

ILLINOIS POLLUTION CONTROL BOARD

November 22, 1974

ENVIRONMENTAL PROTECTION AGENCY )  
COMPLAINANT )

v. )

VILLAGE OF WINNETKA )  
RESPONDENT )

PCB 73-404

MR. KENNETH J. GUMBINER, ASSISTANT ATTORNEY GENERAL, in behalf of  
the ENVIRONMENTAL PROTECTION AGENCY  
MR. DEAN C. CAMERON, ATTORNEY, of SCHIFF, HARDIN, AND WAITE, on be-  
half of the VILLAGE OF WINNETKA

OPINION AND ORDER OF THE BOARD (by Mr. Mardler)

This case comes to the Board on the complaint of the Environmental Protection Agency, charging the Village of Winnetka with violation of Rule 3-3.112 of the Rules and Regulations Governing the Control of Air Pollution, by emitting particulate matter in excess of that allowed, and Rule 103 (b)(2)(B) of the Air Pollution Control Regulations by operating its electric power generating plant without a permit. The complaint was filed September 25, 1973.

Hearing was held on November 21, 1973, in Winnetka, Illinois.

The Agency and the Village proceeded as if the present enforcement action was combined with a companion variance petition, PCB 73-338, in which the Village sought a variance from applicable particulate limits in order to obtain an operating permit. The Agency and the Village filed a joint Motion to Consolidate the variance petition with the enforcement action on November 7, 1973. The Board denied the Motion in an Order entered on November 15, 1973, because the hearing on the variance petition was proceeding on that date. The parties filed a Stipulation for Settlement and an additional Motion to Consolidate the two actions on November 15, 1973, at the hearing held pursuant to the variance petition. At the hearing on the enforcement complaint held on November 21, 1973, the parties again submitted the Stipulation for Settlement and filed a Motion to Consolidate. The Board denied the Motions to Consolidate the two cases on December 20, 1973. The parties submitted a joint Motion to Consolidate the record in PCB 73-338 with the record in the present enforcement action, PCB 73-404. This Motion to Consolidate the Records is hereby granted.

The Village owns and operates an electric generating station known as the Winnetka Electric Plant, located at Tower Road and Lake Michigan in Winnetka, Cook County, Illinois. The plant consists of five boilers

and four turbines used to generate electricity. All boilers exhaust through a single stack approximately 250 feet tall. Boiler No. 8 is equipped with a multi-clone-type collector and boilers No. 4-7 are equipped with baffle settling chambers. Boilers No. 5-8 are exclusively coal-fired; boiler 4 may be alternately fired with coal or natural gas; and boiler 8 may be fired by coal or natural gas together or separately. All coal used as fuel in the plant, at least since 1971, has been Eastern Kentucky coal, with a sulfur content of less than 1%. Boilers 5-7 are used only when natural gas is not available for fuel economy power (purchased in accordance with an interconnection agreement with Commonwealth Edison Company) or not available in sufficient amount to supply the Village's needs, and during emergency circumstances. Since April 2, 1973, natural gas has been available and used as fuel to operate boilers 4 and 8 all of the time, except for the time of a stack test, and during a period of interruption by the Village's gas supplier from August 27 to September 8, 1973. The Village has operated Boiler No. 8 using coal as a fuel when it could have purchased demand energy because of its misinterpretation of its interconnection agreement in that it believed demand energy was available only on an annual demand charge basis (Paragraph 7, Stipulation).

The Village's generating plant has 17.5 mw of gas generating capacity and an interconnection capacity of 20 mw. with the Commonwealth Edison system. This capacity under normal conditions is sufficient to meet the Village's peak demand of approximately 32.25 mw. However, the Village's problem is that natural gas is not always available nor is interconnection of power from Edison always available. Therefore, the Village must occasionally burn coal to meet the demand for electricity.

Rule 3-3.112:

The Agency has based its complaint and case on engineering tests conducted by the Village in conjunction with its Variance Petition in PCB 73-338. The tests were taken at 100% capacity of the boilers. These tests show that at full capacity the boilers do violate Rule 3-3.112. The question is if these tests are adequate to prove a violation of the Rule except for the time that the test was conducted. The answer to that question is no.

A case should not be based on what the Respondent can do. He should be found in violation of what he does do. Central Illinois Light Co. v. Pollution Control Board, 17 Ill. App. 3d 699. In this matter we have evidence that at 100% capacity the units violate Rule 3-3.112. There is no evidence showing these units ever run at capacity except during the tests. Therefore the Board finds that insufficient evidence has been introduced to sustain a finding that Respondent violated Rule 3-3.112.

The record does contain references to possible nuisance violations by the plant. At hearing a statement was given by Mrs. Virginia Leslie. Mrs. Leslie lives near the plant and complained about gritty material being discharged by the plant. Also there was a letter in the record written by Mrs. Robert Mayer of Winnetka, complaining as did Mrs. Leslie.

First, Respondent was not charged with a simple 9 (a) violation. The Complaint's only reference to Section 9 (a) of the Environmental Protection Act is in Paragraph 11, wherein the Complaint states that a violation of Rule 3-3.112 is a violation of the Act. Failure to allege a violation of 9 (a) of the Act in the Complaint cannot be cured by the evidence. To be found in violation, a party must be properly charged and given notice of what he must defend against. Lloyd Fry Roofing Co. v. Pollution Control Board, 20 Ill. App. 3d 301.

Furthermore, the statements of these ladies, while showing a possible nuisance, did not show that the discharge of contaminants was injurious to human, plant, or animal life, to health, or to property, or that they unreasonably (emphasis added) interfered with the enjoyment of life or property.

Rule 103 (b) (2):

This rule provides that Respondent must have an operating permit issued by the Agency. It is admitted in the Stipulation that the plant was operated without a permit, and that a permit would be applied for when the Variance was granted in PCB 73-338.

The Village initially applied for its permit on March 12, 1973. At that time it was suggested to the village that they obtain a variance for boilers 4-7, so that a permit could be issued. The Village filed its variance petition on April 12, 1973 (PCB 73-148). On April 17, 1973, the Board dismissed the Petition for failure to allege a violation of the Act or Regulation. On April 25 the Agency denied the previously-filed permit request, stating that Winnetka had failed to prove that the facility would be in compliance with all applicable rules and regulations. The Village then performed the stack tests mentioned above, and filed a second variance petition on August 13, 1973 (PCB 73-338). This enforcement action was filed September 25, 1973.

It is definitely shown that the Village operated the plant without a proper permit, but for no lack of trying. The Agency said no permit could be issued because the plant was not in compliance. The Board dismissed the variance petition for failure to show violation. Therefore it can be stated that Winnetka was in the unenviable position of proving a violation in order to get its permit.

Therefore, even though Winnetka was in technical violation of Rule 103 (b) (2), no fine will be levied.

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

ORDER

IT IS THE ORDER of the Pollution Control Board that:

- 1) Respondent, Village of Winnetka, is guilty of violating Rule 103 (b) (2) of Chapter 2 of the Board's Rules and Regulations for failure to have a valid operating permit from May 1, 1973, through September 25, 1973.

- 2) The Complaint, as it applies to a violation of Rule 3-3.112 of the Rules and Regulations Governing Air Pollution, is dismissed for lack of sufficient evidence.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted by the Board on the 22<sup>nd</sup> day of November, 1974, by a vote of 4 to 0.

Christan L. Moffett