ILLINOIS POLLUTION CONTROL BOARD
August 8, 1972

ENVIRONMENTAL PROTECTION AGENCY, Complainant, vs	)	
GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., AND WILLARD WIRTZ, Trustees of the Property of the Pennsylvania Central Transportation Company.	)	PCB 72-43

Wayne Golomb and Thomas A. Cengel, Assistant Attorneys General, for the Environmental Protection Agency; Ralph Walker and Harry J. Sterling for Baker et al.

OPINION OF THE BOARD (by Mr. Parker):

The Pennsylvania Central Transportation Company, through its Trustees, George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and Willard Wirtz, operates railroad yards and related facilities in and around East St. Louis, Illinois.

By Complaint filed February 7, 1972 (later amended to designate as respondents the trustees of the railroad), the Agency alleges that open burning of railroad ties and other refuse took place on five different dates: September 29, 1970, October 7, 1970, September 23, 1971, October 1, 1971, and October 6, 1971. Respondents' Answer constitutes a general denial.

We believe the record shows that open burning violations for which respondents must be held accountable did take place on each of the five relevant dates.

The September 29, 1970 fire took place about 2:00 p.m. near the Round House in the Rose Lake Yard of the Railroad (R.21, 51, Agency Exhs. 5, 7). This was a rubbish fire (Agency Exh. 1), which a railroad janitor admitted setting (R. 23-24, 117-119).

Railroad ties (approximately 30 to 40 in number) and trash were burned in the October 7, 1970 fire, which took place at approximately 3:00 p.m. in the lower railroad yards near 208 South Front Street, East St. Louis (R. 24-25, 51, Agency Exhs. 5, 7). The fire covered an area of about 50 feet by 60 feet, the smoke being generally light gray and occasionally black (R. 25). This fire occurred after the Assistant Foreman of the railroad instructed one of his men "to get rid of the ties and the debris" (R.123).

On September 23, 1971 at about 2:30 p.m. railroad ties were burned in the open in an extension of the Rose Lake Yard (R. 28-29, 51, Agency Exhs. 6, 7), the fire covering an area about 20 feet by 20 feet (R. 29-30, photos Agency Exhs. 2-4). Once more the smoke being emitted was light gray, and occasionally black (R. 30).

The October 1971 fires took place on railroad property* adjacent the service road running along the north side of the Rose Lake Yard tracks (R. 53-54, 56, 61). The October 1st fire, of railroad ties and other combustible material, took place at approximately 5:30 p.m. (R. 59-60, Agency Exhs. 12, 15). Heavy dense black smoke was given off from the fire, which covered an area approximately 20 feet by 30 feet (R. 60, photo Agency Exh. 9). The October 6th fire was of approximately the same size and character (R. 61-62, photo Agency Exh. 11, Agency Exhs. 12, 17). It occurred at about 7:15 p.m. These fires as depicted by the photos (Agency Exhs. 9, 11) were accompanied by vigorous, high reaching flames and billowing gray smoke.

While the record includes some evidence of open burning incidents having taken place at times in addition to those described above, we consider this evidence to be incomplete and therefore inadequate to prove additional violations. The Agency apparently felt likewise since it did not amend its Complaint to conform it to the evidence. We hardly need repeat here that due process requires that Respondents be given notice in advance of the hearing of the charges they must meet.

Respondents contend the record fails to prove that the railroad caused or allowed open burning as required by the Act because there was limited evidence as to how each of the fires was started. But, as pointed out in earlier Board decidions (eg. see EPA v. Neal Auto Salvage, Inc., #70-5, dated October 28, 1970), the economic desirability of burning trash, and in this case old railroad ties, creates a duty on the part of the burner to offer a satisfactory explanation. Here, the record shows that open burning took place on the railroad premises (note that the September 29, 1970 violation was admitted, and the October 7, 1970 violation came about in response to foreman's instructions--thus creating an even stronger duty than in the Neal Salvage case). Clearly it was in Respondents' economic interest "to get rid of the ties and the debris" (R. 123); yet respondents offered no satisfactory explanation.

Respondents suggest, however, that they had no control over the actions of their employees. The argument seems to be that control over railroad "properties and employees...vast in number" is not "an easy task", and that the company should not be "unreasonably punished for the independent action of an employee who ignores the directives of his superiors" (Respondents' Brief, pp. 13-14). The argument fails on the record facts as well as the law. Whatever were the company "directives", they were apparently not passed down to the employees in time to do any good (R. 118-119, 125). And the Respondents have failed to show any reason why the time honored legal doctrine of respondent superior should not apply here.

Respondents' remaining arguments, or like arguments, have been raised and discussed in earlier decisions of this Board. Thus, Respondents argue that because violation of the Environmental Protection Act constitutes a misdemeanor (Section 44), the instant enforcement proceeding under the

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* There is a suggestion in the transcript (R.59) that Respondents question the adequacy of the record proofs tying the October 1971 fires to property controlled by Penn Central. We find these proofs, submitted by the Agency, adequate on the point; in any event, the proofs were sufficient to shift the burden to Respondents to come forward with any contrary evidence and they did not do so.

Act is criminal rather than civil in nature, so that the usual criminal safeguards and criminal standard of proof apply. But such contention misconstrues the nature of this proceeding (see EPA v. Container Stapler Corporation et al., #70-18, dated March 3, 1971). While the Act provides for misdemeanor prosecution, the present proceeding is not such an action. The instant case is a civil action calling for the entry of a cease and desist order and the imposition of penalties and does not constitute a criminal charge or require proof in excess of a preponderance of the evidence. For the same reasons Respondents' assertions that the witnesses at the hearing must have been advised of their constitutional rights against self-incrimination miss the mark. (In any event we note that the Hearing Officer did so advise the witnesses, R. 17-18, 105, 112, 116, 121, 128, 134; none of the witnesses refused to testify).

Respondents challenge the constitutionality of the Environmental Protection Act and this Board's Rules and Regulations for failure "to convey a sufficient and definite warning as to the proscribed conduct... to enable the respondents to reasonably understand the charges" (Amendment to Answer, par. 4, 5), for creating "special treatment for open burning of agricultural waste and domicile waste" in derogation of "the legislative purpose" (ibid, par. 6), and for failing to constitute "a reasonable limitation or regulation of open burning" (ibid, par. 7). These and like constitutional arguments have been previously considered and rejected by this Board (eg. see EPA v. J. M. Cooling, #70-21, dated December 9, 1970), and we accordingly apply the same reasoning in rejecting them here.

The Agency seeks a penalty of up to $10,000 for each violation shown to have occurred. It does appear from the record that the Respondents have resolved to cease all open burning in recognition of the laws banning this activity (see Respondents Exhs. 1-6). In view of this we believe a penalty of $250 per violation is appropriate, in this case a total of $1,250 for the five violations.

The foregoing Opinion constitutes the findings of fact and conclusions of law by the Board.

ORDER

1. Respondents shall cease and desist from the open burning of railroad ties and other refuse at its railroad yards and related facilities in and around East St. Louis, Illinois.

2. Respondents shall within 35 days after receipt of this Order pay a penalty of $1,250 by check payable to Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Order and Opinion this 8th day of August, 1972, by a vote of 5-0.

Christan L. Moffett