ILLINOIS POLLUTION CONTROL BOARD
June 8, 1978

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 76-155
CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, a Delaware corporation, and PHILLIPS PETROLEUM COMPANY, a Delaware corporation,	)	
Respondents.	)	

MS. KATHRYN S. NESBURG and MR. JOHN BERNBOM, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF COMPLAINANT;
MR. THOMAS E. GREENLAND, CHICAGO & NORTH WESTERN TRANSPORTATION CORPORATION, APPEARED ON BEHALF OF RESPONDENT CHICAGO & NORTH WESTERN TRANSPORTATION;
MR. ROBERT D. OWEN, OWEN, ROBERTS, SUSLER & TAYLOR and MR. MEL BLOOMFIELD, PHILLIPS PETROLEUM COMPANY, APPEARED ON BEHALF OF RESPONDENT PHILLIPS PETROLEUM COMPANY.

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

On May 17, 1976, the Illinois Environmental Protection Agency (Agency) filed this Complaint against the North Western Transportation Company (North Western) and Phillips Petroleum Company (Phillips), alleging that Respondents caused or allowed sufficient quantities of contaminants to become present in the atmosphere for such 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 and property, thereby causing air pollution in Illinois as defined by Section 3(b) of the Act, in violation of Section 9(a) of the Act. Hearings were held on August 24 and 25, 1976; no public comment has been received by the Board in this matter.

The incident which is the subject of this Complaint was a train wreck which occurred on May 16, 1976 in the Village of Glen Ellyn (Village) in DuPage County, Illinois. The facts surrounding the wreck are, for the most part, not at issue. Early on a Sunday morning May 16, 1976, two North Western freight trains were traveling eastbound on adjacent tracks in the Village. Train 242 was on track 2 traveling eastbound at a speed of approximately 60 mph, and train 380 was on track 3 traveling eastbound at a speed of approximately 40 mph (R.20, 21). Train 242 had overtaken train 380 when it derailed, spilling cars onto the adjacent track in front of the oncoming train 380. Train 380 struck the derailed cars, itself derailing a number of cars including a tank car, PSPX 32028, owned by Phillips and containing anhydrous ammonia. The front end of the tank car was breached, and anhydrous ammonia was emitted into the air (R.64). The resulting ammonia vapors were so dense that people residing near the tracks had to be evacuated from their homes, some becoming ill and requiring treatment for inhalation of ammonia fumes (R.28-30). These people were frightened and inconvenienced, and some sustained damage to plants, pets and property (R.28-32).

The ammonia vapor emissions commenced at about 4:30 a.m. and continued until approximately 8:30 p.m., at which time the leak was plugged by a group representing the DuPage County Health Department, the Village Fire Department and North Western. The tank car owned by the Phillips Petroleum Company and loaded with anhydrous ammonia by Phillips was the fifth car behind the locomotive in train 380, which was put together by North Western. The tank car is of a class designated 112A and was not equipped with a head shield.

The Agency filed its Complaint against North Western and Phillips charging violation of Section 9(a) of the Environmental Protection Act in that anhydrous ammonia was emitted into the ambient air in such a manner as to cause air pollution. North Western and Phillips denied the charges, contending that the Board lacked jurisdiction to inquire into or regulate the field of railway safety and that the Board is preempted by regulations adopted under the Railway Safety Act of 1970 and the Transportation Safety Act of 1974. In addition, Phillips contends that the action is an attempt by the Agency to regulate interstate commerce and is contrary to the commerce clause of the Constitution of the United States.

Before considering the merits of the Complaint, the Board must resolve the issue of its jurisdiction in this matter. Respondents rely heavily upon their contention that the Board

cannot avoid becoming directly involved in the regulation of railroad safety if it attempts to find a violation of air pollution in this case. The Board finds, however, that the two areas of railroad safety and pollution abatement are distinguishable. The Supreme Court endorsed this distinction in Huron Portland Cement Company v. Detroit, 362 U.S. 440 (1960), where local air pollution regulations were held valid against a harbored vessel subject to Federal maritime regulations. In that case, a general smoke abatement rule was violated when a vessel fully licensed and regulated by Federal maritime provisions emitted smoke while cleaning its stack. The Court held that there was no overlap or inconsistency inasmuch as the sole aim of the local abatement rule was protection of the people's health as opposed to the regulation of transportation. More recent Supreme Court decisions have indicated that for preemption to be effective the conflict must be "substantial", Kewana Oil Company v. Bicron Corporation, 416 U.S. 470 (1974), or the State rule must be "absolutely and totally repugnant and contradictory", Goldstein v. California, 412 U.S. at 553, (1973).

As was noted previously, the facts in this case are, for the most part, not at issue. There was a train wreck in the Village of Glen Ellyn on the morning of May 16, 1976 involving two trains put together and operated by North Western, including a tank car of anhydrous ammonia owned by Phillips. The ammonia was emitted to the atmosphere in such a way and in such quantities as to cause people residing near the railroad tracks to be evacuated from their homes and for some to become ill, requiring treatment for inhalation of the ammonia fumes. Some citizens sustained damage to plants, pets and property, and were frightened and inconvenienced by the effects of the ammonia fumes. The wreck occurred at approximately 4:30 a.m.; the fumes were finally abated at approximately 8:30 p.m. Most citizens were able to return to their homes by 10:30 p.m. the same evening. Given the facts, the issue before the Board is whether the emissions of the anhydrous ammonia from a railroad car owned by Phillips due to the wreck of a train put together and operated by North Western constitutes a violation of Section 9(a) of the Environmental Protection Act (Act) such that the Respondents herein may be found to have been in violation of the Act.

There has been much discussion on the record and in the briefs concerning railway safety, federal preemption, federal regulations, etc. The fact remains, however, that at 4:30 a.m. on May 16, 1976 a tank car owned by Phillips and under the control

of North Western was emitting a pollutant into the atmosphere of the State of Illinois in the Village of Glen Ellyn. No one can reasonably suggest that there are any federal regulations concerning that situation at that time. There is no evidence in the record nor does the Board profess expertise to enable it to determine the cause of the train wreck. There can be no doubt, however, that a tank car spewing anhydrous ammonia into the atmosphere 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 and property, is air pollution under the Act and is under the jurisdiction of this Board.

Respondents contend that the wreck was an unfortunate accident which occurred without any intent on their part and that, therefore, they cannot be held in violation of the Act. They contend that the statutory language "cause or threaten or allow" [9(a)] requires more than a mere showing that air pollution happened or existed at a particular place and time. To support this contention Respondents quote a common dictionary definition of the word "cause" - "one who or that which acts, happens or exists in such a way that some specific thing happens as a result; the producer of an effect." The Board accepts this definition and finds that the Respondents were the ones who happened or existed in such a way that resulted in the breached tank car on that Sunday morning in Glen Ellyn. The Board has found in the past that the Act does not demand proof of guilty knowledge or mens rea to support a finding of violation. Meadowlark Farms, Incorporated v. Pollution Control Board, 17 Ill.App.3rd 851, 308 NE2nd 829 (1974), Bath, Incorporated v. Pollution Control Board, 10 Ill.App.3rd 507, 294 NE2nd 778 (1973).

In determining a violation by Respondents in such a case as this, the Board must, according to Section 33(c) of the Act, consider certain factors which in effect weigh the value of the pollution source against the effects of such pollution on the people of the State of Illinois and their property. In this case, no one seriously questions the social and economic value of the pollution source or the suitability of the source to the area where it is located. What concerns the Board here is the character and degree of injury to or interference with the protection of the health, general welfare and physical property of the people. As stated by the attorney for Respondent North Western "there is no argument that people were inconvenienced or that some people were taken ill because of the inhalation of anhydrous ammonia fumes" (R.15). The record fully supports the allegation that people were

not only inconvenienced and harmed physically, but that property was damaged or destroyed. What the Board must now determine is whether this injury and interference could have reasonably been reduced or eliminated by the Respondents.

Respondents allege that they did everything that they could reasonably do given the conditions under which the pollution occurred. Much testimony was presented to support this position including the contention that corrective efforts by North Western were thwarted by the Village Fire Department. The Agency, on the other hand, alleges that not enough was done by North Western and that Phillips was "conspicuous by its absence".

Without becoming enmeshed in the step by step acts and/or failures of North Western with respect to the sequence of events subsequent to the derailment, the Board finds the simple fact to be that after 16 hours the emissions were abated within minutes utilizing equipment that had been available from the beginning. This will undoubtedly be considered Monday morning quarterbacking by many. However, the Board finds that, if Respondents are to ship material capable of causing pollution through areas susceptible to the type of damage found herein, it is their duty to abate any such pollution as quickly as possible. In a case such as this, it is obvious that such pollution must be anticipated and preparations made before the actual occurrence. North Western did anticipate the problem generally when it prepared what it termed a system-wide emergency action plan and issued a handbook to local Fire Departments along its line recommending procedures for handling fires involving hazardous materials (Exhibit 12). Unfortunately, the results here indicate that, although the problem has been recognized by Respondents, it has not been dealt with effectively. The fact that the handbook resided in the Fire Department's library while both the Fire Department and Respondent's experts discussed the situation at the wreck site indicates that mere distribution of the handbook accomplished nothing. The apparent lack of faith in the opinion of Respondent's experts by Fire Department personnel indicates further failure of Respondent's "emergency action plan" under fire. It appears to the Board that, although Respondent North Western has recognized the problem and has made some attempt to address it, it achieved very little success, at least in this case.

Considering the foregoing the Board finds Respondent North Western in violation of Section 9(a) of the Act. Since Respondent Phillips addressed only the issue of preemption, the Board

can find no reason why it should not also be responsible for the emissions from its own tank car and finds that Phillips has violated Section 9(a) of the Act. A cease and desist Order in this matter would serve no useful purpose as the emissions have long since been totally eliminated. The Board finds that, considering the great loss experienced by the Respondents in this matter and their recognition of and attempts to resolve the problem, a fine would not further the enforcement of the Act in this case. The Board finds that, if the People of the State of Illinois are to be exposed to the danger of pollution, it must be the burden of those who own and/or operate the potential source to anticipate and make preparations to abate this pollution should it occur. The owners and/or operators of these sources cannot expect the People of the State of Illinois to defend themselves against such pollution without the help of those inherently best equipped and most knowledgeable with respect to their protection.

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

ORDER

It is the Order of the Pollution Control Board that, on May 16, 1976, the Chicago North Western Transportation Company and the Phillips Petroleum Company violated Section 9(a) of the Environmental Protection Act.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 8th day of June, 1978 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board