ILLINOIS POLLUTION CONTROL BOARD
December 9, 1971

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
v.	)	# 71-239
	)	
JACK McINTYRE and DWIGHT ROWE, d/b/a JACK & DWIGHT'S NuWAY AUTO SALVAGE and SALES	)	

MR. JOHN C. PARKHURST, ASSISTANT ATTORNEY GENERAL FOR THE ENVIRONMENTAL PROTECTION AGENCY

MR. MARSHALL E. DOUGLAS, ATTORNEY FOR JACK & DWIGHT'S NuWAY AUTO SALVAGE and SALES

OPINION OF THE BOARD (by Mr. Lawton):

Complaint was filed by the Environmental Protection Agency against Jack McIntyre and Dwight Rowe, d/b/a Jack & Dwight's NuWay Auto Salvage and Sales,alleging that on specified dates between October 23, 1970 and June 29, 1971 defendants caused or allowed open burning of refuse and conducted salvage operations by open burning in violation of Sections 9(a) and 9(c) of the Environmental Protection Act and Rules 2-1.1 and 2-1.2 of the Rules and Regulations Governing the Control of Air Pollution. The petition seeks the imposition of penalties in the maximum statutory amount. The complaint was amended to assert violations on the following dates: October 23, 1970; November 10, 13 and 21, 1970; December 16, 17 and 18, 1970; April 8 and 30, 1971; June 29, 1971; and August 9, 1971. Respondents filed an answer to the amended complaint denying its material allegations so far as the asserted offenses.

Respondents conduct an auto salvage operation on Barstow Road in the unincorporated area of Rock Island County near Silvis. The operation is characteristic of this business. Auto hulks, either wrecked or abandoned, are taken to the site where upholstery and tires are removed and the auto bodies dismantled and stripped by the use of acetylene torches. Approximately 2500 car bodies in various stages of stripping are located on the premises.

Prior to July 1, 1970, car bodies were burned to remove the non-metal attachments which procedure, respondents assert, terminated on or about that date. But there is no question that fires have occurred between November 10, 1970 and August 9, 1971 with frequency and, in some instances, reaching an intensity causing them to burn over an extended period and creating difficulties in extinguishing. A brief summary of the specific burning episodes follows.

November 10, 1970: This violation was admitted by respondent McIntyre (R.268-9). The Fire Departments of Silvis and Barstow were called and the fire was put out.

November 21, 1970: The fire on this day was witnessed by Marshall Monarch, Director of the Quad City Regional Air Pollution Control Board (R.139). Respondent Rowe expressed the opinion that this fire had occurred as a consequence of a torch-cutting operation igniting a fuel tank (R.141, 176).

December 16, 17 and 18, 1970: Fires were observed by witnesses on these dates (R.60, 66, 139), which were conceded by respondent McIntyre (R.269). These fires were attributed to an employee of respondents who appeared to possess an unenviable propensity for causing cars on which he was working to become ignited, seemingly without effort on his part. In the words of respondent McIntyre (R.269):

> The 16th, the 17th and 18th, I think it was three fires, one every day. I had this guy working for me. Every time he took a part off, he caught a car afire. That was in the wintertime, and our fire truck would freeze up, and the zoning won't let me build a building such as I would like to build."

April 8, 1971: This fire was viewed by a neighbor (R.49) and admitted by respondent McIntyre (R.270) to whom it was particularly memorable because:

> "That is when my wrecker burned up. . . . You know, a wrecker has got great big tires on it, and we couldn't even get to that wrecker because it was all mud. It was just a bad day, and we did put the fire out by hand by using the fire extinguisher and stuff."
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> Q "Did the tires burn up?"
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> A "The whole wrecker. We just built it."

April 30, 1971: This fire was observed by a deputy sheriff who saw flames and smoke extending into the air (R.86). Cars were observed on all sides of the fire. This witness was not able to testify as to whether the fire was accidental or controlled. Respondent Rowe was seen hurrying past the witness to observe the fire and did not pause to discuss the event.

June 29, 1971: A witness testified that fire was observed on this date and lasted for 1-1/2 hours (R.66) in the afternoon, which fire, in the opinion of the witness, was a result of cars burning. This fire was admitted by respondents (R.272) although its duration was asserted to be only twenty minutes, after which time the fire truck arrived to put it out.

August 9, 1971: This fire was witnessed by an Agency employee as well as several neighbors (R.23-29, 43-45, 105-108, 122-124). Fanned by a strong wind, the fire burned for a day before being extinguished by the Fire Department. McIntyre expressed the opinion that the fire had started by using a torch to cut a truck (R.30). His efforts to extinguish the fire himself with his own water tank and caterpillar were unsuccessful (R.257). Twenty thousand gallons of water were poured on the fire before it was ended (R.273). Gas tanks, tires, seats and drive shafts were in the area blocking access to the fire. A large pile of seats became ignited as a result.

Quite clearly the evidence sustains the allegations of the complaint as to open burning and salvage by open burning on the dates above specified. The defense is not that the burning did not occur; indeed, respondents acknowledge the fires in virtually every instance. The defense is that the fires were accidental, that with all fires observed respondents took immediate steps to extinguish or control them, and that they had taken all possible precautions to prevent them from occurring and to extinguish them when, in fact, they did occur. As in all cases of this character, respondents assert that alternative means of salvage operation are too costly, too distant and too impractical.

The issue narrows down to the question whether when fires occur in an auto salvage yard with the frequency noted in the present case over a substantial period of time, the owner or operator can be exonerated by asserting that the fires were not intentional and that everything had been done that could be to prevent or extinguish them. We think the answer must be no. We have previously held that where fires occur under circumstances comparable to the present case, the owner has the affirmative evidentiary burden to prove such fires accidental. Environmental Protection Agency v. Neal Auto Salvage, Inc., #70-5, dated November 28, 1970. However, there are circumstances when fires, though perhaps accidental as distinguished from being intentionally caused, may be of such frequency, duration and character as to manifest negligence on the part of the operator. Merely saying, "I didn't mean to," may be sufficient to excuse a single episode, but where, as here, the fires cover a time span of nine months and unquestionably result from the business activities of respondents as distinguished from outside sources or acts of God, we must find a violation.

Section 9(c) of the Act states that no person shall "cause or allow the open burning of refuse, conduct any salvage operation by open burning, . . ." The word "cause" connotes a conscious and affirmative act on the part of the respondent. The term "allow" in the context used clearly embraces negligent operations as a basis for violation. Where fires in the degree and frequency of the present case have occurred and are admitted, the burden shifts to the respondents to show an absence of negligence. An auto salvage yard has an infinite potential for fires. Car hulks are stored with gasoline still in the tanks. Acetylene torches are used for the dismantling operations. Coupled with this we have the inherent desire of the salvage dealer (not necessarily shown in the present case) to burn the rubber and non-metal attachments on the cars in contemplation of obtaining a better price upon sale to the ultimate buyer. While we do not by this decision hold that the operator is an insurer against any fires taking place on his premises, we do hold that on the facts of the present case the frequency, degree and intensity of the fires resulting from the business operation of respondents constitute a violation. The conduct of the basic business operation is what has created the event. Any other rule would impose on the Agency the impossible burden of showing the respondents setting a match (or acetylene torch) to the car and analyzing the thought processes of the offender. Where 2500 cars are stored for ultimate salvage operations, where gasoline is present in all or most of them, and where fire is used for dismantling, the auto salvage operator has a heavy burden of seeing that no fires occur, or if they do occur, that they are immediately extinguished. Any other rule would make enforcement a game between the operator and the Agency.

In Environmental Protection Agency v. Frank Cobin, d/b/a Cobin Salvage Company, #71-234, dated November 11, 1971, we reviewed the entire subject of auto salvage operation, commenting specifically on the new open burning regulations, and stated:

> "The Board is not unmindful of the problems created by abandoned and wrecked automobiles and the difficulty in their disposal. However, violation of the law is not the answer. Technology exists within the State enabling the disposal of auto bodies in compliance with the law.
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> "The State of Illinois has long been concerned with the disposal of auto bodies which problem is one of national magnitude. See "Auto Disposal, a National Problem", U.S. Department of the Interior, Bureau of

Mines, 1967. Government and industry have been and are presently engaged in efforts to eliminate the blight of abandoned and junk auto hulks. Variation and enforcement actions relative to auto salvage operations constituted the principal business of the old Air Pollution Control Board. For a review of the Board's activities in this respect, see Opinion of Currie, April 29, 1970, in Britz Auto Parts, VR 69-29, in which the subject of auto salvage, its history and litigation in Illinois are reviewed in detail. As the Opinion notes:

> 'The emission of dense, ugly smoke from burning of junk cars is a familiar and unpleasant sight for highway travelers. This is a particularly barbaric, obsolete, and inexcusable form of pollution; for the smoke is highly visible, no attempt is made to contain it, and methods of reclaiming auto bodies without open burning are readily available. The harmful effects of particulate pollution have been amply documented in the Air Quality Criteria issued last year by the federal government: Health, esthetics, property values, visibility, weather, and costs of cleaning, heating and lighting, may all be adversely affected. In this case, as in previous cases, there was undisputed evidence of alternate disposal methods: A mere $25,000 will buy a relatively smokeless incinerator, and a shredding firm at Alton has offered to pay as much for auto bodies whether or not they have been burned.

"Commenting on the same regulatory provisions with which Respondent is charged in the present case, the opinion continues:

> Because open burning is so obnoxious and so unnecessary, this Board banned it outright in the first regulations it issued: "No person shall conduct a salvage operation by open burning." Rules and Regulations §2-1.1. The regulation constitutes an administrative finding, amply supported by the facts, that the open burning of automobile bodies causes offensive, inexcusable air pollution not just in high-priced residential areas and state parks but whenever and wherever it occurs. Proof that the statute itself is violated is unnecessary in an enforcement proceeding under this section; to require such proof would deprive the regulation of any independent significance.'

"The opinion notes the existence of shredders in Peoria and Alton which will accept salvage auto bodies in an unburned condition. Undoubtedly, others exist in the State. Likewise, incinerators complying with the relevant regulations are obtainable at a reasonable price which would enable salvage operations in compliance with the law. The statute requires that we take into consideration the social and economic value of the pollution source and the technical practicability and economic reasonableness of reducing the emissions (Section 33(c)). We have concluded that no social or economic considerations suggest a continuation of respondents operation in violation of the law and that suitable legal alternatives are available that are both technically feasible and economically reasonable."

The holding in Corbin is applicable a fortiori to the present case.

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

Mr. Kissel dissents in a separate opinion. Mr. Aldrich will file a concurring statement.

IT IS THE ORDER OF the Pollution Control Board that respondents cease and desist the open burning of refuse and salvage by open burning at the auto salvage site located in Rock Island County near Silvis, Illinois. Penalty in the amount of $1,000 is assessed for violations of the Environmental Protection Act, Sections 9(a) and 9(c) and Rules 2-1.1 and 2-1.2 of the Rules and Regulations Governing the Control of Air Pollution on November 10, 1970; November 21, 1970; December 16, 17 and 18, 1970; June 29, 1971; and August 9, 1971.

I, Christan Moffett, Acting Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 7 day of December, 1971.