ILLINOIS POLLUTION CONTROL BOARD

July 18, 1974

ENVIRONMENTAL PROTECTION AGENCY	)	
v.	)	PCB 73-393
GLENN WILSON and GARY BAILEY	)	

DISSENTING OPINION (by Mr. Dumelle):

I strongly object to the majority's imposition of a $25.00 penalty for Mr. Bailey's admitted violations of the Environmental Protection Act, Section 9(c) which prohibits open burning and the dismissal of the complaint against Mr. Wilson.

The Pollution Control Board has long been faced with complaints regarding violations of Section 9(c), the conducting of salvage operations by open burning. The first such case was EPA v. Neal Auto Salvage, Inc., PCB 70-5, 1-71, October 28, 1970. In this case the Board imposed the reasonable penalty of $1,000 for the single open burning of a refrigerator truck body in violation of Section 9(c) of the Environmental Protection Act and in violation of 2-1.1 of the Rules and Regulations Governing the Control of Air Pollution. "Salvage by open burning has been illegal in Illinois since 1965. It is time that it be stopped." Neal,supra at 77. In the Neal case the Board stated that "we enter the cease and desist order against Respondent but feel that such order is not sufficient deterrent to the type of activities being conducted. A cease and desist order standing alone would give potential offenders a chance to violate the statute and regulations until they are caught." (Neal supra)

The Board put not a slap on Bailey's hand but a tap on his wrist by assessing the sum of $25.00 as a penalty for Respondent Bailey's admitted violations because of Bailey's apparent lack of wrongful intent and straitened financial circumstances. In previous cases the Board has held that "poverty is not an excuse: people who haven't money to do business as the law required shouldn't do business", EPA v. Koons, PCB 71-30, 1-663, June 9, 1971. The evidence presented in the present case

shows that Mr. Bailey intentionally burned 50 to 60 junk automobiles in order to remove the upholstery and other non-metallic components before the sale of the burned-out car hulks to a scrap dealer. Mr. Scrieber, an Agency surveillance engineer, stated that based upon Emission Factor Book AP-42, pages 2-7, Tables 2-5, Emission Factor Rating, that upon the open burning of 100 cars, there would be produced 10,000 to 15,000 lbs. of particulate matter; 3,000 to 4,500 lbs. of hydrocarbons; and 12,500 to 18,750 lbs. of carbon monoxide. His assumptions were based upon a conservative 2,000 to 3,000 lbs. per car weight. He further testified that in the event 50 cars were burned that his calculated emissions should be reduced by 50% (R. 38). While Mr. Schrieber could not answer the question how many cars were completely burned, his calculated emissions further support Agency Exhibit 1 and Fire Chief Tate's testimony of the consequences of burning 50 cars. At the least, we can say that several tons of particulates were probably discharged.

No evidence was presented at the hearing with regard to the amount of money Mr. Bailey paid Mr. Wilson for the junk automobiles nor the value of car hulks once they have been burned. However, it is illuminating to point out that the majority's penalty assessed amounts to approximately 50¢ per car or $12.50 per ton of particulates emitted. Little deterrent exists from such a miniscule wrist tap to prevent burning violations. Both Mr. Bailey and Mr. Wilson testified that they knew of other cases in the surrounding counties where such open burning salvaging operations have gone on and no complaints filed.

As stated in the Neal case, a cease and desist order alone, or in the present case, coupled with a $25.00 penalty makes it all too inviting for future violations based on the assumption that one can profit by the sale of some 50 to 60 car bodies and only be assessed a $25.00 penalty. While not in the current record and therefore cannot form any basis of this dissent, current value for scrap automobiles is at a high point, approximately $40 per car, depending upon the weight of steel. Mr. Bailey may have made hundreds, perhaps thousands of dollars profit by this violation. Section 2(b) of the Environmental Protection Act mandates that the adverse effects on the environment should be fully considered and borne by those who cause them. Such small penalties as in the present case and as recently declared by the Board in EPA v. Arnold May, PCB 73-109, May 23, 1974, do not provide the deterrent needed to insure future compliance with the Act and Board Regulations, and do not fully ensure that the consequences of such violations shall be borne by those who cause them. Only penalties that make it unprofitable to pollute provide a significant deterrent. In the present case I would have assessed a much higher penalty.

In regard to the dismissal of the complaint alleging that respondent Wilson had violated Section 9(c), I object to the dismissal because sufficient evidence was presented in the record to support a finding that Wilson allowed the violations of 9(c). There would not have been any junk automobiles for Mr. Bailey to burn, had not Mr. Wilson been involved in a towing and wrecking service. Mr. Wilson has for thepast twenty years hauled cars onto the property in question (R. 57). Mr. Wilson is engaged in a towing and wrecking business as well as an auto parts and salvage business. While the evidence presented in the record indicates that Wilson had sold the cars to Mr. Bailey; it does not indicate beyond the statement "on or before July 12, 1973", the date of the violation, as to the date when Wilson sold the automobiles to Bailey. Mr. Wilson was fully apprised of the fact that the upholstery had to be removed from junk automobiles (R. 68). He testified that Mr. Bailey had a designated area out at "our place" which was a gravel ring to cut motors out with a torch and take parts out that the salvage yard would not buy (R. 69). Wilson testified that he used a cutting torch in his salvage business to cut parts out for resale. He further testified that the cheapest manner to remove the upholstery was to burn the junk cars rather than hand removing the upholstery (R. 71). Mr. Wilson was quite apprised that people burned junk automobiles before transportation and sale to the scrap yard. In answer to the question "you have heard of people burning them before?" Mr. Wilson answered "Oh, yeh, they burn them out everyday, I guess because they go by our place load after load". He further stated that he could understand that Bailey burned out the cars because it was cheaper than hand removal (R. 72). Mr. Bailey additionally testified that it was necessary to remove the 50 to 60 cars in order to obtain more room for his salvage operation.

To dismiss the complaint against Wilson, the majority must ignore the relationship between Bailey and Wilson. Mr. Wilson knew that Bailey was going to conduct salvage operations on the gravel circular drive area; he knew that the non-metallic components of the car must be removed before sale to a salvage dealer; and he further knew that it was much easier and cheaper to remove the upholstery by open burning.

In an analagous fact pattern, the Board has previously held that the lack of knowledge of burning on a refuse disposal site cannot be considered defense; that the operator of a refuse disposal site should have known that there may be abuses by those who dump at the refuse disposal site; and that "those persons would use the illegal means of open burning to dispose of their waste" (EPA v. Eli Amigoni, PCB 70-15, 1-229, 230, February 7, 1971). Citing EPA v. Neal, supra, the Board further stated that "an operator of a refuse disposal facility must be responsible

for the actions of those who he allows to dump refuse on his property. If such persons use open burning to dispose of the refuse on his property, it will be presumed that such is allowed and consented to by the owner of the refuse disposal. An owner of such facility has a duty to supervise its operations and to stop open burning on them whether by himself or by those he allows to do so (Amigoni, supra at 230).

Wilson created the situation which led to the open burning violations by Bailey. Wilson further knew that Bailey was going to conduct salvage operations on his property and that such salvage operations might have predictably been carried out by open burning. The Board should have applied the precedent that one who owns or controls a refuse disposal site must bear the responsibility for violations that occur on that site. As further precedent the Board has held in numerous cases dealing with "promiscuous dumping", that the owner of a piece of land on which others dump refuse has the responsibility of prohibiting such open dumping violations.

The majority reasons that Wilson had no control over Bailey once he had sold the junk autos to Bailey. An analogous situation to the contrary is the downstate farmer who owns a piece of land on which a gob pile remains from the previous landowner's mining operations. The Board has held the current landowner liable for pollution occurring from such gob piles even though the factor which caused the pollution to occur was an act of God, rainwater. These cases have been upheld on appeal (See Meadowlark Farms, Inc. v. PCB & EPA, 308 N.E. 2d, 829 and Freeman Coal Mining Corporation v. PCB & EPA, 5th Appellate District, No. 73188, June 28, 1974.

The majority in dismissing the charge against Wilson creates precedent for circumventing the Environmental Protection Act and Board Regulations by merely transferring title to the pollution source to a (indigent) third person and then taking a trip to Florida or otherwise turning their back. This should not be allowed to continue. I would have found Mr. Wilson in violation of Section 9(c) of the Environmental Protection Act by allowing Mr. Bailey to violate Section 9(c) of the Act. I would have assessed a substantial penalty of perhaps $1,000 to eliminate any profit by these violations and imposed a cease and desist order to insure that Mr. Wilson would not be allowing such violations to occur in the future.

Jacob D. Dumelle

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion was submitted on the 8th day of August, 1974.

Christan L. Moffett, Clerk
Illinois Pollution Control Board