

ILLINOIS POLLUTION CONTROL BOARD  
November 14, 1972

ENVIRONMENTAL PROTECTION AGENCY )  
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 v. ) # 72-155  
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 ILLINOIS CENTRAL RAILROAD )

Preliminary Opinion & Order of the Board on Motion to Dismiss  
(by Mr. Currie):

The complaint charges the railroad with open burning of railroad ties and/or other refuse in Decatur Township on August 4, 1971. The railroad responds that it was called to answer for the same acts in a court proceeding to show cause why it should not be held in contempt of a prior court order forbidding such burning, and that a final judgment in its favor was entered on that charge.

The central plea, in addition to familiar procedural objections and attacks on the constitutionality of the Act which we have earlier rejected, is *res judicata*. The issue in the contempt proceeding, however, was whether or not ties had been burned "knowingly, intentionally and willfully." An adverse finding on that charge does not mean the railroad is not responsible for open burning as is charged in the present complaint, since the statute does not require knowing, intentional, or willful burning. See *EPA v. Neal Auto Salvage, Inc.*, #70-5, 1 PCB 71 (Oct. 28, 1970).

To the extent, however, that the court's action established that no willful intentional, or knowing burning took place, that decision is binding on the parties under the doctrine of collateral estoppel. Before proceeding to hearing we will require statements from the parties as to whether or not the judgment did establish this fact, and, if so, what the establishment of this fact leaves of the Agency's case on the present complaint. We shall allow 20 days for the submission of such statements, which in the case of the Agency should include a specification of just what it will seek to prove to establish the alleged violation.

The Railroad urges a broader doctrine of *res judicata* or election of remedies that it says precludes the State from litigating before us issues that were not asserted in the court proceeding. Much the same issue was raised but not decided in *EPA v. Steelco Chemical Corp.*, #71-137, 2 PCB 453 (Sept. 16, 1971), in which a respondent asked us to dismiss

a complaint because a complaint seeking temporary and permanent relief for the same occurrence had been filed in Circuit Court. Because the State elected to proceed only in court and withdrew its Board complaint, we did not decide the question. We did observe, however, that while "the same case" (on the merits) "should not be tried on both" forums, the fact that the Board lacked statutory power to grant temporary relief should not oust the Board of jurisdiction over the complaint for permanent remedies: "we do not think that this statutory gap means the Board cannot try on the merits cases in which preliminary court relief has been sought." In light of the clear statutory design to the Board as a primary forum for pollution enforcement, the prosecutor should not have to forfeit his right to seek ancillary preliminary relief the Board cannot give in order to preserve his right to litigate the main case before us.

The same considerations are decisive here. The statute envisions that complaints for violating its provisions may be brought before a specialized Board; there is no suggestion in the statute that this right must be forfeited in order to vindicate the quite independent right of adherence to a prior court order by a petition seeking relief the Board cannot give. The statutory reference to "duplicitous" complaints is designed to prevent repeated complaints on the same basis by different people; it does not apply to complaints filed by the State at all, and the present complaint is filed on a different basis. See *League of Women Voters v. North Shore Sanitary District*, #70-7, 1 PCB 35 (Oct. 8, 1970).

We find no impermissible vagueness in the complaint, which adequately apprises the railroad of the date and nature of the violations alleged.

We shall await the additional statements indicated above before acting on the motion to dismiss.

It is so ordered.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Preliminary Opinion & Order of the Board on Motion to Dismiss this 14th day of November, 1972, by a vote of 5-0.

