

RECEIVED
CLERK'S OFFICE

AUG 28 2003

ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

| | | |
|------------------------------|---|----------------------------------|
| KAREN & ANTHONY ROTI, et al, |) | |
| |) | |
| Complainants, |) | |
| |) | |
| v. |) | PCB 99-19 |
| |) | (Enforcement - Noise - Citizens) |
| LTD COMMODITIES, |) | |
| |) | |
| Respondent, |) | |

**LTD COMMODITIES' SECTION 101.520 MOTION
FOR RECONSIDERATION AND MODIFICATION AND STAY**

Respondent, LTD Commodities, Inc., by its attorneys, Baizer & Kolar, P.C., pursuant to 35 Illinois Administrative Code §101.520, moves the Illinois Pollution Control Board ("PCB") to reconsider, modify and stay enforcement of its July 24, 2003, decision. In support of this motion, LTD states as follows:

Introduction

1. On February 15, 2001, the PCB issued its interim decision regarding this case. While the PCB found LTD's nighttime trucking operations a nuisance, the PCB board made the following finding:

"The Board finds that eliminating LTD's nighttime operations would not be economically reasonable" (February 15, 2001, decision, p. 30).

The PCB also found that \$300,000 was "a significant sum" to construct a noise wall on LTD's property. LTD relied upon these findings by the PCB in preparing for the remedy phase of this case. Thus, LTD was shocked by the PCB's July 24, 2003, decision which requires LTD to shut down its nighttime trucking operations until it builds a noise wall costing between \$623,350 and \$3,000,000.

Modifications Requested

2. For the reasons set forth in this motion, LTD requests the following specific modifications to the PCB's July 24, 2003, decision:

- A. Allow LTD to conduct nighttime trucking operations while it works with noise consultant George Kamperman, P.E. to examine ways to reduce noise at the site to the same level as offered by the wall proposed by Dr. Paul Schomer.
- B. Allow LTD to conduct nighttime trucking operations while it works with Mr. Kamperman on a noise wall proposal/estimate for the north and east property lines of the LTD property.
- C. Allow LTD to conduct nighttime trucking operations while it obtains a specific proposal/estimate to demolish the retaining wall and build a retaining wall and noise wall as a unified structure.
- D. Allow LTD to conduct nighttime trucking operations while it pursues permission from the Village of Bannockburn to build a wall on the north and east property lines and/or in the location of the existing retaining wall.
- E. Allow LTD to use the backup beeper on its yard tractor during daytime hours.
- F. Clarify that the PCB's decision regarding disconnecting backup beepers only applies to the yard tractor at LTD and does not apply to over-the-road trucks not owned or operated by LTD.
- G. Allow LTD to load and unload trailers between 10:00 p.m. and 6:00 a.m. provided its truck dock doors are closed.

- H. After the Village of Bannockburn has made its decision regarding the noise wall proposals, reopen the hearing to allow LTD to present evidence regarding the specific proposals submitted to Bannockburn and Bannockburn's decision on the wall proposals.
- I. After the Village of Bannockburn has made its decision regarding the noise wall proposals, reopen the hearing for presentation of findings and recommendations by Mr. Kamperman.
- J. After the Village of Bannockburn has made its decision regarding the noise wall proposals, reopen the hearing for consideration of an appropriate remedy.

Shutting Down LTD's Nighttime Trucking Operations
Will Harm LTD And Its Employees

3. At that original hearing, LTD president and CEO Michael Hara testified that eliminating LTD's second shift would "destroy" LTD. (February 15, 2001, decision, p. 14). According to Mr. Hara, even with a second shift lasting until 10:00 p.m., LTD could not ship its Christmas orders. (February 15, 2001, decision, p. 14). Thus, based on Mr. Hara's testimony and other evidence in the record, the PCB found "that eliminating LTD's nighttime operations would not be economically reasonable" (February 15, 2001, decision, p. 30). LTD relied upon this finding in planning its presentation of evidence for the remedy hearing held last year. While LTD recognized it was possible that the PCB would require it to build a wall, LTD felt assured (based on the February 15, 2001, decision) that it could operate at nights while pursuing permission from Bannockburn to build a wall.

4. LTD is currently operating a night shift beyond 10:00 p.m. (Ex. A, Michael Hara affidavit, par. 7). It needs to operate beyond 10:00 p.m. to ship customer orders. (Ex. A, Michael Hara affidavit, par. 7). The PCB's current decision requiring LTD to shutdown nighttime operations until it builds a noise wall will be devastating to LTD's business and its employees. First, LTD's 400 evening employees will have their weekly gross earnings reduced by 25% based on the reduction of hours they can work each week. (Ex. A, Michael Hara affidavit, par. 4). Moreover, it will be difficult for LTD to recruit employees to work a six-hour second shift. (Ex. A, Michael Hara affidavit, par. 5). With reduced hours and difficulty recruiting employees, LTD will be unable to ship its merchandise during its busy season. (February 15, 2001, decision, p. 14).

LTD's 2002 Season Was Atypical

5. The PCB apparently believes that LTD can shutdown its nighttime operations while pursuing permission to build a noise wall because it did not operate last season at nights after October 18, 2002. However, this conclusion by the PCB ignores the testimony by Jack Voigt of LTD that the shutdown was not permanent, but was based on business last season. (October 16, 2002, hearing, p. 76, 83).

6. The affidavit of Mr. Hara establishes that the 2002 season was not a typical season. LTD was able to shut down its second shift because of a combination of factors. Those factors were as follows:

- A. A slow economy. (Ex. A, Michael Hara affidavit, par. 7).
- B. A longshoremen strike on the West Coast that delayed or blocked shipments to LTD. (Ex. A, Michael Hara affidavit, par. 7).

C. LTD adding a Naperville facility that lessened volume at Bannockburn. (October 16, 2002, hearing, p. 76-77).

7. This season, there is no longshoremen's strike affecting shipments to LTD. Thus, contrary to the assumption made by the PCB, LTD cannot operate its business with trucking operations limited to 6:00 a.m. to 10:00 p.m.

Subsequent Compliance Should Not Be Held Against LTD

8. One of the section 42(h) factor considered by the PCB was "the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of the Act." As noted in the PCB's decision, LTD has opened additional facilities in the past five years. Most recently, LTD opened a facility in Naperville which enabled LTD to shift some shipping from Bannockburn to Naperville. (October 16, 2002, hearing, p. 76-77). This conduct by LTD surely is some evidence of its due diligence to reduce noise at the Bannockburn site. However, the PCB relied upon this action by LTD to conclude that LTD could operate at Bannockburn without nighttime trucking operations. This conclusion is not true. LTD needs to operate at night at Bannockburn to process its orders. Thus, it is unfair on the one hand to examine LTD's subsequent compliance and due diligence and then on the other hand cite LTD's conduct as a reason to shutdown LTD's nighttime trucking operations.

Steve Mitchell Cannot Build A Noise Wall Where Proposed By Dr. Schomer

9. In its July 24, 2003, decision, the PCB states that "Steve Mitchell stated the Huff Company could successfully build a wall in the proposed location." (July 24, 2003, decision, p. 11). The "proposed location" by Dr. Schomer is adjacent to the existing retaining wall in the

fabric that supports the retaining wall. Mr. Mitchell clearly testified that he could not build a wall in that area. Mr. Mitchell testified as follows:

Q. And so you have apparently had some communications or contact with the structural engineer regarding the issue of there being support fabric holding up the retaining wall?

A. Not with an engineer. I had some communication either from you or from Mr. Kaiser, I don't remember who it was but somebody told us there was some fabric in there. *I then asked our structural engineer is that an issue, can we go through the fabric and he would recommend against that, at least until he saw some drawings of what was in there.*

Q. As you sit here today, it's your understanding that a wall Mr. Schomer, Dr. Schomer proposes would have to be outside the area where there is fabric based on your engineer?

A. That's how I understand it, that's correct.

(October 15, 2002, hearing, p. 245)(emphasis added). Edward Anderson was the only engineer to testify regarding the support fabric. His testimony established that a wall cannot be built where Dr. Schomer proposed it be built. (July 24, 2003, decision, p. 4). To avoid the support fabric, a wall would have to be built in the parking lot, which is in the middle of the noise source and the receiving properties. All parties agree a wall in the parking lot would not be effective. (July 24, 2003, decision, p. 9). Thus, the PCB's order that LTD build a wall where proposed by Dr. Schomer is based on the misunderstanding that Mr. Mitchell could build a wall at that location.

**There Is No Evidence Bannockburn
Will Amend Its Ordinances To Approve A Noise Wall**

10. Besides incorrectly assuming that LTD can operate without a night shift, the PCB decision assumes that the Village of Bannockburn will approve a noise wall at LTD. As noted by PCB chairperson Thomas E. Johnson and member Michael E. Tristano in their dissenting opinion, "obtaining village approval for the construction of the noise wall is questionable." LTD believes it is very unlikely that Bannockburn will amend its ordinances to approve such a tall noise wall. LTD believes it is especially unlikely that Bannockburn will approve a wall in the location proposed by Dr. Schomer because the wall will reduce parking at LTD's facility. Thus, by allowing LTD to conduct trucking operations at night only if it builds a noise wall where proposed by Dr. Schomer, LTD believes the PCB has effectively permanently shutdown LTD's nighttime trucking operations.

LTD Should Be Allowed The Option Of A Property Line Noise Wall

11. The testimony in the record is that a property line noise wall is a viable alternative. Both Dr. Schomer and Dr. Tom Thunder testified a property line noise wall would be effective. (Dr. Paul Schomer, October 15, 2002, p. 145; Dr. Tom Thunder, October 15, 2002, p. 262; December 9, 2002, p. 20). Mr. Mitchell testified that he could put a wall "within a foot or so" of LTD's north property line. (Steve Mitchell, October 15, 2002, p. 251).

12. Regarding the Weber home, a property line noise wall is still an alternative. Dr. Schomer curves his wall to the southeast to provide protection to the Webers. A separate noise wall possibly could be constructed along LTD's east property line or northeast of the warehouse to provide noise relief to the Weber family. LTD should be allowed to present this alternative to

Bannockburn. Presenting two alternatives to Bannockburn will increase the chance of having a noise wall approved.

PCB Definition Of Nighttime Trucking Operations

13. In its decision, the PCB defines “trucking operations as the loading or unloading of trucks, moving trailers with the yard tractor, and the coupling and uncoupling of trailers.” The PCB has ordered that LTD cease such operations between 10:00 p.m. and 6:00 a.m. This definition of “trucking operations” is unnecessarily restrictive. LTD’s docks have doors that can be closed while trailers are loaded and unloaded. These doors may not be able to be closed with tractors still attached. However, to the extent that LTD can load and unload trailers behind closed truck dock doors, it should be allowed to do so between 10:00 p.m. and 6:00 a.m.

Backup Beeper On Yard Tractor

14. In its July 24, 2003, decision, the PCB required LTD to “cease and desist from using backup warning beepers at the Bannockburn facility at any time and replace any backup warning beeper used on a yard tractor with either a human spotter or a strobe light.”

15. LTD does not have control over all backup beepers at its site. Many over-the-road trucks that come to LTD have backup beepers. LTD has no authority to disconnect the backup beepers on the over-the-road trucks.

16. Requiring LTD to disconnect the backup beeper on its yard tractor during daytime hours is dangerous and contrary to the evidence in the record. All evidence in this case focused on the backup beeper being a nuisance at night. During the day, the Complainants are at work. For most of LTD’s busy season, Complainants’ children are at school. Quite simply, the majority of the complaints concerned the backup beeper on the yard tractor during nighttime

hours. Leslie Weber testified that she heard the beeper after 10:00 p.m. while laying in bed. (Tr. 477). She also heard it in the early morning hours while in bed. The noise would wake her at times and she would drive to LTD to investigate. (Tr. 448-50, 530). Paul Rosenstock likewise found the backup beeper a nuisance in the nighttime hours. He made a log of the backup beeper in the 10:00 p.m. hour. (Tr. 578-580). Karen Roti testified that the noise would affect her at night and that she would take "Tylenol with codeine or Benadryl or a couple beers" to fall asleep. (Tr. 714, 776-77). Regarding the nuisance allegation, the PCB found: "In summary, complainants allege that, as a result of the continuing noise from LTD, they have been unable to sleep and enjoy quiet activities around the home." (February 15, 2001, decision, p. 22).

17. Since the noise complaints centered on the backup beeper at night, LTD volunteered to disconnect the beeper during nighttime operations. (October 16, 2002, hearing, p. 53). LTD never volunteered to disconnect the backup beeper during daytime hours.

18. At night, a strobe light provides a reasonable alternative to a backup beeper since the light is easily visible in the dark. However, during the day shift, a strobe light would merely blend in with the daylight and may not provide adequate warning to dock workers and over-the-road truckers. Moreover, with a dock pilot directing trucks during the day, trucking operations will slow down and the yard tractor will idle for a longer time while a dock pilot determines if it is safe to backup.

19. For the above reasons, LTD requests that the PCB modify and/or reconsider its decision and allow LTD to use the backup beeper between 6:00 a.m. and 10:00 p.m. Moreover, LTD requests that the PCB clarify its decision that backup beepers on over-the-road trucks need not be disconnected.

LTD's Presentation Of Evidence

20. Complainants will no doubt respond to this motion by arguing that LTD should have presented a specific plan for a property line noise wall at the hearing last fall. However, LTD did not provide specific plans for a property line noise wall because it received assurance from Dr. Thunder that a property line noise wall was a reasonable alternative and would cost less than the wall proposed by Dr. Schomer. Moreover, since the PCB previously found a \$300,000 wall to be a "significant sum," LTD rightly considered it very unlikely the PCB would order construction of a wall costing between \$623,350 and \$3,000,000. Quite simply, in reliance on the PCB's February 15, 2001, decision, it was reasonable for LTD to assume that a worst case scenario would be a PCB order that LTD petition the Village of Bannockburn for permission to build a noise wall on its property by the retaining wall and/or on the north property line. Never did LTD envision (nor should it have) that the PCB would require a noise wall in a location that would eliminate precious parking spaces at a cost of two to ten times the original \$300,000 estimate. Most important, if the PCB gave any hint in its February 15, 2001, decision that it would shut down nighttime trucking operations, LTD certainly would have made a different presentation of evidence at the hearing.

George Kamperman, P.E.

21. Because the PCB decided to shut down LTD's nighttime trucking operations unless it built a noise wall, LTD decided to retain a new noise consultant to take a fresh look at this case. Joseph Kolar, LTD's attorney, contacted George Kamperman, P.E. to review this matter. Mr. Kamperman has reviewed the PCB's two decisions and other documents. He is willing to work with LTD on an expedited basis to look for ways to reduce noise at the site.

Also, Mr. Kamperman is willing to work with LTD to present noise wall proposals to the Village of Bannockburn. A letter from Mr. Kamperman is attached hereto as exhibit B.

Stay Regarding July 24, 2003, Decision

22. Pursuant to section 101.520, "a timely filed motion for reconsideration or modification stays the effect of the final order until final disposition of the motion" However, if the PCB denies LTD's motion for reconsideration and modification, the stay provided by section 101.520 will expire. If LTD must appeal this matter to the Second District Appellate Court, Supreme Court Rule 335(g) provides that "[a]pplication for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency." Thus, if the PCB denies this motion for reconsideration and modification, LTD hereby respectfully requests that the PCB stay its decisions pending direct review in the appellate court.

Conclusion

23. As noted by Mr. Hara in his affidavit, current economic conditions make it difficult to conduct business. (Ex. A, Michael Hara affidavit, par. 3). In the current unstable economy, the work-hour restraints imposed by the PCB will be harmful to LTD's financial stability. (Ex. A, Michael Hara affidavit, par. 3). LTD spent a lot of money to build its warehouse addition based on the expectation that it could use the facility 24 hours a day. (Ex. A, Michael Hara affidavit, par. 3). LTD is paying rent for a building in a premium location based on the ability to use the building 24-hours a day. (Ex. A, Michael Hara affidavit, par. 3). The PCB's July 24, 2003, decision is financially harmful to LTD because it will not recoup the investment on its warehouse addition and it must pay the same rent and utilities for a building

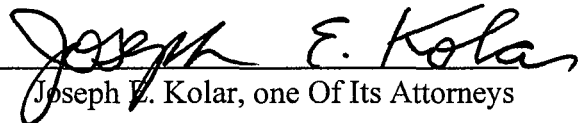
that can be used only 16 hours a day. Moreover, local taxing districts will ultimately suffer as well because LTD will be entitled to seek a reduction in its real estate assessment based on the work-hour restrictions imposed by the PCB. A lower assessment will mean less real estate taxes from LTD for local schools and other taxing districts.

24. LTD respectfully requests that the PCB grant the modifications requested in paragraph 2 of this motion so that LTD can further address the noise complaints while not jeopardizing LTD's financial well being.

WHEREFORE, LTD respectfully requests that the PCB provide the following relief:

- A. Stay the effect of the July 24, 2003, order in accordance with section 101.520;
- B. Reconsider and modify the July 24, 2003, order in accordance with paragraph 2 of this motion;
- C. If the PCB denies this motion, stay the effect of the February 15, 2001 and July 24, 2003, decisions pending appellate review;
- D. Allow LTD to file a reply to any response filed by Complainants; and
- E. Provide such other and further relief as is just and equitable.

LTD Commodities

By 
Joseph E. Kolar, one Of Its Attorneys

ATTORNEYS FOR RESPONDENT

BAIZER & KOLAR, P.C.
513 Central Avenue, 5th Floor
Highland Park, IL 60035
847-433-6677
Fax: 847-433-6735

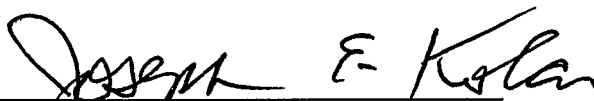
CERTIFICATE OF SERVICE

The undersigned states that on August 28, 2003, he personally served the original and nine copies of the foregoing LTD COMMODITIES' SECTION 101.520 MOTION FOR RECONSIDERATION AND MODIFICATION AND STAY upon the Illinois Pollution Control Board at the following address:

Ms. Dorothy M. Gunn
Clerk of the Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

and one copy by Federal Express for delivery on August 29 to the attorney listed below:

Steven P. Kaiser
35 E. Wacker Drive, Suite 1750
Chicago, IL 60601



Joseph E. Kolar

Exhibit A

Affidavit

Michael Hara on oath states:

1. I am President and Chief Executive Officer of LTD Commodities LLC. I have personal knowledge of the matters set forth in this affidavit.
2. I have reviewed the Illinois Pollution Control Board's two decisions regarding the LTD property in Bannockburn, Illinois.
3. The PCB's most recent decision requiring that LTD shut down its trucking operations between 10:00 P.M. and 6:00 A.M. each day will create an undue hardship on LTD and the more than 400 employees who work on LTD's Bannockburn evening shift. In a very difficult economy to do business, the work-hour restraints imposed by the PCB will be harmful to LTD's financial stability. LTD is paying rent for a building in a premium location based on the ability to use the building 24-hours a day. LTD built its most recent warehouse addition based on the expectation that it could use the facility 24 hours a day. The PCB's decision is financially harmful to LTD because it must pay the same rent and utilities for a building that can be used only 16 hours a day.

Employees Gross Earnings

4. If LTD is unable to operate between 10:00 P.M. and 6:00 A.M., most of LTD's lines, including our customer order fulfillment shipping operations, would virtually be shut down. Most of the 400 evening employees, who currently work past 10:00 P.M., will have their work hours reduced by at least two hours per day, thus reducing their gross earnings by 25% or more on a weekly basis. This loss in gross earnings would be approximately \$2,274 per employee on an annual basis.



Currently LTD is forced to lease space from the North Shore Unitarian Church in Bannockburn due to limited parking availability in the company's north parking lot adjacent to the receiving area. The company uses all 120 parking spaces at the church for its parking needs in addition to the 300 + parking spaces in the LTD north lot. Building a wall in the location required by the PCB will eliminate approximately 40 parking spots in LTD's north lot, and thus exasperate an already desperately limited parking situation. Since during peak season LTD uses every possible parking space in its north and south lots, as well as all parking available at the church, the elimination of 40 spaces would create a substantial hardship for LTD and its employees. The loss of additional parking spaces would also affect the value of the overall property because any prospective user of the LTD building needs sufficient parking. The existing parking at LTD is barely sufficient. Thus, the loss of additional spaces would adversely affect the value of the LTD property.

Conclusion

9. In the PCB's original decision in this case, the PCB wrote "that eliminating LTD's nighttime operations would not be economically reasonable." However, the current PCB decision is basically a turnabout on the original decision. I have personal experience with the approval process with the Village of Bannockburn. I was involved in the approval process for the addition to the LTD warehouse. Assuming Bannockburn would even approve a wall, it is impossible to obtain approval from Bannockburn to build a wall and then build the wall in less than six months. Thus, the PCB's decision requiring that LTD build a wall before operating after 10:00 P.M. effectively shuts LTD down at night for at least six months and possibly longer.

10. From the beginning of this case, LTD has taken steps to reduce noise at its Bannockburn facility. LTD has never committed to building a wall because no one assured LTD that building a wall would appease the Lake Forest neighbors to the north. However, LTD is willing to hire a new noise consultant to prepare a detailed plan of ways to reduce noise to the same level as that offered by the noise wall proposed by Dr. Schomer (reduce the noise in hall). Also, LTD is willing to pay consultants to prepare detailed plans (approved by a noise engineer) to build a wall on the north property line and present such plans to the Village of Bannockburn.

11. As the President and CEO of LTD, I respectfully request that LTD be allowed to pursue the options addressed in paragraph 10 above without shutting down LTD's business between 10:00 P.M. and 6:00 A.M..

Affiant says nothing further.


Michael Hara

Subscribed and Sworn to
before me on August 25, 2003

Notary Public

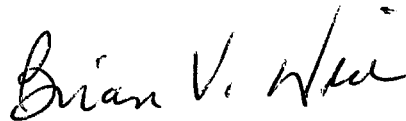
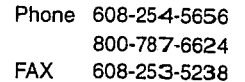




Exhibit B



RECEIVED
AUG 25 2003
BAIZER & KOLAR, P.C.

PERGUND-BAYENNE, N. J.

EXHIBIT
B

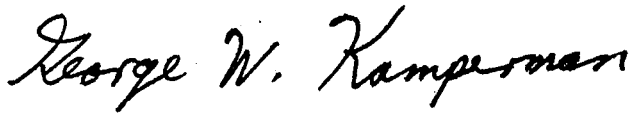
KAMPERMAN ASSOCIATES INC.

Joseph E. Kolar
August 22, 2003
Page 2 of 2

This Phase One study would be limited to 40 hours of consulting time and I would accomplish the study in a time period of one month. For information on my background and experience please go to www.kamperman.com. I look forward to working with you on this challenging project.

Sincerely,

KAMPERMAN ASSOCIATES INC.

A handwritten signature in black ink that reads "George W. Kamperman". The signature is written in a cursive, flowing style.

George W. Kamperman, P.E., Bd. Cert. INCE