ILLINOIS POLLUTION CONTROL BOARD
March 22, 1971

LIPSETT STEEL PRODUCTS, INC. )
)
v. ) PCB #70-50
)
ENVIRONMENTAL PROTECTION AGENCY)

Opinion and Order of the Board (by Mr. Currie):

Salvage by open burning has been against the law since 1965. Lipsett, part of a substantial interstate enterprise stretching as far as Pennsylvania, asks permission to salvage boxcars by open burning until June 30, 1971. We say no.

Lipsett has been burning several hundred retired railroad cars each year since 1957 (R. 166) on its property at the south edge of Granite City (Ptr's Ex. C). Immediately to the north are a number of houses that were there many years before Lipsett was (R.90, 111, 122, 138), whose occupants described the smoke from the burning as a horrible nuisance in terms of sight, smell, and cleaning problems, and who vigorously opposed the granting of a variance (R. 96-110, 113-16, 121, 125-27. 133-34, 136-37, 139, 142-43). Cars are burned in order to remove their wooden parts (R. 22), the end product is scrap metal as raw material for the steel industry (R.14).

So far as the record shows, Lipsett made no attempt to comply with the law until May, 1969, when it filed a program for reducing air contaminants (ACERP) with the then Air Pollution Control Board. This plan provided flatly that the practice of open burning would cease by the end of 1970:

> Current "annual" and "lot" bid contracts for condemned railroad cars contaminated with wood will be phased out over the next 18 months with all burning operations to cease by December 31, 1970. The number of wood contaminated units purchased will be reduced by one-third by December 31, 1969. The remaining two-thirds will be phased out in the year 1970, with no wood contaminated units being purchased or burned after December 31, 1970. This phase out period will permit our fulfilling current contractual obligations, an orderly adjustment of our personnel requirements, and the establishment of new sources of scrap metal without wood contamination. (Ex. B, pp. 2-3).

A further provision dealt with the contingency that technology would develop to allow the dismantling of cars containing wood without pollution:

> If, during the phase out period, current research projects present a technologically feasible and economically reasonable method of mechanically removing this wood contamination or

systematically incinerating it, Lipsett Steel Products, Inc., will either install such equipment in a period of time reasonable under the then circumstances or cease all open burning railroad car salvage operations. (Id., p. 3).

The program was approved May 29, 1969, and periodic reports were required (Ex. F).

The promised one-third reduction has plainly not yet been achieved, more than one year after the agreed date. The initial ACERP recited that 486 cars had been burned in 1968; the present petition alleged that 30 to 35 cars are burned each month, or 360 or 420 per year, as contrasted with the 320 level promised by the end of 1969. More than that, the company vice-president testified that Lipsett at the time of the hearing processed approximately 200 cars each month (R.37, 41), a figure that suggests a gross violation of the ACERP condition and a decided lack of candor in the petition since he also said 85 to 90% of the cars available require burning (R.22, 37). There is no evidence of periodic reports.

Lipsett chose to put its trust in the search for control technology. Upon the well-publicized failure of the highly touted Booz-Allen incinerator experiment in June 1970 (R. 25-27), the company's own expert designed his own device, which consists of gas-assisted blowers that hasten combustion, of an enclosure in which the burning is to take place, and of an afterburner to consume the smoke collected in the enclosure (R. 219-21). The blowers have been installed and are in use (R. 183). The company says the blowers alone reduce smoke emissions by eighty to ninety-five percent (R. 169, 230); but several neighbors said the smoke was as bad as it had been before (R.96-100, 114, 125, 134, 136). The remaining equipment is to be installed by June 30, 1971. It is anticipated that upon completion of the project cars can be burned in compliance with the emission regulations, but the designer was not sure (R. 234).

Lipsett contends that to require compliance now would impose an arbitrary and unreasonable hardship, as the statute requires for a variance (Environmental Protection Act, Section 35). It argues that to forbid open burning today would require it to shut down (R. 34, 167), since its automobile scrap business, which is normally of equal importance, has come to a halt due to the inoperability of a press (R. 17). Lipsett also argues that there is no economical alternative way to remove the wood from boxcars (R.23), and that there are too few all-metal cars available to keep the business going (R. 48, 49, 77). To shut down, the company says, would not only deprive it of profits but also put some fifty employees out of work (R. 155). The union joined the variance request (R. 209 and Ptr's Ex. G). In contrast, the company argues, the pollution which would be caused if the variance is granted would be slight: Burning would be conducted only when the wind is away from the neighbors (R.40), only until June 30, and only with the blowers to reduce emissions (R. 38-39).

Lipsett is no small polluter, and the site of its burning

operations is not remotely located. The neighbors made clear, and the EPA confirmed, that the results of blower-assisted burning are rather foul. Each car contains 6000 to 7000 pounds of wood (R. 21). There is tar in boxcar roofs and grease on the axles (R. 246), and oil is used to ignite them (R. 169). Refrigerator cars, which the company also wants to burn, are even worse, since they contain not only wood but "other non-metallics such as the insulation" (R. 38). All 50 cars now stored on the site are refrigerators (R. 74). Petitioner's Exhibit I is a film showing two boxcars burning side-by-side, one with a blower in operation and the other unassisted. After an initial startup period during which time emissions from the car being burned with the aid of a blower are as thick if not thicker than those from the other car, there is an obviously noticeable visual difference in the opacity of the emissions from the two cars. The company's witnesses said this startup period lasted only "twenty or thirty seconds", or "30 to 45 seconds" (R. 169, 220), but they were contradicted not only by EPA testimony that the dark emissions lasted for ten minutes (R. 286), but by the persuasive visual evidence of the company's own film. In either event we are not prepared to require the community to endure even thirty seconds of such foul air. An EPA engineer testified that the smoke emitted during the startup, even with a blower, was #5 Ringelmann (R. 286), and we think that the public should not have to bear exposure to emissions of this sort.

The film leads us to believe that the blower assistance greatly reduces the duration of the emissions of thick black smoke from the burning car. Total burning time is two hours (R. 247), and the emissions after the initial startup period, while significantly reduced, are far from pleasant. Even though the blower-assisted burning may be better than unassisted burning, we are not prepared to say that the effect on the community of the emissions from this process is tolerable. Driving at 70 m.p.h. in a 60 m.p.h. zone may not be as dangerous as driving at 80 m. p. h. would be, but it is in any event unacceptable and a clear violation of the law.

Nor is all harm avoided by burning only when winds are from the north; not only can a wind shift cause odor and dirt problems on residential property (R. 180-81), but the visual nuisance and the considerable contribution to the serious particulate problems of the St. Louis area remain. We cannot say that clouds of smoke (R. 182) are acceptable within sight of downtown St. Louis just because they are blown away from the nearest homes.

As for hardship, we cannot but wonder what, if anything, was being done to find a solution to the burning problem during the four years before the ACERP was approved. While we cannot impose penalties for a delay that was forgiven by the approval of the ACERP, the delay

is relevant to the question of present hardship. The technology of the proposed solution is simple enough, involving only the building of a large enclosure to serve as a combustion chamber (R. 300-302, 325-26); with any real effort we think it could and should have been developed years ago. Moreover, the company flatly promised to stop open-burning by the end of 1970, and it has alleged no facts that suggest any reason why it was less feasible to do so in fact than it had appeared in prospect. The development of the incinerator was a bonus to the company; it is not, however, an excuse for continuing burning past the promised deadline, which itself was more than five years after open burning was expressly forbidden.

We think that when a company obtains special permission, four years after its offensive activities are outlawed, to continue them for another year and a half in order to phase them out without hardship, it should be held to its promise to stop at the end of that time. That some hardship to the employees may result is regrettable, but we cannot allow that to dissuade our denial of a variance in every case, for to do so would be to pull the teeth from the statute. We cannot permit a company to hide behind the skirts of its employees. It is Lipsett's fault if innocent employees must suffer. And we think it better that a few men who profit from the polluting operation be laid off, if that is the case, than that the entire community continue to be subjected to the offensive nuisance of boxcar burning any longer.

Insofar as the company is concerned, it has brought any hardship upon itself by failing to live up to its promise and by not starting earlier to find the necessary technology. As for the employees, we think it important that those who work for polluters recognize that it is in their interest to push as vigorously as they can for correction of the problem. And, as the company says, the time involved is only three months. Moreover, it is not clear that denial of the variance will result in closing the facility. The Agency reminds us that the Booz-Allen experiment showed the feasibility of removing wood with a high-pressure water jet (R. 194, 233, 289), and the company admits some of the cars it buys have no wooden parts (R. 22, 49, 158). Indeed, unless the company has falsified either the number of cars allegedly processed (200) or the number burned (30 to 35) each month, there are plenty of all-metal cars to be had. Similarly, the feasibility of removing wooden parts of railroad cars with simple hand tools should be more thoroughly explored. Although the company said this method was not "economically possible", and alleged that it would not do the job, it conceded it had not tried it (R. 23, 193, 200, 201). This method might require more, rather than fewer employees, but it would seem more appropriate for the company to bear any increased labor costs that hand stripping might require than for the community to continue suffering as a result of this operation. Finally, we see no reason why the breakdown of the automobile press should be held to the detriment of the long-suffering neighbors.

The burden of showing unreasonable hardship is a heavy one, see EPA v. Lindgren Foundry Co., #70-1 (Sept. 25, 1970). It has not been met here. The state has been more than patient with those who defile the air by burning boxcars. We think it is time, six years after the practice was prohibited, to allow the people to breathe the decent air they were promised so long ago.

The petition for variance is denied. Any further open burning will be subject to severe penalties under the statute.

This opinion constitutes the Board's findings of fact, conclusions of law, and order.

(Mr. Aldrich and Mr. Kissel dissented and will file dissenting opinions).

I, Regina E. Ryan, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order this 22nd day of March, 1971.

REGINA E. RYAN
CLERK OF THE BOARD