STATE OF ILLINOIS)
) SS
COUNTY OF PEORIA)

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
v.	)	NO: PCB 70-5
	)	
NEAL AUTO SALVAGE, INC., a corporation	)	

DECISION AND ORDER

Notice and complaint filed by the Environmental Protection Agency were served upon Neal Auto Salvage, Inc. (hereinafter referred to as "Respondent") alleging violation of Rule 2-1.1 of the Rules and Regulations Governing the Control of Air Pollution effective under Section 49(c) of the Environmental Protection Act, in that on July 16, 1970, Respondent was observed conducting a salvage operation by open burning of a truck body. By letter dated August 20, 1970, Respondent was notified that a Hearing on the Complaint would be held on September 11, 1970 at the Peoria Public Library, Peoria, Illinois.

On September 11, 1970, Hearing was conducted by Samuel T. Lawton, Jr., a member of the Pollution Control Board and duly designated Hearing Officer for the Hearing. The Environmental Protection Agency was represented by its Chief Enforcement Officer; Respondent was represented by counsel. At the opening of the Hearing, the Environmental Protection Agency asked leave to file an Amended Complaint alleging that Respondent, on July 16, 1970, was observed to be conducting a salvage operation by open burning, in violation of Section 9(c) of the Environmental Protection Act, and in violation of Rule 2.1-1 of the Rules and Regulations Governing the Control of Air Pollution, effective under Section 49(c) of the Environmental Protection Act or, in the alternative on said date, Respondent was observed conducting the open burning of refuse in violation of Rule 2-1.2 of the regulations and the same statutory provisions. No objection was made at the Hearing to the filing of the Amended Complaint and leave was granted to file said Amended Complaint.

Respondent was given ten (10) days in which to file an Answer, which has been received. The answer denies the material allegations in the Complaint and moves that the amended complaint be dismissed. This motion is denied.

At the Hearing, Respondent moved that the Hearing Officer disqualify himself from conducting the Hearing because he had previously participated in a Hearing and written the Order of the Air Pollution Control Board in which Respondent's request for a variance to permit the open burning of automobile bodies on its premises has been denied. The motion to disqualify was denied.

Harry Neal, President and sole owner of Respondent, was called by the Environmental Protection Agency as an adverse witness pursuant to Section 60 of the Illinois Civil Practice Act. Objection was made to calling Neal as an adverse witness under Section 60 of the Practice Act, which objection was noted but not sustained (R17). Testimony of the Environmental Protection Agency and Respondent was heard and completed on September 11, 1970, at which time Respondent moved that a continuance be granted to a new date before Respondent proceed with its defense. This motion was denied.

Each side was given the right to file briefs and the matter taken under advisement.

We have reviewed the entire testimony and the evidence in the case, together with the briefs submitted by both parties. We have carefully considered all legal arguments raised by both parties and have reviewed the relevant constitutional, statutory and regulatory provisions.

It is the Order of the Pollution Control Board that an Order be entered against Neal Auto Salvage, Inc. directing it to cease and desist all salvage operations by open burning and that a penalty of $1,000.00 be assessed against Neal Auto Salvage, Inc.

Before commenting on the evidence and the substantive aspects of the case, it is necessary to consider and dispose of the constitutional and procedural points raised by Respondent. In addition to asserting that the Agency has failed to sustain its burden of proof, Respondent asserts that the Complaint should be dismissed and the Respondent found 'Not Guilty' for the following reasons:

1. That a continuance should have been granted on Respondent's Motion at the close of the Hearing;

2. That the Hearing Officer should have disqualified himself;

3. That by being called as an adverse witness, Respondent was forced to incriminate himself and was thereby deprived of his constitutional rights.

These contentions will be considered in the order stated.

Contrary to the allegation in Respondent's brief, that it is a "long practice custom and tradition in proceedings before administrative bodies in the State of Illinois" to grant continuances or split hearings, it is neither the policy nor the practice of this Board to grant continuances unless there is a showing that a party will be subjected to substantial hardship in being compelled to proceed. Such showing is totally lacking in the instant case. The original complaint charged violation of Rule 2-1.1 in that Respondent was observed conducting a salvage operation by open burning of a truck body. The amended complaint alleged that Respondent was observed conducting a salvage operation by open burning in violation of the same rule. Section 9(c) of the Environmental Protection Act, violation of which is also asserted in the amended complaint, makes illegal the conduct of a salvage operation by open burning. For purposes of this proceeding, we disregard all allegations relating to open burning of refuse. It is not apparent how amendment of the pleadings worked to the prejudice of Respondent. Moreover, the Environmental Protection Agency's evidential proof was entirely based upon the salvage operation by open burning of a truck body which was the sole allegation of the original complaint. If Respondent had been properly prepared to proceed in defense of the allegations of the original complaint at the time of the Hearing, it would have been adequately prepared to meet the proof offered at that time irrespective of the filing of the amended complaint.

The amended Counts were a statement of the statutory and regulatory provisions covering the factual circumstances alleged in the original Complaint without the specification of the precise evidential event. By the original Complaint, Respondent was on notice of the precise time and nature of the alleged offense. It was on notice as to the character of proof that would be presented by the Environmental Protection Agency and should have been cognizant of what would be needed to rebut such showing. Those persons who have furnished affidavits appended to Respondent's brief should have been present at the Trial to testify to the events and circumstances set forth in their affidavits. Their affidavits must be disregarded. Since the proof in no way departed from the allegations of the original Complaint, no continuance was appropriate.

Respondent next contends that the Hearing Officer should have disqualified himself from conducting the hearing because he had previously participated in an earlier hearing and written the Order of the old Air Pollution Control Board denying Respondent's variance request to conduct an open burning operation. This contention is patently without merit. As explained to the Respondent, the role of the Hearing Officer is solely to conduct the Hearing and prepare a record. The fact that he was also a participant in Respondent's previous efforts to obtain a variation to do that which he is now charged with doing illegally in no way serves as a basis for disqualification. Carrying this absurd contention to its

illogical conclusion would foreclose all members of the Board from hearing any case involving a second offense or administrative proceeding concerning a Respondent who had previously been before the Board in any capacity. Indeed, the Rules of the Federal Court provide precisely the opposite in requiring reference to the same judge who had heard any matter where the Defendant had previously been before the court. Further, the issue in the present case is entirely different from that presented by the former variation petition. The variation request related to whether the Respondent should be allowed to continue open burning of auto bodies. The issue in the present case is whether Respondent, did, in fact, conduct an open burning operation. The function of the Hearing Officer in this proceeding is strictly administrative. When the record is presented to the Board, the Board acts independently in making its decision on the disposition of the case.

Respondent next contends that Neal has been denied his constitutional rights by being called to testify as an adverse witness and has thereby been compelled to incriminate himself. Respondent reasons that since violation of the Act could be the basis of a misdemeanor charge and because Neal would allegedly be subject to a contempt proceeding if he fails to testify in the Hearing when called, he is thereby forced to incriminate himself in violation of the Fifth Amendment of the United States Constitution. The answer to this contention is simple. If Neal desired to plead the Fifth Amendment and refuse to testify, he should have done so at the time he was called as a witness. This he failed to do. The only objection voiced was in being called under Section 60 of the Practice Act (R17). The practice of calling an adverse witness is standard judicial procedure. No reason is given why it would be inappropriate in the instant case which complied with Section 60 of the Practice Act. Indeed, the practice had already been written into the procedural rules of the Board and is followed in normal court procedure generally. While Respondent cannot be forced to incriminate himself, his refusal must be timely, and made at the time he is called. The present contention is an afterthought.

During the course of the Hearing, Respondent's counsel suggested that he was surprised to discover that the Hearing was a formal one from which serious consequences might follow. This suggests procedures before State Administrative Agencies should not be taken seriously. What may have created this impression we cannot imagine. It is time all people realize that the State of Illinois means serious business in pollution control and all parties should guide themselves accordingly. In the instant case, the Complaint and notice made quite plain the possible consequences of Respondent's alleged acts. The statute and regulations have been enacted to be enforced, and it is our intention to do so.

We turn now to the substative contentions of the Complaint and the evidence adduced at the Hearing. The facts of the case are simple. Respondent conducts an auto salvage operation in the unincorporated area of Peoria County. It has approximately 1,800 vehicle bodies on its premises (R124). While its principal business is stripping cars of accessories and parts and selling them, it also sells salvage car and truck bodies to scrap dealers and processors after the stripping operation has been accomplished. More money is obtained from a scrap dealer for a car that has had its upholstery and non-metal attachments removed than from one which contains them (R141). Manual removal of these items is deemed time-consuming and expensive. Burning is considered the cheapest, and most practical method. Harry Neal admitted to employing this technique in the past (R143). In the course of its salvage operations, vehicle bodies are cut into sections with acytelene torches. Fires on occasion result from this process (R115).

Otto P. Klein, Jr., Environmental Control Engineer, employed by the Environmental Protection Agency of the State of Illinois testified that on July 16, 1970, he observed a plume of smoke one-half mile in length, while approaching Respondent's property and that on closer inspection saw a refrigerator-type truck body burning in Respondent's salvage yard (R43-50). The witness, who has had great experience in the observation of auto salvage air pollution cases, specifically testified to his personal observation of the burning as aforesaid, the type of vehicle, the presence of smoke and flame and the details of the entire area where the burning took place. His testimony is both believable and uncontradicted. There is no denial in the evidence that such burning took place. There is no contention that the burning was accidental. There was no apparent effort to extinguish the flames. The principal contention made by Respondent was that the refrigerator-type truck on Respondent's premises was not at the location observed by Klein (R110, 134).

Harry Neal, in his testimony, was not sure that he was on the premises on the day in question (R32) and contended only that if there had been a fire that he would have known about it or that his employees would have so informed him (R127). The testimony of Otto J. Klein, Jr. in observing the burning operations and testifying to its character degree, location and emissions satisfied the initial burden of proof incumbent upon the Agency. The burden shifted to the Respondent to rebut the allegations. This it has failed to do. The presence of a burning truck in a salvage yard in consideration of the economic advant of such burning and the history of salvage operations requires an explanation in defense. The Respondent has the facts in its possession and must offer a satisfactory explanation. None was forthcoming.Moreover, the

existence of an acknowledged fire hazard imposes both the duty on the Respondent to have available the means to extinguish it and the obligation to take affirmative steps to do so. The character of the salvage operation, the use of torches for removal of parts, the evident desire to cause burning of upholstery and non-metallic accessories imposes an affirmative obligation on a salvage operator to see that fires do not take place, to take affirmative steps to extinguish them and to be prepared to offer a satisfactory explanation when, in fact, a fire does occur. The temptations are great to attribute such fire to accident, obtain the economic benefits from it and then assert that the operator is not responsible.

The uncontradicted evidence conclusively proves salvage operation by open burning. No defense was offered that it was arbitrary or unreasonable to comply with the regulations. On the contrary, Respondent endeavored to show, unsuccessfully, that it did comply.

In the record of this case is the entire record of the Respondent's previous petition for variance before the Illinois Air Pollution Control Board. There the Board, in denying the request for variation to burn auto bodies on the premises, stated that denial of the variation to Respondent would not constitute a hardship but that its allowance would impose upon the adjacent neighbors the burdens which the open burning regulations were designed to prevent. What the Air Pollution Control Board said in denying the variance, we adopt for the purposes of this proceeding.

> "In short, petitioner's case amounted to no more than an attempt to pass on to unwilling neighbors a portion of the cost of disposing of its wrecked automobiles. The mere desire to save money is not ground for a variance; it is always cheaper to pollute than to comply, but that statute and regulations require everyone to make financial sacrifices in order to minimize air pollution. In cases construing analogous variance provisions in zoning ordinances, the courts have made clear time and again that mere financial gain to the petitioner is not enough to permit violations. E.g., Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333, 338 (1931): "The mere fact that the owner of a particular parcel of property . . . can make more money out of it if permitted to disregard the ordinance instead of required to comply with it, is neither a difficulty nor a hardship authorizing the board of appeals to permit such owner to disregard the ordinance . . . " Accord, River Forest State Bank v. Zoning Board, 34 Ill. App. 2d 412, 181 N.E. 2d 1, 4 (1st Dist. 1961)

Having been denied a variation, Respondent seeks to obtain the benefits of such allowance by violating the law. In arriving at its decision, the Board is mindful of the testimony of Neal that other

materials were burned in the open in the past besides the specific truck. These matters we disregard in arriving at our finding since no notice was given to Respondent of anything but the burning of the truck. We enter the cease and desist order against Respondent but feel that such Order is not sufficient deterrent to the type of activities being conducted. A cease and desist order standing alone would give potential offenders a chance to violate the statute and regulations until they are caught. The offense in the Respondent's case is aggravated by the fact that it had just been denied a variance to do the thing it now has done. Salvage by open burning has been illegal in Illinois since 1965. It is time that it be stopped. We urge every citizen who observes salvage by open burning to report such violation to the Environmental Protection Agency or to file a formal complaint with this Board. As this decision makes clear, the testimony of one's eyes and nose may be adequate for the purposes of penalizing violators.

THE POLLUTION CONTROL BOARD FINDS:

1. That it has jurisdiction of the subject matter of this proceeding and the parties hereto;

2. That proper notice of the Complaint and Hearing was given to Respondent and Hearing thereon held all as by statute and regulation in such cases made and provided;

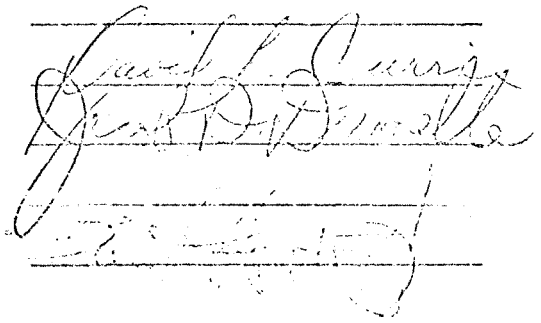
3. That Neal Auto Salvage, Inc. conducted a salvage operation by open burning of a truck body, in violation of Section 9(c) of the Environmental Protection Act and in violation of Rule 2-1.1 of the Rules and Regulations governing the control of air pollution effective under Section 49(c) of the Environmental Protection Act.

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD THAT:

1. Neal Auto Salvage, Inc. cease and desist the conducting of a salvage operation by open burning in violation of Section 9(c) of the Environmental Protection Act and of Rule 2-1.1 of the Rules and Regulations covering the control of air pollution effective under Section 49(c) of the Environmental Protection Act.

2. Penalty in the amount of $1,000.00 is hereby assessed against Neal Auto Salvage, Inc. for violation of Section 9(c) of the Environmental Protection Act and violation of Rule 2-1.1 of the Rules and Regulations covering the control of air pollution effective under Section 49(c) of the Act for having conducted a salvage operation by open burning on July 16, 1970.

I concur:



I dissent: