

ILLINOIS POLLUTION CONTROL BOARD  
August 30, 1990

ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	AC 89-304
v.	)	(Administrative Citation)
	)	IEPA No. 10085-AC
G & M WRECKING CO., INC.	)	
	)	
Respondent.	)	

PAUL K. JAGIELLO, APPEARED ON BEHALF OF COMPLAINANT; and

GEORGE D. GILLEY, APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on the December 29, 1989 filing of an Administrative Citation, pursuant to Section 31.1 of the Illinois Environmental Protection Act ("Act"), by the Illinois Environmental Protection Agency ("Agency"). The citation alleges one violation of Section 21(q)(3) of the Act and was served on G & M Wrecking Co., Inc. ("G & M") on December 28, 1989. On January 16, 1990, G & M filed an Answer to Administrative Citation and Petition for Review. A hearing was held on May 1, 1990, at the State of Illinois Center. Three witnesses testified concerning this dispute. Mr. James Haennicke, a field inspector with the Agency's Land Pollution Control Division, testified on behalf of the Agency. Mr. Gordon Martin, President of G & M, and Mr. Joseph Masterson, an employee of G & M, testified on behalf of G & M. Also present was one member of the public who declined to make a statement. The filing of briefs was waived at hearing in favor of closing arguments.

BACKGROUND

G & M is the current owner of property located in Calumet City, Cook County, Illinois. In 1980 or 1981, G & M entered into an agreement with the mayor and first ward alderman of Calumet City to demolish several buildings on the property and cover the remaining concrete and brick debris (R. 27, 30, 32). Subsequently, the City was unable to pay G & M pursuant to the demolition contract (R. 34-35). G & M then purchased the site and, prior to October 31, 1989, tore down the buildings and covered the remaining debris (R. 35).

ALLEGED VIOLATION

On the morning of October 31, 1989, at approximately 10:30

a.m., Mr. Haennicke was conducting a drive-by inspection of the site and noticed smoke emanating from it (R. 8-9). Upon arriving at the site, Mr. Haennicke passed a man, a supposed gate guard (R. 21).\* The guard neither spoke to Mr. Haennicke nor prevented him from entering onto the property (R. 21). Mr. Haennicke then witnessed and photographed two individuals standing beside a fire that appeared to contain burning plastic or rubber coated wire (R. 10; Pet. Exs. 1,2,3). The photographs indicate that the fire was next to a cement building foundation (R. 19). There were no standing portions of the building on the foundation, and only minor debris (rocks and stones) surrounded the foundation (R. 19). The first individual did not give his name to Mr. Haennicke, but stated that he was from out of state visiting friends and that he did not know who started the fire (R. 18; Narrative Inspection Report and Affidavit attached to Administrative Citation). He also stated that there were a total of three individuals on the site and that the gate guard was often drunk and did not pay much attention to the site (R. 21; Narrative Inspection Report and Affidavit attached to Administrative Citation). Mr. Haennicke immediately had the other individual extinguish the fire after he informed both individuals that open burning was illegal (R. 9-10; Pet. Exs. 2,3; Narrative Inspection Report and Affidavit attached to Administrative Citation).

At hearing, Mr. Martin stated that the persons in the photographs were not employees of G & M, that he did not recognize the persons in the photographs, and that he did not authorize anyone to dump or burn on the site (R. 27-29). When asked to identify the burning material depicted in the photographs, Mr. Martin testified that it could have been rubber insulated copper wire (R. 28). He then stated that although he did not know where the wire came from, it could have come from one of the demolished buildings (R. 28-29). With regard to the measures taken to keep people off the property, Mr. Martin indicated that he put a steel gate and fence across the front of the property and blocked a missing portion of the fence with dirt (R. 36-38). He also stated that he did not believe that it was necessary to place a fence around the entire perimeter of the site or around the concrete foundation because the site was located at the end of a road (R. 36-38). Finally, Mr. Masterson, an employee of G & M, testified on behalf of the company. He stated that although he had been at the site on occasion, he had no reason to visit the site (R. 40). He also testified that Mr. Martin was in charge of the site (R. 40).

#### DISCUSSION

---

\*There is a discrepancy in the record as to whether the guard was sitting in or near a trailer (R. 21; Narrative Inspection Report and Affidavit attached to Administrative Citation).

Section 31.1 of the Act provides that "[t]he prohibitions specified in subsections (p) and (q) of Section 21 of this Act shall be enforceable either by administrative citation under this Section or as otherwise provided in this Act." Section 21(p) of the Act applies to sanitary landfills permitted under the Act while Section 21(q) applies to all dump sites. The administrative citation issued against G & M alleges violation of Section 21(q)(3). Section 21(q)(3) provides that no person shall:

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

\* \* \*

3. open burning;

Section 21(a) of the Act sets forth the general prohibition against open dumping by providing that, "[n]o person shall cause or allow the open dumping of any waste."

Before a respondent can be held liable pursuant to Section 21(q), the Board must find 1) that the respondent caused or allowed open dumping and 2) that the open dumping resulted in one or more of the occurrences specified in Section 21(q). It follows that the Agency has some burden to show that the open dumping of waste occurred, the respondent caused or allowed the open dumping, and that the open dumping resulted in one or more of the occurrences specified in Section 21(q). Ill. Rev. Stat. 1989, ch. 111½, par. 1031.1(d)(2). Thus, the initial inquiry in this case is whether the Agency made a sufficient showing with regard to the question of whether open dumping occurred.

In the instant case, Mr. Martin admitted, and the evidence is uncontroverted, that there was a fire on G & M's property (R. 33; Pet. Exs. 1,2,3). The Agency presented no definitive evidence at hearing, however, to support an allegation of open dumping. In fact, when G & M's attorney asked that the record reflect that there was no indication of dumping, the Agency's attorney stated, "If wire was there and it was being burned, I would assume the wire would have to be dumped." (R. 11)

Although the Board is not saying that the Agency can never present valid assumption of open dumping in an administrative citation case, we do note that, in order to be valid, the assumption must be supported by the facts of the case. Here, Mr. Haennicke witnessed two unidentified men standing next to a small pile of what appeared to be burning rubber-coated copper wire. The photographs indicate that the pile was no larger than a small

leaf pile, and that the site was relatively clear of debris. The Board is at a loss to understand how these circumstances, standing alone, support an assumption of open dumping. There is no indication in the record of where the wire came from, who put it next to the foundation, or whether the wire can even be classified as a disposed waste.

In addition to the above, there are two factors that bolster the Board's conclusion that the Agency did not adequately meet its burden with regard to the open dumping. First, not only did Mr. Haennicke not adequately question the two unidentified men, he did not even attempt to question the supposed gate guard. Second, Mr. Haennicke comments at hearing indicate that there was not enough factual support on the issue of open dumping:

Q (Mr. Gilley, G & M's attorney) And your inspection completes itself as site observation, just causing or allowing open burning only, is that correct?

A (Mr. Haennicke) Correct.

(R. 21)

Pursuant to the administrative citation process set forth in the Act, a person may not be held to have violated the subsection prohibiting open burning without first being found to have caused or allowed open dumping. Based upon the facts presented in this case, the Board cannot say that G & M caused or allowed open dumping. Accordingly, the Board cannot and will not conclude that G & M violated Section 21(q)(3) of the Act as alleged by the Agency.

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

#### ORDER

The Board finds that the Illinois Environmental Protection Agency failed to establish that G & M Wrecking Co., Inc. violated Ill. Rev. Stat. 1989, ch. 111½, par. 1021(q)(3) on October 31, 1989. Accordingly, this case is dismissed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111½ 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.

Board members J. Theodore Meyer and B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 30th day of August, 1990, by a vote of 5-2 .

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