

ILLINOIS POLLUTION CONTROL BOARD
November 28, 1972

ENVIRONMENTAL PROTECTION AGENCY,)
)
 Complainant,)
)
 vs.) PCB 72-209
)
 MONSANTO CHEMICAL COMPANY,)
)
 Respondent.)

Frederick C. Hopper, Assistant Attorney General for the EPA
Randall Robertson and Phocion Park, Attorneys for the Respondent

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

Respondent, the operator of a chemical plant at Sauget, Illinois is charged with emitting dense smoke, particulate matter and odors into the atmosphere so as to cause air pollution in violation of Section 9(a) of the Environmental Protection Act and Rule 3-3.122 of the Rules and Regulations Governing Control of Air Pollution. The complaint alleges that Monsanto has allowed these emissions "since July 1, 1970" and in particular on twelve dates which are specified in the Complaint.

Respondent denies these charges and alleges that its emissions are reasonable. Respondent further alleges that "air pollution" is defined in such a vague and uncertain manner as to render Section 9(a) of the Statute unconstitutional and claims that Section 9(a) constitutes an invalid delegation of legislative authority without sufficient standards to guide this Board in the exercise of the delegated power. We rejected these Constitutional objections in EPA v. Grainite City Steel (70 PCB-34) and adhere to our earlier decision.

When the case was called for trial an EPA investigator testified that he had observed smoke emissions from Respondent's stack on July 20, 1970, January 5, 1971 and September 15, 1971, three dates alleged in the Complaint. Two of the observations were of ten minute duration and one was for seven minutes. The investigator, a trained smoke observer, said that the emissions "averaged" #3 Ringelmann on one date and #2 3/4 Ringelmann on the other two dates. Some of the emissions did not exceed #2 Ringelmann. There was no testimony of the number of minutes within the observation period in which smoke was greater than #2 Ringelmann in density, and the observer's written reports were for some unknown reason omitted from the record forwarded to this Board.

Monsanto employees testified that it is necessary to periodically blow accumulated soot from its coal fired boiler in order to regain efficiency. Rule 3-3.310 states that during this process it is

permissible to emit smoke of a density darker than #2 of the Ringelmann chart for not more than six minutes in any observed sixty minute period. The company had been blowing soot from its boiler once during each shift for a ten minute period. Recently the Company has found that, by changing the number of blowers and repositioning them within the boiler, the time period for blowing soot can be reduced to 5 minutes. This, of course, does not reduce the emissions but will apparently enable Monsanto in the future to show that it is abiding by the Rule.

The Agency has proved that the "average" density for the observation period was above #2 Ringelmann. No testimony was offered to show how many minutes the smoke density was above #2 Ringelmann and how many minutes it was of a lesser density. We are unable to conclude from the evidence submitted to us that Respondent emitted smoke more dense than #2 Ringelmann for a time greater than the permitted six minutes on the dates in question. The observer's written reports which have been admitted into evidence but were not included in the material sent to us might supply the missing information. For that reason we will leave this question open until the case is again submitted to us so that the parties have an opportunity to locate the missing exhibits.

There was testimony regarding the odor of fumes--usually chlorine gas--on a number of dates since July 1, 1970. The EPA had alleged nine specific dates when such emissions of odors had occurred and proved that odors were emitted on four of the dates mentioned in the original Complaint: December 9, 1970, February 25, 1971, September 13, 1971 and September 30, 1971. For three other alleged violations--August 10, 1970, August 24, 1970 and September 11, 1970 the proof varied somewhat from the allegation, but the defense attorney stated that he had no objection to an amendment alleging that the emissions occurred on August 4, 1970, August 21, 1970 and September 10, 1970. The EPA evidence for these seven dates consisted of testimony from an EPA investigator that he smelled chlorine gas at various locations downwind from the Monsanto plant. On six of the dates there was no physical effect or damage noted, however, on August 4, 1970 the investigator said that the chlorine odor was very strong and caused eye irritation and a raw throat during the ten minute observation. On that occasion, August 4, 1970, the witness was located on Route 3, a public highway passing through the Monsanto property.

There is no standard established for chlorine emissions in Illinois nor is there proof here of the quantity of Monsanto's emissions. Any prosecution must be based upon the theory that emissions of chlorine gas were sufficient to cause a nuisance. We cannot find a nuisance in proof that the odor of chlorine was simply observed on six dates. On just one date alleged in the Amended Complaint, August 4, 1970, was there evidence of physical effects from the chlorine gas, and on that date we are not sure there was proof of the source. In view of our decision to remand the case for more evidence we will hold our decision regarding the possible violation of that date.

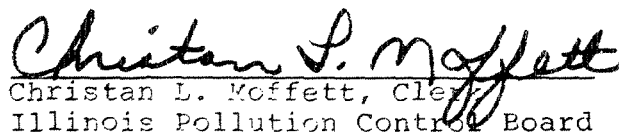
We remand this case to the Hearing Officer to permit defendant to rebut testimony regarding odor emissions on November 14, 1970, April 29, 1971, January 9, 1972, May 15, 1972, September 5, 1972 and September 21, 1972, dates which were not specifically alleged in the Amended Complaint. Defendant claimed that it was surprised by the testimony regarding these dates which came from members of the public who appeared at the hearing. This evidence consisted of the recorded observations of the President and the Personnel Manager of Sterling Steel Casting Co., a plant located near Monsanto. These Sterling Steel Co. officials stated that on some of these dates the Monsanto emission had been so strong that Sterling Steel Co. employees had been driven out of the plant and production had been affected. Sterling Steel had complained to Monsanto on several occasions that the fumes were curtailing production.

This type of testimony, at least initially, indicates that the fumes caused injury and damage, a necessary element of the prosecution case. We agree with Respondent, however, that there should be a greater opportunity to rebut this testimony than could be afforded at this first hearing. Therefore, this matter is remanded to the Hearing Officer for an additional hearing limited to rebuttal evidence on the incidents mentioned by the Sterling Steel Co. employees.

ORDER

It is ordered that this case be remanded to the Hearing Officer for rebuttal evidence regarding the claimed violations of November 14, 1970, April 29, 1971, January 9, 1972, May 15, 1972, September 5, 1972, and September 21, 1972.

I, Christian L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order was adopted this 28th day of November, 1972 by a vote of 5 to 0.


Christian L. Moffett, Clerk
Illinois Pollution Control Board

