BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ENVIRONMENTAL PROTECTION AGENCY)
)
)
v.) #70-18
)
CONTAINER STAPLER CORPORATION,)
FEDERAL WIRE MILL CORPORATION,)
and CITY OF HERRIN)

OPINION OF THE BOARD (BY MR. LAWTON):

Complaint was filed by the Environmental Protection Agency against Container Stapler Corporation, Federal Wire Mill Corporation and the City of Herrin alleging in Paragraph 1 that on August 4 and 5, 1970, the corporate Respondents caused and allowed water pollution by discharging contaminants into the City of Herrin Sanitary Sewer System in violation of Section 12(a) of the Environmental Protection Act ("Act") and Regulation SWB-5 of the Illinois Sanitary Water Board, continued in effect by Section 49(c) of the Act.

Paragraph 2 alleges that the City of Herrin caused and allowed water pollution by discharging contaminants and increasing the quantity or strength of contaminants into the waters of the State of Illinois, in violation of Sections 12(a) and 12(c) of the Act, and Regulation SWB-5 aforesaid. The complaint asks for the entry of an Order directing all Respondents to cease and desist the causing and allowing of water pollution and the assessment of penalties against each Respondent in the amount of $10,000 for each violation, plus $1,000 a day for each day such violation shall have been shown to have continued.

Section 12(a) of the Act provides that no person shall:

> "Cause or threaten or allow the discharge of any contaminants into the environment in any state so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act."

Section 12(c) of the Act provides that no person shall:

> "Increase the quantity or strength of any discharge of contaminants into the waters, or construct or install any sewer or sewage treatment facility or any new outlet for contaminants in the waters of this State, without a permit granted by the Agency."

"Water pollution" is defined under the Act, Section 3(n) as "such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish or other aquatic life."

SWB-5, Rule 1.01, provides:

"Any person, firm or corporation engaged in manufacture or other process, including deactivation of processes, in which cyanides or cyanogen compounds are used shall have each and every room, where said compounds are used or stored, so constructed that none of said compounds can escape therefrom by means of building sewer, drain or otherwise directly or indirectly into any sewer system or watercourse."

This case was originally set to be heard on October 30, 1970 at Carbondale, but continued on the motion of James W. Sanders, at that time attorney for Container Stapler Corporation, to December 4, 1970. On the continued hearing date, the firm of Harris & Lambert appeared on behalf of the corporate Respondents and moved for a continuance, alleging by Affidavit, that the firm had not been retained until November 30, 1970 to appear in this matter, that Affiant R. W. Harris had made arrangements to attend a seminar out of the state and that his partner, Gordon Lambert, was on trial. The Affidavit further asserted that counsel were unable to properly prepare the case because of the inadequate time available prior to hearing. The motion for continuance was denied by the Hearing Officer.

The corporate Respondents then tendered a series of motions which will be considered in the order filed. The first alleged that the Environmental Protection Act violated Article II, Section 2, of the Illinois Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, because it constituted an invalid delegation of legislative power, that Respondents were denied equal protection under the laws, that the Act constituted class legislation and compelled a litigant to submit his controversy "to a tribunal of which his adversary is a member and makes his antagonist his judge and does not afford due process of law."

A jury demand was filed, which demand was denied by the Hearing Officer on the grounds that the Environmental Protection Act establishes the Board as an administrative tribunal and makes no provision for the trying of fact by a jury.

Motion to dismiss was next filed on the grounds that the Act violated the Sixth Amendment of the United States Constitution by providing for a monetary penalty in the nature of a fine and "forces Respondents herein to be witnesses against their own interest".

A motion was filed to dismiss the case on the grounds "that if the Hearing Officer is to decide the cause herein by any standard or quantum of truth less than the quantum known as 'beyond a reasonable doubt', the proceeding would deprive corporate respondents of due process of law on the grounds that the penalty provided under the Act is a criminal penalty requiring 'proof beyond a reasonable doubt'."

A motion to dismiss was filed on the grounds that the Act was so vague, uncertain and indefinite that corporate Respondents would be unable to prepare their defense, and thereby be deprived of due process of law under the constitutions of the United States and the State of Illinois.

Further motion to dismiss was filed on the grounds that the Environmental Protection Act, in permitting the appeal of the Board's Orders to the Appellate Court of the State of Illinois, was inconsistent with the Administrative Review Act and thereby deprives the corporate Respondents of due process of law.

All motions to dismiss were taken with the case and referred to the full Board for ultimate disposition. Rule 308(b), Procedural Rules of the Pollution Control Board.

Pursuant to Rule 107(c) of the Rules of the Pollution Control Board, corporate Respondents moved that a certain document (later introduced as Corporate Respondents' Exhibit 1) be stamped "Not Subject to Disclosure". Upon proof made by Respondents, the motion was allowed and the document accordingly so stamped.

Leave was given to all Respondents to file answers instanter. The answer of the corporate Respondents denied the material allegations of the Complaint and contained an affirmative defense asserting that the Respondents' plant was conducted in such a way as to make impossible the discharge of cyanide, or that if, in fact, such discharge took place, it was not technically practical or economically reasonable to eliminate such emissions. The answer of the City of Herrin denied the material allegations of the Complaint and contained two

affirmative defenses,the first alleging, in substance, that it must accept all sewage received by it, that it cannot determine the specific source of the sewage and cannot control and treat certain pollutants discharged into its sewers, which are ultimately discharged by it into discharge channels. The second affirmative defense denied culpability.

The Hearing Officer proceeded with the trial of the cause, at the conclusion of which all parties were given leave to file briefs.

The Board notes the propriety of the Hearing Officer's denial of continuance based upon the retention of counsel shortly before the Hearing. This case had been continued initially upon representation of counsel then representing the corporate Respondents. Allowing a continuance based on substitution of counsel shortly before trial date would permit an endless succession of continuances making a travesty of the Act and preclude the Board from performing its statutory functions. Likewise, the Hearing Officer's determination that no jury could be called was correct. The Environmental Protection Act makes no such provision.

Prior to disposing of the substantive issues of this proceeding, it is necessary to consider the multitudinous motions for dismissal filed by corporate Respondents.

It is the Order of this Board that all motions to dismiss this proceeding be denied. The contentions raised by these motions have either been disposed of in prior decisions of this Board or are so patently without merit that elaborate legal analysis is unnecessary.

The motion relative to requiring proof of guilt beyond a reasonable doubt misconstrues the nature of the proceeding. While the Act provides for misdemeanor prosecution, the present proceeding is not one. The instant case is a civil action calling for the entry of a cease and desist order and the imposition of penalties and does not constitute a criminal charge or require proof in excess of a preponderance of the evidence. Likewise,the assertion that the judge and prosecutor are one and the same manifests a profound misunderstanding of the basic legislation, establishing the Environmental Protection Agency as the prosecutor, and the Pollution Control Board as the court.

The motion for dismissal on the grounds that representatives of Respondents are compelled to testify against themselves was disposed of in Environmental Protection Agency v. Neal Auto Salvage, #70-5, dated 10/28/70, where Respondent was called by the Environmental Protection Agency as an adverse witness. There we said:

"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 (R.17). 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. <u>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."</u> (Emphasis supplied).

It is manifest that a motion in anticipation of the possibility of self-incrimination cannot be made prior to the calling of a witness. In the Neal case, (supra) the witness was called under Section 60 of the Civil Practice Act. At the time the motion was filed in the instant case, no one had yet testified and representatives of Respondents, when they did testify, were called by their own counsel and not the Environmental Protection Agency.

The constitutional arguments raised on the question of vagueness and absence of standards to support a delegation of legislative authority, have been previously considered by this Board in Environmental Protection Agency v. J. M. Cooling, #70-21, decision dated 12/9/70. The relevant provisions of the statute and the regulations under which the present proceeding was tried are set forth above. The specific regulation with which corporate Respondents are charged expressly prohibits the discharge of cyanide into a sewer system or water course. There is no question that this regulation is specific, detailed and understandable. Section 12 of the statute contains a series of express prohibitions regarding the discharge, increase and deposits of contaminants so as to cause water pollution in Illinois. A violation of a regulation constitutes a violation of the Act. See 12(a). The Board, under Section 13, is authorized to adopt regulations with regard to the enactment of water quality and effluent standards, issuances of permits relative to equipment having

a potential of water pollution, standards for the certification of sewage works and requirements and standards for monitoring contaminant discharges at their source, in addition to other areas of regulation not relevant to this proceeding. As we said in Cooling:

> "Statutory and regulatory provisions, far less detailed than the foregoing, were held to withstand the challenge of vagueness in the case of Department of Health v. Owens Corning Fiberglass Corporation 242A. 2nd 21 1968, affirmed 250A, 2nd 1969, where the Defendant was found guilty of violating a regulation enacted pursuant to a New Jersey statute which merely prohibited the causing, suffering, allowing or permitting the emission into the outdoor air of substances in quantities resulting in "air pollution". Air pollution was defined under the statute as the "presence in the outdoor atmosphere of substances in quantities which are injurious to plant or animal life or to property or reasonably interfere with the comfort and enjoyment of life and property within the state..."
>
> The New Jersey statute and regulations, in effect, adopted a general nuisance approach without the specification found in the Illinois Act and regulations, which not only detail what is prohibited, but likewise specify what must be done affirmatively in the operation of facilities such as conducted by Respondent."

See also Metropolitan Sanitary District of Greater Chicago v. U. S. Steel Corporation 41 Ill. 2d, 440, 243 N. E. 2d 249.

The motion to dismiss on the grounds that the Environmental Protection Act, in permitting direct appeals to the Appellate Court, contravenes the Administrative Review Act, is wholly without merit. The jurisdiction of the Appellate Court of Illinois to consider administrative appeals is set forth in Article VI, Section 6, of the Illinois Constitution:

> "The Appellate Court shall have such powers of direct review of administrative action as provided by law."

Section 41 of the Environmental Protection Act has made such a provision.

We now consider the substantive aspects of the case. On August 4 and 5, 1970, Murl Teske, Environmental Control Engineer employed by the Environmental Protection Agency obtained water

samples from discharges emanating from the south wall of the plant operated by the corporate Respondents (R.39), where the effluent from the plant entered the municipal sewer system. Two samples were obtained on each day at separate points of discharge from Respondents' building. These samples were taken to the laboratory of the State Department of Health and analyzed for cyanide content. The sample taken on August 4, 1970 from the southeast corner of the plant showed cyanide content in the amount of 0.75 milligrams per liter. The sample obtained from the middle of the south wall on August 4 disclosed no cyanide content. The August 5 samples were taken at the same locations. On this occasion, Teske treated the sample bottles with pellets of sodium hydroxide to raise the pH of the liquid and prevent the cyanide from escaping as gas (R.52). These samples disclosed a cyanide content of 5.2 milligrams per liter from the discharge at the southeast corner of the plant and a content of 2.7 milligrams per liter in the discharge from the middle of the south wall of the plant. Effluent samples were obtained from the Herrin sewage treatment plant on August 5, which were likewise analyzed at the laboratory and disclosed a cyanide content on that date of .14 milligrams per liter. Subsequent testings were made by Teske at both the plant of the Respondents and the sewage treatment plant which disclosed the presence of cyanide in both the factory effluent and the sewage treatment plant effluent. (See Environmental Protection Agency's Exhibits 7 through 20, inclusive, R.66,67,79). Tests as late as October 28, 1970, disclosed cyanide content in the factory effluent. A test on October 16, 1970, disclosed cyanide in the sewage treatment plant effluent.

Container Stapler Corporation and Federal Wire Mill Corporation, while separate corporate entities, have a common management and occupy the same factory building in Herrin, Illinois. Container Stapler Corporation is a manufacturer of staples and stapling machines; Federal Wire Mill Corporation is a wire manufacturer processing finished wire in a variety of ways (R.228). Cyanide is used in the copper plating process of both companies (R.201 and following). In connection with the copper plating, a Pfaudler Cyanide Recovery Unit is used. This unit recovers the cyanide-bearing waste and rinse waters from three copper cyanide plating lines, recycling the copper and cyanide-bearing effluent and the rinse water in a closed circuit (R.233), the cyanide returning to the plating tank and the rinse water in distilled form, returning to the rinse tank. Installation of this unit had been approved by the State Sanitary Water Board on March 19, 1968. (Corp. Res. Exhibit 2). According to the testimony, no cyanide-containing water can leave the plant or get into the municipal sewage system. The recovery unit is located in a holding pit surrounded by concrete. Residue not susceptible to reclamation containing cyanide and other

effluents is held in a holding tank and extracted by hose to a tank truck, removed from the premises and ultimately disposed of by incineration (R.213,237). The cyanide recovery system is connected to two plating processes by piping, covering distances of fifty and twenty-five feet, respectively (R.244). The relative location of the component units is shown on Respondents' Exhibit 1. The copper plating process provides for the wire to be fed into the plating tank, where it passes through the plating bath and is electroplated, drawn down to final size and finished. The finished product is placed into barrels. Rinse water used in the cleaning eliminates all remnants of the cyanide-bearing plating solution and is recycled in the Pfaudler unit as indicated. (R.250-252). According to testimony, there is no place where water residue from spools of wire can spill on the floor, (R.253) nor can emissions from the cyanide recycling process reach the sewer system.

The evidence introduced by the City of Herrin does not contradict the finding of cyanide in its effluent. On the contrary, the evidence indicated that the city itself had been aware of this situation by its own analysis for some time (R.186), without being able to determine its origin. Employees of the city sewage treatment plant testified that they are in the process of making installation to detect the presence of cyanide in its effluent (R.173, R.181).

The evidence leads to the following conclusions:

The corporate Respondents, in installing the Pfaudler recycling unit, have made a conscientious and determined effort to eliminate cyanide from their effluent and from the sewage facilities of the city and the waters of the State. However, irrespective of their efforts, some cyanide has been escaping from the plant through its water discharge. Exactly how this occurs is not established by the evidence. However, the fact that it does occur has been adequately demonstrated.We feel that the corporate Respondents should be ordered to cease and desist the discharge of cyanide in their water effluent into the sewers of Herrin, subject to the terms and conditions hereinafter set forth. The factual circumstances do not call for the imposition of a monetary penalty and none will be assessed.

As far as the City of Herrin is concerned, we must find it not guilty of the violation charged. Clearly, SWB-5 relating to manufacture or processes utilizing cyanide is not applicable. No other effluent standard for cyanide has yet been promulgated by the Board nor has there been proof that water pollution has been caused by the cyanide emissions, so as to constitute a violation of the Act. While the Board might be asked to take judicial notice of the toxic effect of cyanide as an abstract proposition, evidence is lacking in this

record that the cyanide contained in the effluent involved in this proceeding is of a magnitude to cause water pollution as defined in the Act. Notwithstanding this finding, it should be made clear that a municipality can be held responsible for its effluent even though the pollutant is contributed by others, and be found in violation of the relevant statutory and regulatory provisions upon proper proof of violation. The alternative would be the enactment of a comprehensive sewer code.

The foregoing Opinion constitutes the finding of fact and conclusions of law by the Board.

IT IS THE ORDER of the Pollution Control Board:

1. The City of Herrin is not found to be in violation of Sections 12(a) and 12(c) of the Environmental Protection Act and Regulation SWB-5 of the Illinois Sanitary Water Board, continued in effect under Section 49(c) of the Act.

2. Container Stapler Corporation and Federal Wire Mill Corporation are found to be in violation of Regulation SWB-5 of the Illinois Sanitary Water Board, continuing in effect under Section 49(c) of the Act, which regulation violation likewise constitutes a violation of Section 12(a) of the Environmental Protection Act. Container Stapler Corporation and Federal Wire Mill Corporation are hereby ordered to cease and desist the discharge of cyanide, directly or indirectly, into the sewer system of the City of Herrin. Provision shall be made to monitor the effluent from each possible source of cyanide-containing water. Each outlet of water containing cyanide shall be thoroughly guarded to prevent escape. Precautions shall be taken for the prevention of spillage at all locations where such possibility exists, and specifically, where metal plating takes place, where metal products are rinsed, where movement of cyanide-bearing material occurs, and where effluent is removed from tanks and placed in holding facilities or tank trucks. Ongoing surveillance to assure the effectiveness of the Pfaudler Recovery Unit shall be conducted. Inspection and monitoring of all of the locations and areas above set forth shall be conducted and reports made to the Agency no less than every two months relative to the effectiveness of the foregoing program.

I, Regina E. Ryan, certify that the Board adopted the above opinion and order on ____________, 1971.