ILLINOIS POLLUTION CONTROL BOARD
March 22, 1973

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
v.	)	PCB 72-181
	)	
	)	
CERRO COPPER & BRASS DIVISION OF CERRO CORPORATION	)	

Thomas A. Cengel, Assistant Attorney General, for the Environmental Protection Agency;
Marvin W. Goldenhersh, on behalf of Cerro Copper & Brass Division of Cerro Corporation.

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

The complaint in this case was filed by the Environmental Protection Agency ("Agency") against Cerro Copper & Brass Division of Cerro Corporation ("Cerro Corporation") on April 28, 1972, alleging violations of the following provisions: Section 9(a) air pollution prohibitions of the Environmental Protection Act ("Act"); Rule 3-2.110 of the Rules and Regulations Governing the Control of Air Pollution ("Rules"), remaining in effect pursuant to Section 49(c) of the Act, requiring permits prior to the installation or construction of new equipment capable of emitting air contaminants to the atmosphere or intended to eliminate or control the emission of air contaminants; Rule 3-3.111 of the Rules, prohibiting excessive particulate emissions; and Rule 3-3.332, requiring certain procedures to be followed in case of malfunctions or breakdown of equipment.

The Cerro facilities which are the subject of this case are located in Sauget, Illinois, and consist of a copper blast furnace and a copper anode furnace, both of which are now controlled by the same quencher and venturi scrubber systems. The breakdown of the scrubber system in April of 1970 was the apparent cause of the alleged particulate and annual report violations. The scrubber was returned to full service in December of 1970.

Cerro, in its answer, raises several defenses to the complaint, including: a right to trial by jury; allegations that the Act or Rules are indefinite and uncertain; the Act and Rules lack provisions for reasonable notice regarding the technical requirements; that Respondent was in fact not given reasonable notice regarding such requirements; and the lack of authority of the Pollution Control Board to levy money penalties. The Board has rejected

these defenses since its inception, and such rejection has been upheld by the Third District Appellate Court of Illinois in the case of Environmental Pollution Agency v. C. M. Ford _____ Ill. App. 2nd, _____; PCB 71-307. Accordingly, Respondent's defenses raised in its answer and its amendment to its answer are denied.

Respondent raises as a defense to the permit violation allegations its submittal of the information necessary to various state agencies, both the Air Pollution Control Board and its successor, the Environmental Protection Agency. Because the agencies had this information, Cerro claims it had "de facto permits". Cerro introduced into the record considerable correspondence between itself and the state agencies previously mentioned, but admits that "no formal permits had been issued timely (R.18)." The fact that Cerro had submitted substantial data does not excuse its failure to comply with the regulatory procedures found in Rule 3-2.110. Cerro claims the formal permit application and issuance is a mere formality. We disagree. The permit procedure is a system whereby the permitting authority can have a full and complete centralized program for determining whether or not facilities will be in compliance with the Act or Regulations. The Regulations requiring permits under Rule 3-2.110 went into effect in August of 1969. It was only until after the commencement of legal action that Cerro made the application for permits, and in fact, Cerro did receive permits for its facilities.

The Section 9(a) allegations charging air pollution is easily resolved. The Agency has the burden of showing that the emissions from the Respondent had the harmful effects on the environment required by the definition of air pollution as found in Section 3(b) of the Act. The Agency has not made that showing, and accordingly we find no violation of Section 9(a).

The excessive particulate emissions in violation of Rule 3-3.111 are alleged to have occurred from July 1, 1970 on a continuing basis to the close of the record. Consistent with our decision in Environmental Protection Agency v. Mystik Tape, PCB 72-180, we will consider allegations only to the date of filing.

The Agency and the Petitioner in the Stipulation agree that the relevant testing data is found in Exhibit 18, which summarizes stack tests performed on the copper anode furnace No. 3 in October, 1972. These tests were performed without the use of the scrubber system in an attempt to make the test conditions as close as possible to the actual conditions of operation during the time the scrubber system was not operational. These tests indicate a particulate emission rate ranging from

2.17 pounds per hour to 41.61 pounds per hour, depending on which cycle of the furnace operation was involved. The allowable emission rate based on the process weight of the facility is 19.2 pounds per hour. Cerro states that the emission rate should be based on a 24-hour average. If such averaging were allowed, the emission from the facility would be 17.8 pounds per hour, which is slightly below the allowable emission rate. The Agency strenuously and correctly asserts that 24 hour averaging is improper. The table which gives the allowable rates of emissions based on process weight rates speaks in terms of process weight pounds per hour translated to tons per hour, and discusses the rate of emission in pounds per hour. Nowhere does it discuss the possibility of averaging whether on a daily, monthly, or yearly basis. The Board has consistently interpreted the emission tables to mean what the tables say: one hour means one hour, the most recent such interpretation being Environmental Protection Agency v. Central Illinois Light Company, PCB 72-83, decided November 8, 1972. Further supporting this conclusion is the Opinion of the Board adopting emission standards, R71-23. When discussing emission tables virtually identical to that found in the Rules, the Board states at page 14, "The one hour time period is simply intended to designate the emission averaging time...". Accordingly, we find that the process weight tables mean pounds per hour when they say pounds per hour, unless there are specific exceptions to a particular rule.

Cerro asserts that an exception, Rules 3-3.330 et seq., exists in this case. It states that it complied with Rule 3-3.331 and that its emissions in excess of the Rules are therefore excused. The Agency, however, alleges that the provisions of 3-3.331 were not complied with. In fact, the Agency alleges that the non-compliance with Rule 3-3.332, requiring that annual report of upset or breakdown conditions be made to the technical secretary, has been violated by the Respondent. Cerro makes the same argument with respect to the annual report as they made regarding the permit requirement. Cerro says they filed a "de facto" report (R.22), but admits that there was no formal annual report as required by the Rule. Our response to Cerro's defense for the failure to file the annual report is the same as our reply to their failure to obtain permits: procedures created pursuant to statutory and regulatory authority are to be complied with de jure. Accordingly, for the failure to file its annual report as required, we find Cerro in violation of Rule 3-3.332 and of Rule 3-3.111, the prohibition against excessive particulate emissions.

There is no question of Cerro's good faith. They have shown a consistent pattern of cooperation, and for that reason the penalty will be small in comparison with Cerro's potential liability.

This opinion constitutes the findings of fact and conclusions of law of the Board.

IT IS THE ORDER of the Pollution Control Board:

1. Respondent shall pay $3,000 to the State of Illinois as a penalty for the violations of Rules 3-2.110, 3-3.111, and 3-3.332. Payment by certified check or money order shall be made within thirty-five (35) days of receipt of this Order to: Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois, 62706.

2. Respondent shall cease and desist from all violations found in this Opinion.

I, Christan Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Order was adopted on the 22nd day of March 1973, by a vote of 4-0.

Christan Moffett, Clerk
Illinois Pollution Control Board