ILLINOIS POLLUTION CONTROL BOARD

March 7, 1974

ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
vs.	)	
	)	PCB 73-193
FLEISCHMANN MALTING COMPANY,	)	
	)	
Respondent.	)	

Kenneth J. Gumbiner, Assistant Attorney General, on behalf of the Environmental Protection Agency;
Thomas J. Regan, Attorney, on behalf of Respondent.

OPINION AND ORDER OF THE BOARD (by Mr. Seaman):

On May 4, 1973, the Environmental Protection Agency filed Complaint against Fleischmann Malting Company, charging therein continuing violation of Section 9(a) of the Environmental Protection Act, Ill. Rev. Stat., Ch. 111-1/2, §1009(a) (1971). A public hearing was held in this matter on September 4, 1973.

Respondent is the owner and operator of a grain storage and processing facility located at 2143 West 51st Place, Chicago, County of Cook, Illinois. Complainant alleges that beginning on or about July 1, 1970, and continuing every day of operation to the filing of Complaint, Respondent has caused or allowed the discharge of gaseous organic emissions of such characteristics and duration as to cause injury to the health of persons living in the vicinity or to unreasonably interfere with the enjoyment of life or property of such persons, in violation of Section 9(a) of the Act.

On June 14, 1973, the Hearing Officer in this cause ordered Complainant to furnish Respondent with a list of witnesses expected to be called. Of this list, Complaintant's attorney stated as follows:

> "Well, it is absolutely true we did not provide a list of witnesses, but I orally advised Mr. Regan, and we weren't sure because of the time being taken up by him procuring an expert, who would be available to testify."

> "Any time you have a number of citizen witnesses who have their own jobs and so on to attend to and their own businesses to run, you cannot be sure on a particular date, or ever, if they will be able to appear. And Mr. Regan never advised me it was necessary that he have that list subsequent to the request which was filed way back in June. It is now September, although we talked about it many times." (R. 5).

Respondent submits that it was error to allow any of Complainant's witnesses to testify at the hearing and that their testimony should not be considered by this Board.

Rule 313(b)(i) provides that the Hearing Officer shall order the production of a list of witnesses who may be called at a hearing upon written request by any party. There is no question that Complainant should have complied with the Hearing Officer's order. It is for us to decide whether Complainant's failure to produce the list of witnesses resulted in such prejudice to Respondent that the testimony of Complainant's witnesses at the hearing should not be considered in our deliberation.

We observe, initially, that the effects of failure to comply with Rule 313(b)(i) must always be considered on a case by case basis. It cannot be seriously contended that the mere violation of Rule 313(b)(i), without more, constitutes a fatal error in every circumstance. Such a rule would be tantamount to automatic dismissal for violation per se and such severe application would not be warranted in every case.

However, we do not mean to minimize the importance of the subject rule as a discovery device intended to insure a fair opportunity to prepare for hearing and to avoid surprise at the hearing. Certainly there are circumstances under which non-compliance with Rule 313(b)(i) would result in such extreme prejudice that the Board would be warranted in striking testimony.

In the instant cause, it appears that, although Complainant was remiss in failing to tender the list of witnesses before hearing, its failure was due to confusion and inadvertence, as will be seen below. Respondent's position at hearing was that Complainant should proceed with its case-in-chief but should not be permitted to adduce testimony relevant to the allegations of the Complaint. Respondent was unresponsive to offers of continuance.

During direct examination of Complainant's first witness, Howard O. Chinn, Respondent again objected as follows:

> "MR. REGAN: I will renew the objection at this point as to his failure to supply the list of witnesses. To the extent Mr. Chinn is now directing any testimony toward this complaint or what it purports to charge, or any testimony relative to Fleischmann Malting Company, we renew our objection as to the witness.
>
> HEARING OFFICER HORNE: Let the record so state.
>
> MR. GUMBINER: Let the record also state that if Mr. Regan feels after today that he would like a day to review the statements of Mr. Chinn or to take his deposition, that we would be glad to provide him with time to do so, and recall Mr.Chinn at a later date.
>
> MR. REGAN: I understand the hearing has been convened. This is an adversary proceeding and we are at issue, as I understand the practice.
>
> MR. GUMBINER: If Mr. Regan wishes to withhold his cross examination until he has taken a deposition, if he feels that it would prejudice his case not to do so, again I make the same offer.
>
> MR. REGAN: I have no comment.
>
> HEARING OFFICER HORNE: Okay." (R. 14,15).

At the close of direct examination of Mr. Chinn, the following transpired:

> "MR. GUMBINER: I have no further questions of Mr. Chinn. But I would, for the record, since I just recalled it with respect to Mr. Regan's objection to the list of witnesses, I recall when I supplied him with the rather extensive copies of documents that I had in my possession, that all the witnesses who are going to be here today were listed on those documents.

MR. REGAN: I object to Mr. Gumbiner's recall, and again renew the objection that there is an order here on the State to furnish a list of witnesses, which has not been done.

HEARING OFFICER HORNE: Let the record so show.

MR. GUMBINER: Since the order did not say written list of witnesses, I did orally advise Mr. Regan that the names of the witnesses would be on that list, that I could not specifically tell him to limit the list, but that he could depose any of the names on the list if he so chose.

MR. REGAN: Well, the legal argument now, Mr. Gumbiner, is now settling the case down to one of a recall as to the list of witnesses. I direct his attention and the Board's attention to the Civil Practice Act of Illinois. There are definite guide rules for conducting civil proceedings and trials. The list of witnesses is a written document, and if he misunderstands that order, I am sorry for that. We do not have a list of witnesses, nor have I ever been furnished the name of Mr. Chinn as a proposed witness in this case, no way, no how. But I will get on with the cross examination of him now that he is here and we are at issue.

MR. GUMBINER: May I continue, Mr. Horne?

HEARING OFFICER HORNE: Yes. Please do.

MR. GUMBINER: I would just point out that the rule that applies in this case is the Pollution Control Board Procedural Rules, and not the Civil Practice Act. Rule 313 entitled "Discovery," says the hearing officer may, upon written request of any party, require a list of witnesses who may be called at the hearing be produced. It says nothing about a written list.

MR. REGAN: Well, we submit that the counsel's understanding of the way the order is complied with, apparently this isn't a forum to rectify that misunderstanding at the hearing now, and I take it the witness has been tendered to me

for cross examination.

HEARING OFFICER HORNE: Right.

MR. GUMBINER: That is right." (R. 24,25,26).

At the close of Complainant's case-in-chief, the following transpired:

"MR. GUMBINER: We are on the record now, and I would like to make the statetement that throughout the proceedings preliminary to this hearing today, discussions have been had with Mr. Regan at a pre-trial conference and elsewhere, whereat it was considered whether or not the State should delay its case in order to allow Fleischmann Malting time to get an expert. That, of course, appeared to be a good idea to the State, until it was informed that it would take some months to find an expert and then some more months to determine--for a determination by that expert what would happen.

On Friday I received a hand-delivered letter from Mr. Regan about 5:30 in the afternoon. It may have been delivered earlier, but that is when I received it. It was a carbon copy of a letter by Professor First, and just in general it outlined a rather extensive program for determining the existence and cause of a particular odor problem at Fleischmann Malting.

At that time I made the determination that it would be in the State's--to the State's benefit to allow that expert time to make a preliminary study. I was not able to contact Mr. Regan due to the lateness of the hour and the Labor Day weekend, and I figured it would be better, and I assumed it would be acceptable to Mr. Regan, to delay this hearing until his expert had time to make that preliminary determination and possibly avoid protracted litigation in this case.

At this point I had three witnesses--actually there were four witnesses planning to testify but one woman was unable to make it today. There are other witnesses whom I advised not to come today because I assumed that we would be giving Mr. Regan the time he has been asking for up until now.

So, for the record I would like to make that offer

to Mr. Regan to adjourn for some reasonable period based upon that expert's statements as to determing the cause of the problem, if there is one, at Fleischmann Malting. In the event that is not the case, I would need at least several days to recontact these witnesses and reschedule them. If Mr. Regan has people that are here today and would not be available some other time, I suggest Mr. Regan put those witnesses on now and I would have no objection to interrupting my case to do that.

MR. REGAN: The position of Fleischmann Malting is that we are here today in response to a notice from yourself, Mr. Horne, setting the hearing, and noting through the summer months that a delay in the matter was apparently working a prejudice of some kind. Accordingly, we are here today in response to a hearing.

If the State's--I don't know what the State is doing. I understand this to be an adversary proceeding. There are penal sanctions to the Environmental Protection Act. This Board has the authority to levy a fine and to issue the highest of chancery edicts, a cease and desist order.

I view this as an adversary proceeding and I have come prepared with my people today. I don't need gratuitous offers from the State that they are going to continue it." (R. 60,61,62).

Finally, Respondent's attorney stated as follows:

"MR. REGAN: Well, this gets too lawyer-like. If the State is resting, I have to rethink my entire proceeding. If they are going to continue or make a motion for a continuance here, we are going to object to it." (R. 74).

It is apparent from the tenor of the Record that Respondent's numerous objections were calculated to place Complainant in the position of proceeding with its case-in-chief without the testimonial constituents thereof. Respondent objected on numerous occasions to a continuance. (R. 67).

At the very inception of the hearing, Hearing Officer Horne inquired:

"HEARING OFFICER HORNE: Do you think your case would be prejudiced by not having the list of witnesses?

MR. REGAN: I am entitled to take the depositions of all the witnesses.

HEARING OFFICER HORNE: Well, I think we will have to go on with this hearing. I think that your objection will be made a part of the record and the Board will take note of that.

Any other objections before we start, or any other motions?

MR. REGAN: I have none, Mr. Horne." (R. 5,6).

Mr. Regan's answer was clearly unresponsive to Mr. Horne's question.

Finally, at the close of Complainant's case-in-chief, Respondent's counsel stated as follows:

"HEARING OFFICER HORNE: What is your objection?

MR. REGAN: I respectfully object to any continuance of the hearing. I am here ready to go forward, despite the procedural failure of the State to give us any list of witnesses. We don't know what the people are going to testify, but now that we have heard their testimony, we are prepared to make our legal argument on the basis of that testimony." (R. 67).

We note that hearings on matters before this Board are certainly adversary proceedings, and that attorneys for the respective parties are obliged to develop and pursue such tactics as are legally available to them to best serve the interests of their clients. Counsel for Respondent has argued this point of law with skill and vigor; however, the testimonial evidence objected to will be allowed and considered by this Board.

Respondent is in the business of making malt. Malt is made by soaking grain in water and allowing it to germinate. Respondent drys the germinated grain by forcing warm air through it and out certain vents. Mr. Howard O. Chinn, Chief Engineer for the Environmental Control Division of the Illinois Attorney General's Office and a registered professional engineer, testified that he visited Respondent's facility in July of 1973 and toured the plant. Mr. Chinn observed six roof ports on top of the building exhausting warm, moist air which had a musty, damp odor. (R. 16). Mr. Chinn testified to the odor and the technological feasibility of controlling same. (R. 17-20).

Three citizen witnesses testified regarding the odors emanating from Respondent's facility. Caroline Blaha lives 1/2 block from Respondent's facility and has lived there for 32 years. She testified to: "Gassy smells, and then sour smells and like malt smell. Really bad malt smell." (R. 43). Mrs. Blaha testified that she smells the odors almost every day and is frequently forced into her house so that she cannot enjoy her backyard. (R. 45).

Respondent attempted to rebut the testimony of Mrs. Blaha by presenting the testimony of Mr. Gordon D. Foster, Respondent's Executive Vice President, who stated that Respondent's facility was shut down during the summertime. Mrs. Blaha had testified that she could smell the odors almost every day. However, while it is true that Respondent does not operate during the summertime, it is also true that Respondent devotes this off-time to cleaning its malting chambers. (R. 141).

Margaret Koscielski also lives within 1/2 block of Respondent's facility and has lived there for over six years. (R. 48). Mrs. Koscielski testified to a continual "awful moldy odor" which is sometimes of such intensity that she has actually become nausiated. (R. 49). In an attempt to alleviate the effects of the odor, Mrs. Koscielski bought an air conditioner as soon as she could afford it. (R. 49). She also stated that she was bothered by the odors during the summer months.

Mr. Joseph Kernic testified that he has lived across the street from Respondent's facility on and off for fifty-two years. (R. 55). Mr. Kernic stated that not only does he get a smell "like home brew fermenting but also periodically puffs of sulphur come out of Respondent's roof." (R. 56).

Respondent had stipulated to the testimony of five additional citizen witnesses whose testimony is sub-

stantially the same as set out above. Now, Respondent objects to consideration of that stipulated testimony, because the list of witnesses was not presented before the hearing began. We have previously ruled on this question and will, accordingly, accept the stipulated testimony.

Respondent's witness, Robert S. Kelly, is an investigator hired by the Respondent to determine the number of living units within one city block in each direction from Respondent's facility. He testified "Just in round figures it is in the neighborhood of 360." (R. 128) and that "I was about to say approximately 3.6 or 3.5 individuals per dwelling which would put the number of people residing in that area in the neighborhood of 1,100 or 1,200 people." (R. 131).

It is apparent, even taking the population estimate by Mr. Kelly as true, that Respondent has misinterpreted the nature of the Environmental Protection Act. The Act does not say every person in a neighborhood must be affected (or come in and testify for that matter). What the Act does say is that Respondent cannot unreasonably interfere with the enjoyment of life or property. The question is not the number of people but the unreasonableness of the interferences.

Respondent has spent $125,000.00 for a baghouse at its facility, but nothing for odor control. (R. 101).

We are satisfied that Respondent violated Section 9(a) of the Act by unreasonably interfering and continuing to unreasonably interfere with the enjoyment of life of citizens in the environs of its facility.

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

IT IS THE ORDER of the Pollution Control Board that Respondent shall:

1. Within 60 days of the date of this Order cease and desist violation of Section 9(a) or file with the Agency a statement detailing the abatement procedures it intends to implement. In no event shall Respondent achieve compliance later than 180 days from the date of this Order.

2. Pay to the State of Illinois the sum of $1,000.00 within 35 days from the date of this Order. Penalty payment by certified check or money order payable to the State of Illinois shall be made to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706.

Mr. Marder dissents.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted on this 7th day of March, 1974 by a vote of 4-1.

Christan L. Moffett