's objection to testimony of Complainants' Witness Mr. Birky (R. 377).

Sustained Complainants' objections to Consolidated's questions (R. 428, 429-30, 430-31, 431, 437-38, 440, 441-42).

Sustained Complainants' objection to Consolidated's question to Consolidated's Witness Mr. Cutler concerning investigative report of U.S. DOT on the basis that it was hearsay (R. 587-88).

Sustained Complainants' objection to Consolidated's Witness Mr. Cutler's testimony about the statements of another witness as hearsay; the Board will strike the answer of this witness (R. 594).

The Board will also uphold Hearing Officer's decision to reject Consolidated's objection (R. 662-3).

The Board will overrule the Hearing Officer's ruling which allowed the testimony of Complainants' Witness, Mr. Charles Clark, on matters concerning the chemical reactions and properties of bromine, water, and calcium bromide for two reasons: The testimony is based on hearsay and Mr. Clark was qualified as a sanitary engineer and not as an expert in chemistry and chemical properties (R. 496-98, 731). Testimony referring to the personal experiences of the witness with bromine is of course admissible into evidence (R. 502-3).

Other rulings of the Hearing Officer which the Board will overturn include the decisions which:

Sustained Complainants' objection to Consolidated's question to Complainants' Witness Mr. Cavanaugh (R. 533-34).

Sustained Complainants' objection to testimony of Consolidated's Witness Mr. Cutler on the basis that the testimony merely interpreted U.S. DOT regulations; the Board finds the testimony is admissible for the limited purpose of determining what Consolidated did after consulting the U.S. DOT and other regulations (R. 574-77).

Sustained Complainants' Motion to Strike testimony of Consolidated's Witness Mr. Cutler as non-responsive to the question. The Board finds that Complainants' Motion is improper and will admit the evidence to the record (R. 590-91).

Sustained Complainants' objection to testimony of Consolidated's Witness Mr. Cutler; the Board finds that the testimony is not hearsay but is within the competence of witness' expertise. The answer will be admitted into evidence (R. 595-96).

Sustained Complainants' Motion to exclude Consolidated's Exhibit #3, a resume of Consolidated's Witness Mr. Sedivy's experience (R. 610-12).

The Amended Complaint filed with the Board on June 3, 1976, charged that on the date of this occurrence, April 12, 1976; Respondent Consolidated Freightways caused or allowed bromine emissions to be discharged into the atmosphere so as to cause air pollution in violation of Section 9(a) of the Act as defined by Sections 3(b)(Air Pollution) and by 3(d)(Contaminants) of the

Act. The Amended Complaint also alleged that, subsequently, Consolidated disposed of or caused the disposal of refuse in violation of Section 21(f) of the Act at a landfill site which did not have an operating permit as required by Rule 202(b) of Chapter 7: Solid Waste Regulations, and was not authorized to accept hazardous or liquid wastes by a permit as required by Rule 310(b) of Chapter 7.

AIR POLLUTION

The facts in the record concerning the charges of air pollution focus on the circumstances surrounding a shipment of bromine transported by Consolidated on April 11th and 12th, 1976, on I-55 US-66. The record discloses that Consolidated owned and operated a tractor attached to a double trailer load which left the St. Louis Terminal on April 11, 1976, at 9:00 p.m., carrying a shipment of 200 cases of bromine in the front end of the first trailer (R. 166, 173, 590). At approximately 2:00 a.m. on April 12, a Dwight Officer stopped Respondent's tractor-trailer 1 1/2 miles north of Dwight, Illinois, on I-55 US-66 to warn the driver that its first trailer was emitting visible amounts of smoke (R. 169, 292, 338).

Thereafter, the State Police who arrived at this site where the carrier had been stopped observed vapors billowing to a height of 20 feet from the front end of the first trailer which spread in an easterly direction over the railroad tracks adjoining I-55 US-66 and toward nearby farm houses (R. 174, 293, 338). Not knowing the precise nature of the emissions the State Police concluded from the bills of lading that the discharges might possibly be bromine (R. 300, 346). At approximately 3:00 a.m., Officer Veronda of the State Police, ordered that I-55 US-66 be closed to traffic in the north and southbond lanes and notified the railroad to discontinue rail traffic on the line adjoining this highway (R. 299-301). At 4:00 a.m., Officer Veronda ordered Trooper Cofield to evacuate farm houses and all others in the direction that the fumes were heading. Following this order, Officer Cofield evacuated farm houses in the vicinity of the occurrence as the wind shifted toward Dwight (R. 339-41). At 6:00 a.m., Officer Cofield ordered the evacuation of east edge of Dwight. Thereafter, the record discloses that the entire City of Dwight was evacuated including the Fox Valley Developmental Center for severely handicapped children by 7:17 a.m. (R. 382) and the Continental Manor nursing home by approximately 11:00 a.m. (R. 459). Testimony from a number of occurrence witnesses indicated that traffic was resumed on I-55 US-66 at 10:10 a.m. after the trailer was removed to an isolated area (R. 307); that fumes from the trailer subsided around 1:00 p.m. permitting patients from the nursing home to return at 1:00 p.m. (R. 461); and by 3:00 p.m. all the handicapped children had returned to the center (R. 386).

While no personal injuries were reported from patients or staff of the handicapped center or the nursing home as a direct result of this evacuation (R. 338-461), two firemen at the scene of the occurrence were overcome by the fumes. The record discloses that while in performance of their duties as firemen, James McWilliams and Philip Becker were affected by the fumes (R. 416, 447). Both men were treated at the hospital and released within one hour (R. 413, 445-6). Other witnesses in and around the scene of this occurrence stated that breathing was restricted or difficult and burning nostrils was experienced from inhaling of the fumes (R. 335, 342). From a distance, those who were evacuated in Dwight claim that the air had a heavy odor or stench (R. 384-5) or a pungent odor (R. 461). However, other witnesses experienced no immediate reaction at the scene of the occurrence (R. 359). Consolidated's witness, Mr. Monroe, had no shortness of breath (R. 689).

While Consolidated does not deny that emissions were released from its trailer on the date of the occurrence, Respondent takes exception to the characterization and conclusion, in the absence of chemical analysis, that the fumes were bromine emissions. Evidence from the record indicates that fumes were emitted from the front end of the first trailer where the 200 cases of bromine were stored (R. 338, 590). An occurrence witness stated that liquid bromine had seeped out of the glass and cardboard containers onto the floor and other lading in the trailer (R. 196). According to competent chemical testimony in the record, bromine in the presence of cardboard will produce sufficient heat (temperature elevations to 188°C (244°F)) to generate bromine fumes (R. 621, 648). With evidence of this temperature potential in 200 cases of 40 ounce bromine bottles there can be little doubt that vapors discharged from Consolidated's front trailer contained bromine fumes from this shipment which proved toxic to those overcome by the fumes.

The next question to be determined by the Board is whether the bromine emissions constitute a violation of the Act. As previously stated, the Complainants alleged that Respondent Consolidated caused or allowed air pollution in violation of Section 9(a) as defined by the 3(b) and 3(d) Sections of the Act.

Section 9(a) of the Act states in pertinent part:

> "No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment ... so as to cause air pollution in Illinois either alone or in combination with contaminants from other sources."

Section 3(b) defines air pollution as:

> "(T)he presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property or to unreasonably interfere with the enjoyment of life or property."

Section 3(d) defines contaminant as:

> "(A)ny solid, liquid, or gaseous matter any odor, or any form of energy, from whatever source."

It is clear from the record that Respondent Consolidated violated the air pollution provisions as contemplated by the definitions of this Act. By allowing uncontrolled discharges of bromine into the ambient atmosphere surrounding this occurrence, the aerosol contaminants were of sufficient concentration and duration so as to injure those who were in direct contact with the fumes and to create circumstances which precipitated the evacuation of Dwight and the temporary closure of I-55 - US Highway 66 and temporarily discontinuing service along the adjoining railroad.

Respondent contends that it cannot be held in violation of the statutory language "cause or allow" (Section 9(a)) of the Act unless there is a showing that it failed to act under a duty or undertook some activity which directly contributed to the cause of the violation (Resp. Brief 22). In addition, Consolidated supported this contention with defenses that it was free from any wrongdoing and that latent defects in packing and packaging materials caused this occurrence (Resp. Brief 8-21). The Board will remind Respondent Consolidated that liability for violation of the Act or Rules does not depend on affirmative proof of negligence. The Act simply makes it illegal to cause or allow pollution or to exceed standards set by the regulations. Chicago, Milwaukee, St. Paul, and Pacific Railroad, PCB 71-254, 4 PCB 697. Most recently the Board found that a violation of the Act does not demand proof of guilty knowledge; only that Respondent caused, threatened, or allowed the violation of the Act. Chicago and Northwestern Transportation Company, PCB 76-155 (June 8, 1978). A common dictionary definition of the word cause is "one who or that which acts, happens or exists in such a way as that some specific thing happens as a result; the producer of an effect." In this case, the facts are evident that Respondent's activities as carrier of this bromine shipment caused violations of the Act notwithstanding a showing of mens rea or a duty to act. Meadowlark Farms, Inc., 17 Ill.App.3d 851 (1974); Bath Incorporated, 10 Ill.App.3d, 507, 294 (1973).

Before considering the penalty provisions of the Act, the Board will review Respondent's case for factors in mitigation. In testimony concerning conditions prior to the occurrence, Complainants' and Respondent's witnesses showed that the 200 cases of bromine were in good condition when accepted and loaded onto Trailer 29-5794 at its Memphis Terminal and when it left the St. Louis Terminal for Chicago on April 11, 1976 (R. 136, 169, 176, 279, 570, 574, 581). Under Interstate Commerce Commission rules Consolidated claimed that it was obligated to accept and transport goods which showed no incidence of damage (R. 576-80).

The record also indicates no evidence of any wrongdoing on the part of the driver to Chicago. During the trip, Ed Merriman reported that he stopped before all railroad crossings and he checked his equipment on two different occasions during the trip (R. 175, 177). When stopped by the policeman north of Dwight, Illinois, the driver noticed that there was no evidence of tampering with the contents of this shipment; the seals on the hatches of both trailers were locked (R. 180).

While the record does not disclose what precisely caused the liquid bromine spill and the resulting toxic fumes, several theories are advanced. Complainants' claim that the uppermost carton of bromine was allowed to fall while in transit due to improper loading of the shipment at Respondent's Memphis Terminal (Comp. Brief 22). This theory is simply not supported by any evidence in the record. To the contrary, the testimony indicated that the shipment was loaded to prevent shifting, and the front cases were "stair-stepped" to prevent the uppermost cases from falling (R. 163, 594). Using the expert testimony and the experiments of Mr. Stanley Sedivy, Respondent Consolidated proposed in the record that latent packing and packaging defects were responsible for the bromine spill and emissions (Respond. Brief 13-21). Since this theory is supported by no competent evidence in the record, the Board will similarly dismiss Respondent's conclusions on this matter.

In considering Section 33(c) factors of the Act, the Board must weigh the value of this pollution source against the effects of this pollution on the people injured by the occurrence. There is no question of the social and economic value in this tractor-trailer shipment of goods or the suitability of its location on the interstate highway. While we are concerned about the character and degree of injury and interference of those effected by these toxic emissions, the Board will not ignore that it is technically impossible to reduce or eliminate this threat to the environment when the precise cause of the occurrence cannot be identified. For this reason, the Board finds that a fine or a cease and desist order would not aid in the enforcement of the Act for the violations of Respondent Consolidated found herein.

SOLID AND HAZARDOUS WASTE

The charges of solid and hazardous waste violations against Respondent Consolidated speak to circumstances which were under the control of Respondent's Safety Supervisor, Benard Monroe. After arriving at the scene, Monroe, with Michael Bean, a hazardous waste consultant from Hulcher Emergency Services, detached the rear trailer and drove the tractor and front trailer to an isolated area on Scully Road off of I-55 - US Highway 66 (R. 190, 679). When firemen arrived, ventilation holes were cut in the top and side of the trailer so water could be applied and lime added to assist in neutralizing the bromine which had seeped onto the trailer floor and the other lading (R. 196, 199). After discovering that the contents in the trailer was unsalvageable, the trailer was torn up and turned on its side (R. 218-20, 232). The bromine bottles, broken glass, freon containers were crushed and collected with the bits of aluminum siding, charred remnants of cardboard, and other debris and the residue containing the bromine component for loading into dump trucks and for disposal at a landfill facility (R. 218-223, 232, 233).

In other testimony, Mr. Monroe stated that he had contacted the EPA Action Center at 4:00 p.m. (R. 681). The Agency personnel who advised Monroe, Charles Clark and Thomas Cavanaugh, testified that they considered the debris to be hazardous because of the bromine component which limited disposal of the debris to those sites specially permitted for accepting hazardous wastes (R. 502, 510, 531-2). Initially, Mr. Monroe was given three locations for the disposal of this debris (R. 681) but his attempts to contact the Sheffield, Ocoya, and Brockman sites by phone proved fruitless on April 12th (R. 681). The record shows that Charles Clark recommended these sites to Monroe (R. 492-4). In later conversations, Thomas Cavanaugh advised Monroe that Sheffield was the best site; Ocoya and Brockman were unsuitable (R. 524, 526). Charles Clark further testified that he specifically told Monroe that the material was not to be taken to the Morris landfill because its operation was unsatisfactory (R. 494) and Morris landfill did not have an operating permit (R. 520). Monroe, however, denied that Charles Clark or anyone from the Agency had warned him against taking the debris to the Morris landfill (R. 687-88). Monroe further testified that he did not make a prior determination whether Morris had a permit to operate its landfill site or to accept hazardous wastes (R. 701).

On page 686 of the transcript, Monroe admitted that on April 13, 1976, at 3:00 p.m. that trucks carrying the debris from this occurrence were disposed of at the Morris landfill. Mr. Monroe had testified that he needed to dispose of the material on the trucks because the trucks were costing "us" money (R. 684). At 8:00 a.m. that Tuesday morning, Mr. Monroe had finally got into contact with Sheffield and was told that because equipment was down the debris could not be disposed until the following Monday

(R. 682). Mr. Schoen of the Agency had contacted Sheffield after Monroe had learned that the equipment might be working by that Friday (R. 686). Under these circumstances, the debris containing the bromine component was deposited in the Morris site by trucks under the control of Consolidated without concern for the permit status of the Morris landfill site (R. 520).

Section 21(f) of the Act states that no person shall "(D)ispose of any refuse, or transport any refuse into this State for disposal, except at a site or facility which meets the requirements of this Act and of the regulations thereunder."

In pertinent part, Rule 202(b)(1) of Chapter 7: Solid Waste Regulations states that, "no person shall cause or allow the use or operation of any existing solid waste management site without an Operating Permit issued by the Agency not later than one year after the effective date of these Regulations (July 27, 1973)."

Rule 310(b) requires that "hazardous and liquid wastes may be accepted at a sanitary landfill only if authorized by permit."

Respondent Consolidated contends that Complainants did not satisfy its burden in establishing violations under Section 21(f) of the Act, since Consolidated was not aware of the Morris permit problem, and it had made every effort to work with the Agency in attempting to find an acceptable disposal site. Consolidated also claims that there is no evidence that neutralized residue from the occurrence was liquid or hazardous (Resp. Brief 28).

As stated above, Section 21(f) and Rule 202(b)(1) require a showing that Consolidated disposed of refuse at a site without an Operating Permit. A violation of Rule 310(b) requires proof that liquid or hazardous waste was accepted at a site without a supplemental permit. In this case, Respondent Consolidated's admission of disposing of the debris from this occurrence at Morris is corroborated by the testimony of Michael Bean (R. 222, 224, 648). Testimony of Agency personnel indicated that the Morris landfill was not permitted to accept solid waste on or before April 13, 1978, when the debris was deposited at Morris. This evidence alone is sufficient to show violations of Section 21(f) of the Act and Rule 202(b)(1) of Chapter 7.

Respondent's other arguments concerning its good-faith attempts to find an acceptable site landfill for its hazardous waste and its failure to discover the permit status of the Morris landfill site are not competent defenses and do not relieve Consolidated of its responsibility under these provision of the Act or the Rules.

To satisfy the liquid or the hazardous waste burdens of Rule 310(b) of Chapter 7 against Respondent Consolidated, the Complainants must show, apart from proof that the waste was deposited without the requisite supplemental permit, that some physical or chemical quality of the waste made it difficult to manage except by supplemental or extraordinary measures, or that a particular component, a combination of components or a product thereof would pose a danger to public health if the hazardous component were released to the environment. It is apparent in the record that the residue from this occurrence contained a bromine component, but there is no evidence which indicates that the physical or chemical characteristics or concentration of the bromine or any component in the residue caused the waste to be hazardous or that the consistency of the residue required special handling for it to be properly deposited at the Morris landfill. The record indicates that representatives of the Complainants were present throughout the occurrence. Yet, Complainants have failed to present any evidence indicating that the waste or any of its components were hazardous; nor did the Complainants provide any competent evidence concerning the properties or characteristics of any component in the residue which would prove dangerous to the environment or public health.

It is not the proper function of the Board to supply technical facts which are deficient in the record. While the Board has expertise in diverse areas, our determination must be based upon evidence presented in a hearing at which all interested parties were given an opportunity to cross-examine the testimony of expert witnesses and to offer evidence to the contrary. Smith v. Department of Registration & Education, 412 Ill. 332 (1952); Farney v. Anderson, 56 Ill.App.3d 677 (1978); Craig v. Pollution Control Board, 376 N.E.2d 1021 (1978). The Board will hereby dismiss the allegation against Respondent Consolidated concerning Rule 310(b) of Chapter 7.

In making a determination in this part, the Board will consider the Section 33(c) factors in reference to this record. There is no doubt that the resulting debris was part of a lading which had social and economic value before this occurrence when in route to Chicago on I-55 - US Highway 66. However, the disposal requirements of debris at a properly permitted landfill site is considered to be within the technical feasibility of any person within this State. While Complainants failed to prove that the waste contained any hazardous components, the existence of the bromine component is evident in the residue, which according to this record should have been disposed with the other debris in a properly permitted landfill site. The unfortunate circumstances and defenses claimed by Respondent Consolidated do not relieve this Respondent of the obligations under the Act and Rules which require proper disposal to avert an incalculable threat to public health and the environment. It is the decision

of the Board to assess a penalty of $1,500.00 upon Respondent Consolidated for violations found in this part.

MOTION TO DISMISS BY CONSOLIDATED

On September 13, 1977, Respondent Consolidated filed a Motion to Dismiss which supplemented the same motions made during the hearing (R. 147-49, 555, 738). Respondent claims that not unlike Michigan Chemical, Red Ball and Hulcher, pre-hearing discovery was insufficient to show any liability on part of Consolidated. In addition, Respondent contends that it was denied full and fair hearing because it was not aware of the "secret" stipulations, the agreements, or the testimony from Mr. Bean of Hulcher, from Mr. Shankle of Michigan Chemical, or the affidavit from Mr. Wallace of Red Ball that which were all planned before the parties were dismissed. Respondent also claims that Complainants exceeded prosecutorial discretion.

Since there is no basis for these claims in evidence, the Board is not persuaded by these arguments to overturn its present findings. Respondent's Motions to Dismiss are hereby denied.

MOTION FOR COSTS

On August 17, 1977, Complainants filed a Motion pursuant to Procedural Rules 314(e) and 701(b) to pay the reasonable costs to Complainants for proving certain facts at the hearing in this case. Consolidated responded in opposition to this Motion on August 24, 1977.

Complainants claimed that in reply to their Request for Admissions of Fact dated February 25, 1977, Consolidated filed a Response dated March 17, 1977, containing a sworn denial of Request Nos. 7, 8, 15, 16, 17, 18, 19, 20, 21, 22, 26, 27, 29, and 32 which Complainants contend were subsequently proven during the hearing at an expense of $407.24 including the charge of $200.00 for five hours of attorney's time.

The Board finds insufficient evidence in the pleadings or in the record to warrant imposition of costs. After reviewing the texts of Complainants' requests, the Board notes that certain denials reflected legitimate facts at issue in this case and that certain statements were not fully proven in Complainants' case-in-chief. Other statements were poorly constructed, requested two admissions in one statement and required that responding party accept conclusionary phrases in the statement (Request Nos. 15, 16, 17, 18, 19, 20, 21, 22). Complainants Motion for Costs is hereby dismissed.

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

ORDER

Respondent, Consolidated Freightways Corporation of Delaware, is found to have caused or allowed emissions of bromine contaminants into the environment so as to cause air pollution in violation of Section 9(a) of the Environmental Protection Act. No penalty will be assessed for this violation of the Act.

Respondent, Consolidated Freightways Corporation of Delaware, is found to have caused or allowed the acceptance of hazardous wastes at the Morris landfill site without an operating permit in violation of Section 21(f) of the Environmental Protection Act and Rule 202(b) of Chapter 7: Solid Waste Regulations. The Board will assess a penalty of $1,500.00 for violations found herein; penalty payment by certified check or money order payable to the State of Illinois shall be made not later than 35 days of the date of this Order to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois, 62706.

The allegation against Respondent Consolidated Freightways Corporation of Delaware pertaining to violations of Rule 310(b) of Chapter 7: Solid Waste Regulations is hereby dismissed.

Respondents, Michigan Chemical Corporation, Red Ball Motor Freight, Inc., and Hulcher Emergency Service, Inc., are dismissed as parties to this action.

Respondent, City of Morris, Illinois, is found to have violated the permit requirements of Section 21(e) of the Environmental Protection Act and Rule 202(b)(1) of Chapter 7: Solid Waste Regulations. The Board will assess a penalty of $750.00 for violations found herein; penalty payment by certified check or money order payable to the State of Illinois shall be made not later than 35 days of the date of this Order to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois, 62706.

The allegations against Respondent, City of Morris, Illinois, pertaining to violations of Rule 310(b) of Chapter 7: Solid Waste Regulations and Section 21(b) of the Act are hereby dismissed.

Respondent, Albert Pfaff d/b/a Pfaff Construction, is found to have accepted hazardous or liquid wastes in violation of Section 21(b) and Rule 310(b) of Chapter 7: Solid Waste Regulations. The

Board will assess a penalty of $750.00 for violations found herein; penalty payment by certified check or money order payable to the State of Illinois shall be made not later than 35 days of the date of this Order to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois, 62706.

The allegations against Respondent, Albert Pfaff d/b/a Pfaff Construction, pertaining to violations of Rule 202(b)(1) of Chapter 7: Solid Waste Regulations and Section 21(e) of the Act are hereby dismissed.

IT IS SO ORDERED.

Mr. Nels Werner dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 4th day of October, 1978 by a vote of 4-1.

Christan L. Moffett, Clerk
Illinois Pollution Control Board