

ILLINOIS POLLUTION CONTROL BOARD  
March 28, 1991

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Complainant, )  
 )  
v. ) AC 90-59 (Doc. A & B)  
 ) IEPA Case No. 299-90-AC  
 ) (Administrative Citation)  
 )  
SOUTHERN PACIFIC RAILROAD, )  
 )  
Respondent. )

WILLIAM SELTZER APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY;

W. E. VAN HOOK APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon a petition for review of an administrative citation ("citation") filed by Southern Pacific Railroad ("Railway") on July 16, 1990. The citation was issued on July 9, 1990, by the Illinois Environmental Protection Agency ("Agency") pursuant to Section 31.1(d) of the Illinois Environmental Protection Act ("Act") (Ill. Rev. Stat. 1989, ch. 111½, par. 1001 et seq.).

Hearing was held on October 23, 1990 in Springfield, Illinois;<sup>1</sup> no members of public attended. The Agency presented one witness, Allyn Colantino, field investigator for the Agency. W. E. Van Hook testified on behalf of the Railway. The parties elected not to file briefs, standing on their closing arguments. For the reasons discussed below, the Board finds that the Railway violated Section 21(q)(1) of the Act.

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1. The transcript is cited as "R. at \_\_\_\_\_"; The petition for review is cited as "Pet. p. \_\_\_\_\_".

BACKGROUND

The citation was issued to the Railway as the owner of a tract of land located in Sangamon County, Illinois. The tract of land is designated with Site Code No. 167000006 by the Agency and is not a permitted landfill. The site is commonly known to the Agency as Auburn/Southern Pacific R.R..

On the basis of an inspection conducted by Allyn Colantino on May 14, 1990, the Agency determined that the Railway had operated the facility in violation of Section 21 (q) (1) and noted that the Railway was subject to a civil penalty of \$500.00 for the violation. The Railway then timely filed a petition for review with the Board.

APPLICABLE LAW

Section 21(q)(1) of the Act states:

No person shall in violation of subdivision (a) of Section 21, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

1. litter;

\* \* \* \* \*

Section 31.1 of the Act sets forth the procedural aspects of an administrative citation. Section 31.1 provides, in part, that:

- a) The prohibitions specified in subsections (p) and (q) of Section 21 of this Act shall be enforceable either by administrative citation under this Section or as otherwise provided in the Act.
- b) Whenever Agency personnel or personnel of a unit of local government to which the Agency has delegated its functions pursuant to subsection (r) of Section 4 of this Act, on the basis of direct observation, determine that any person has violated any provision of subsection (p) or (q) of Section 21 of this Act, the Agency or such unit of local government may issue and serve an administrative citation upon such person within not more than 60 days after the date of the observed violation.

\* \* \* \* \*

- d) If Based on the record, the board finds that the

alleged violation occurred, it shall adopt a final order which shall include the administrative citation and findings of violation as alleged in the citation and shall impose the penalty specified in subdivision (b) (4) of Section 42. However, if the Board find that the person appealing the citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty.

Penalties in actions of the type here brought are prescribed by Section 42(b)(4) of the Act which provides:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) or (q) of Section 21 of this Act shall pay a civil penalty of \$500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Trust Fund to be used in accordance with the provisions of "An Act creating the Environmental Protection Fund", approved September 22, 1979 as amended; except that if a unit of local government issued the administrative citation 50% of the civil penalty shall be payable to the unit of local government. Ill. Rev. Stat. 1989, ch. 111 $\frac{1}{2}$ , par. 1042(b)(4).

#### DISCUSSION

The Railway property was initially inspected in January of 1990. At that time the inspector noted a violation and an administrative warning notice (AWN) was issued. (R. at 7). According to the Agency inspector, "the gist of the administrative warning notice" was that the Railway "had 60 days to clean up the property". (R. at 7).

The Railway's property near Auburn is easily accessed by the public. The littering taking place on the property found at the inspections, appeared to be an ongoing process (R. at 12). Respondent does not deny that the litter was on the Railway property.

This administrative citation is unique in that the Railway, asserts that, in an effort to comply with the AWN, they were "preparing to remove and dispose of the debris on Railway property when upon the advice of Mr. Ellenberger [an Agency employee], we ceased any further efforts pending the outcome of a

pre-enforcement conference with the trespasser who placed the debris on Railway property." (Pet. p. 1). This position is supported by a copy of a letter to Mr. Glenn Savage of the Agency dated March 21, 1990 (5 days after the Awn was issued) from W.E. VanHook an employee for the Respondent. That letter states: "please advise if you desire the Railway to remove this debris now in accordance with the Administrative Warning Notice or if we should wait to determine the remedial actions which will be taken by the trespasser as a result of the pre-enforcement conference." (Pet. p. 1). The Respondent asserts that the administrative citation was the first indication the Railway had received that the Agency wanted the Railway to proceed with clean up.

The exchange between Respondent and the Agency concerning the clean up of the site indicates a misunderstanding which was not cleared up until after issuance of the citation. (Pet. p. 1). The misunderstanding which existed was that the Agency was referring to another site near Carlinville which was the subject of a pre-enforcement conference. It should be noted that there is no indication in the record that the Agency intentionally misled the Railway; nor is there any indication that Mr. Ellenberger knew that his comments had been misunderstood. The site which is the subject of this administrative citation is near Auburn.

The Agency has established that the Auburn site was a place where open dumping occurred and that the Railway had not tried to stop such dumping. The pictures also clearly show litter at the site. Further, the Railway does not deny that open dumping which resulted in litter had occurred. It should also be noted that the Railway did not argue that the dumping occurred as the result of uncontrollable circumstances. Therefore since neither statutory defense to the administrative citation were argued by the Railway, the key question in this case is whether the actions by the Agency were such that the Railway should not be found in violation of the Act.

The Board has previously held that Agency actions can lead to an improperly issued citation (IEPA v. Jack Wright, AC 89-227; August 30, 1990). In another case, the Board held that the Agency's actions estopped the Agency from issuing a citation (In the Matter of: Piolet Brothers Trading, Inc.; AC 88-51, July 13, 1989).

In Jack Wright, the Respondent alleged that the Agency inspector upon inspection "assured me there would be no problem with an IEPA fine." (Jack Wright, p. 4). The Agency's action led the Respondent to believe that the matter would be closed if he Respondent cleaned up the site within 30 days (Jack Wright, p. 5). The Board found that "[b]ecause of the assurance made by the field inspector . . . the Board finds that the administrative citation was improperly issued". (Jack Wright, p. 7).

The Board's decision in Jack Wright was consistent with the Second District Appellate Court of Illinois whereby an Agency agreement not to bring an enforcement action was held to be binding on the Agency. In Modine Manufacturing Co. v. Pollution Control Board, 193 Ill. App. 3d 643, 549 N.E.2d 1379, 140 Ill. Dec. 507 (1990) (Modine I), the Court discusses an unpublished decision in Modine Manufacturing Co. v. Pollution Control Board, 176 Ill. App. 3d 1172 (1988) (an unpublished order) (Modine II). In Modine I the Court explained that the Agency, in Modine II, had agreed to accept a compliance plan from Modine and to refrain from bringing an enforcement action. Modine asserted that the agreement not to institute enforcement proceedings for emission and permit violations barred the enforcement action brought by the Agency. In Modine II, the Court dismissed the action for emissions violations and remanded the case to the Board to set the penalty on the permit violations. In discussing Modine II the Court further stated "that the EPA had agreed not to pursue enforcement based on emissions violations but that no such agreement existed with respect to permit violations." Modine I (549 N.E.2d 1381, 140 Ill. Dec. 509).

In the Pielet case, the Respondent argued that under the common law principles of estoppel, the Agency should be estopped from punishing the Respondent for activities the Agency allowed. (Pielet, p. 8). The facts in the Pielet case relevant to the estoppel argument are that the Respondent had several meetings with the Agency and provided documentation to the Agency such as a Memorandum and Closure Plan. The Agency did not inform the Respondent that the activity the Respondent was undertaking could be a violation for which a citation could be issued. The Board found that the Agency was estopped from finding violations because the Board believed that "the record reveals that the Agency, through its representatives, made representation to Pielet Brothers upon which Pielet Brothers could reasonably have believed allowed it to deposit waste by area fill method in certain portions of the landfill in addition to those permitted". (Pielet, p. 9).

This case can be distinguished from both Jack Wright and Pielet. In Jack Wright, the Respondent specifically stated at hearing that the Agency told him that if he cleaned up the site there would be no problem with the Agency. The testimony was not refuted. In this case, the Railway does not assert that the Agency has made such representations. The transcript at hearing implies that the administrative warning notice may have led the Railway to believe that clean up of the site would result in no fine. However, that is not explicitly stated. In addition, the administrative warning notice was not filed as a part of the record. Therefore, the Board cannot clearly ascertain that the Agency had led the Railway to believe that clean up would result in no fine. In addition, the Agency merely requested that the Railway hold off on clean up until after a pre-enforcement conference. The Agency did not agree to refrain from bringing an enforcement action, unlike the Modine case.

This case is also distinguishable from Pielet. Here, the Railway asserts that it was verbally told not to clean up a site. The Railway confirmed that conversation with its letter of March 21, 1990 (Ex. 1). The Railway asserts that it received no further comment until the citation was issued. In this case, the Respondent refrained from cleaning up a site based on the verbal instructions of one Agency employee (Mr. Dale Ellenberger). It should be noted that Mr. Ellenberger was not the inspector whose name appears on the inspection report for the citation at the Auburn site. In addition, it is not clear from the record what position Mr. Ellenberger holds with the Agency.

Further, the Railway introduced evidence that it had cleaned up the site by September 4, 1990. (R. at 26). This is almost eight months after the initial inspection, and almost two months after issuance of the citation. The Railway asserts that it could not move quicker toward clean up because of the bidding procedure required by the Railway. (R. at 25). Given the corporate restraints of bidding, the Railway should have foreseen that it could not clean up the site if required to do so, within the 60 days given in the administrative warning notice. Thus even if the Agency had immediately clarified the misunderstanding, the Railway may not have had the site cleaned up within the timeframes set forth in the administrative warning notice.

It should be noted that the Railway admitted that there were steps which could be taken to prevent open dumping at the site. Mr. Van Hook testified that the Railway would continue to monitor the area and that "[i]f we have problem areas, which this one may become one, that we do take steps to barricade and prevent continued access." (R. at 29). Mr Van Hook indicated that barricades had been erected along the Railway's right of way where trespassing had become a problem. (R. at 28).

The Railway failed to argue the statutory defenses to an administrative citation which are that the open dumping did not occur or that dumping occurred as the result of uncontrollable circumstances. In addition the Board does not believe that the Agency actions were sufficient to invoke the principal of estoppel. Therefore, the Board finds that the Railway was in violation of Section 21(q)(1) of the Act on May 14, 1990.

#### ORDER

1. Respondent is hereby found to have been in violation on May 14, 1990, of Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1021(q)(1).
2. Within 45 days of this Order Respondent shall, by certified check or money order, pay a civil penalty in the amount of \$500 payable to the Illinois Environmental Protection Trust Fund. Such payment shall be sent to:

Illinois Environmental Protection Agency  
Fiscal Service Division  
2200 Churchill Road  
Springfield, Illinois 62706

Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (Ill. Rev. Stat. 1989, ch. 120, par 10-1003), from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal, during which payment of the penalty is stayed.

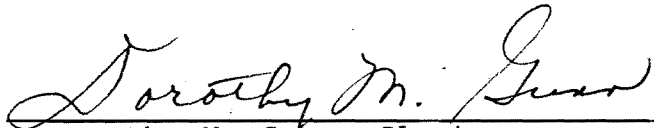
3. Docket A in this matter is hereby closed.
4. Within 30 days of this Order, the Agency shall file a statement of its hearing costs, supported by affidavit, with the Board and with service upon Southern Pacific Railway. Within the same 30 days, the Clerk of the Pollution Control Board shall file a statement of the Board's costs, supported by affidavit and with service upon Southern Pacific Railroad. Such filings shall be entered in Docket B of this matter.
5. Respondent is hereby given leave to file a reply/objection to the filings as ordered in paragraph 4 of this order within 45 days of this Order.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111 $\frac{1}{2}$ , par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

J. D. Dummelle dissents.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 28<sup>th</sup> day of March, 1991, by a vote of 6-1.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board