

ILLINOIS POLLUTION CONTROL BOARD
September 15, 1994

SANGAMON COUNTY,)
)
 Complainant,)
)
 v.) AC 94-16
) (Administrative Citation)
 LEROY DONLEY and DONLEY, INC.,)
 an Illinois Corporation,)
)
 Respondents.)

ROBERT SMITH, ASSISTANT STATE'S ATTORNEY, SANGAMON COUNTY,
APPEARED ON BEHALF OF COMPLAINANT;

DELMAR DONLEY APPEARED ON BEHALF OF RESPONDENT DONLEY, INC.

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

This matter comes before the Board on an administrative citation complaint filed March 21, 1994 pursuant to Section 31.1 of the Environmental Protection Act (Act) (415 ILCS 5/31.1 (1992)) by Sangamon County. The citation alleges that respondent Leroy Donley, the present owner of the property, and respondent Donley, Inc., violated the open dumping provisions of the Act (415 ILCS 5/21), specifically as those provisions relate to the occurrence of litter and open burning at the site.

Donley, Inc. filed a petition for review on April 4, 1994. Accordingly, a hearing was held on June 29, 1994 before hearing officer Deborah L. Frank. Sangamon County presented one witness, Mr. Brian Wood, a solid waste inspector for Sangamon County, Department of Public Health. Delmar Donley testified on behalf of Donley, Inc. The filing of post-hearing briefs was waived, and no briefs were filed.

MOTION FOR DEFAULT

At the hearing, the attorney for Sangamon County moved that the Board enter a default judgment against Leroy Donley, stating that Leroy Donley hasn't appeared at hearing and did not file a petition for review of the citation. (Tr. at 21.)

Our review of the record indicates that Leroy Donley has not been properly served with the administrative citation. Although Sangamon County State's Attorney's letter of April 6, 1994 to the Clerk of the Board states that service was had upon Leroy Donley and Donley, Inc., only a single, signed certified mail receipt solely addressed to Donley, Inc. was attached to the letter as

proof of service. The Board finds that since service was not had upon Leroy Donley, the administrative citation should be dismissed as against Leroy Donley. Today's order will include this dismissal. Accordingly, the motion for default judgment against Leroy Donley is hereby denied. This finding regarding Leroy Donley does not affect the service which was made upon Donley, Inc.

We next turn to the merits of findings of violation as alleged in the administrative citation against respondent Donley, Inc.

APPLICABLE LAW

The administrative citation issued against respondents Leroy Donley and Donley, Inc., alleges violation of subsections (1) and (3) of Section 21(p) of the Act. Section 21(p) provides that no person shall in violation of Section 21(a) of the Act:

cause or allow the open dumping of any waste in manner which results in any of the following occurrences at the dump site:

1. litter;

* * *

3. open burning;

Where a petition for review has been filed as was filed by respondent Donley, Inc., Section 31.1(d)(2) of the Act states that if, based on the record, the Board finds the alleged violation occurred, then the final order issued shall include a finding of violation as alleged in the citation, and shall impose the penalty specified in subdivision (b)(4) of Section 42, i.e., \$500 per violation. Section 31.1(d)(2) further provides that if the Board finds the violation resulted from uncontrollable circumstances, it shall adopt a final order which makes no finding of violation and which imposes no penalty. Thus, a two-part inquiry is required: first, the Board must determine whether there was a violation based on the record in this case, and if so, the Board must then determine whether the violation was caused by uncontrollable circumstances.

BACKGROUND

The subject property consists of 8.33 acres and is located at the corners of Sandhill Road and Peoria Road in Springfield Township. The location is designated with Illinois Environmental Protection Agency site code no. 1678220075. Ownership of the property is recorded as belonging to Leroy Donley and Illinois National Bank under a specified trust number.

At hearing, Brian Wood testified that he first inspected the property on September 20, 1993, and observed smoke and flames coming from a pile of railroad ties. He stated that the pile also contained what appeared to be the metal coils of a box spring mattress. (Tr. at 6-7; See also Compl. Exh. 3, photos 19 and 20.) He stated that he also observed a second pile of railroad ties that was not burning, a pile of broken wooden pallets, and two to three unmounted truck tires. (Tr. at 6-7, Compl. Exh. 3 photos.) He testified that subsequent to the September 20 inspection, the Department of Public Health sent an inspection report and administrative warning notice to Leroy Donley, which noted alleged violations of open dumping, and of causing and allowing open burning and litter. (Tr. at 7; Compl. Exh. 3.) Donley, Inc. responded to the administrative warning notice by letter dated December 3, 1993. The letter stated that the pallets would be cleaned up, the tires removed, and the burning discontinued. (Compl. Exh. 4.) On January 31, 1994, Mr. Wood again inspected the property and found the remains from the pile of burning railroad ties (charred wood) that appeared to have been pushed over a slope into a ravine area. (Tr. at 9, 11; Compl. Exh. 5, photos 14 and 15.) The tires were no longer at the site. (Tr. at 9.) The second pile of railroad ties was at the site and the broken pallets were still at the site. (Tr. at 9, 11; Compl. Exh. 5, photos 13 and 16.) The inspector testified that he considered the pallets to be litter because they were broken, unorganized, and appeared to be waste material. (Tr. at 14.)

Delmar Donley testified that the site is used as a storage yard and that a previous tenant had used the site as a storage yard. Regarding the railroad ties, he stated that they had been neatly stacked, but were set on fire by someone. He said that the fire department came out and the burning ties were pushed out of the way of the other ties so they would not all burn. He said that he sells the railroad ties so he did not want to burn them. (Tr. at 15.) He further testified that there was no further burning after the fire department came out and that there was no further burning after the letter was sent to Sangamon County. (Tr. at 16.) He did not state any dates when the fire department came out, only mentioning that the pictures show the "remains of the original time that they were set on fire" (Tr. at 16). He testified that there is a gate on the property to keep intruders out, and that he does not know who set the railroad ties on fire. (Tr. at 17-18.) Concerning the present condition of the railroad ties, he stated that there continues to be a pile of stacked ties on the property, and that the five or six ties remaining from the fire are still down the bank of the ravine. (Tr. at 17.)

Regarding the pallets, Delmar Donley stated that there are only eight to fifteen pallets on the property, and that these pallets were used to block off one of the roads so that truck drivers would know which road to use. (Tr. at 16.) Pallets have

been used in this manner for probably two years. (Tr. at 17.) He said there are two or three pallets remaining on the property. These he still uses to block off the road. (Tr. at 16-17.)

DISCUSSION

The Board must first determine whether on January 31, 1993, respondent caused or allowed open dumping on the site which resulted in litter and open burning. It is the complainant's burden to make this showing to the Board. (IEPA v. Lakewood Homes & Development Co., Inc. (March 25, 1993), AC 92-41, _____ PCB _____; Section 31.1(d)(2) of the Act.)

Section 3.24 of the Act defines "open dumping" as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill". (415 ILCS 5/3.24 (1992).) Section 3.31 of the Act defines "refuse" as "waste" which is defined in the Act as, inter alia, "garbage * * * or other discarded material, resulting from industrial, commercial, mining and agricultural operations, * * *". (415 ILCS 5/3.53 (1992).)

The Fifth District Appellate Court in Illinois Environmental Protection Agency v. Illinois Pollution Control Board (5th Dist. 1991), 219 Ill.App.3d 975, 579 N.E.2d 215, 162 Ill.Dec. 401, in reviewing an administrative citation involving consolidated refuse at a demolition area, presented an analysis of whether open dumping is happening at a site. The court focused on whether disposal was occurring at a location, citing the definition of disposal in the Act at 415 ILCS 5/3.08 (1992):

"Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste * * * into or on any land or water or into any well so that such waste * * * or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

The Board finds that based on the record the stacked railroad ties were not refuse since they were not discarded material, but were stored for future sale. Sangamon County did not rebut Delmar Donley's testimony here. However, there is no evidence that at the time of the January 31, 1993 inspection the previously burned railroad ties were being stored for future sale. In fact, they had been pushed into the bank of a ravine. The Board finds that these charred ties constitute a consolidation of refuse at a disposal site that does not meet the requirements of a sanitary landfill. Therefore, the complainant has shown that respondent Donley, Inc. caused or allowed open dumping as was found by inspection on January 31, 1993.

Regarding the pallets, the Board finds that using refuse or waste, i.e., discarded material, to block a road constitutes disposal under the definition in the Act. Since the use of waste material to block a road is a method of disposal at a site that is not a sanitary landfill, the Board finds that respondent Donley, Inc. caused or allowed open dumping at the site.

In St. Clair County v. Louis Mund (August 22, 1991), AC 90-64, 125 PCB 381, the Board adopted the definition of litter contained in the Litter Control Act:

"litter" means any discarded, used or unconsumed substance or waste. "Litter" may include, but is not limited to, any garbage, trash, refuse, debris * * * abandoned vehicle * * * or anything else of an unsightly or unsanitary nature which has been discarded, abandoned or otherwise disposed of improperly. (415 ILCS 105/1.)

The Board finds that the open dumping of waste on the property resulted in litter. The pallets and charred railroad ties observed on the property were discarded materials constituting litter.

Open Burning

There is no evidence that the railroad ties were discarded material and not stored for future sale at the time of the September 20, 1993 inspection. However, the photographs and the testimony indicate that other debris, including a mattress box spring was on the property and burning at the time of the September 20, 1993 inspection. Complainant does not contest that the burning occurred at the site on this occasion. Evidence of this past burning remained on the property at the time of the January 31, 1994 inspection. Therefore, the Board finds that respondent Donley, Inc. caused or allowed open dumping that resulted in open burning occurring at the site. Respondent Donley, Inc. can be found to have allowed the open burning even though its agents may not have performed the burning and may have attempted to secure the property by a gate. See Illinois Environmental Protection Agency v. Gordon (2/7/91), AC 89-156, 118 PCB 309, 312, citing Freeman Coal Mining Corp. v. Pollution Control Board (1974), 21 Ill.App.3d 157, 313 N.E.2d 616:

[T]he fact that the discharges were unintentional, or occurred despite efforts to prevent them, is not a defense. The owner of the property that creates the pollution has a duty, imposed by the legislation, to take all prudent measures to prevent the pollution. The efforts by the landowner to control or treat the pollution go to the issue of mitigation, not to the

primary issue of liability. [citations omitted.]
(Gordon at 312.)

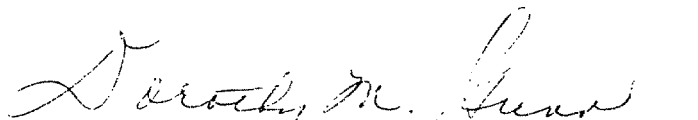
In summary, the Board finds that Sangamon County has met its burden of proof that the alleged violations occurred. Based on the facts and law presented in this case, the Board concludes that Donley, Inc. did cause or allow the open dumping and open burning that occurred on the property. Therefore, Donley, Inc. is in violation of Section 21(p)3 of the Act. The Board further concludes that Donley, Inc. did cause or allow the open dumping and litter that occurred on the property. Therefore, Donley, Inc. is in violation of Section 21(p)1 of the Act.

INTERIM ORDER

1. This administration citation is hereby dismissed as against respondent Leroy Donley only.
1. Respondent Donley, Inc., is hereby found to have violated 415 ILCS 5/21(p)(1) and (3) (1992).
2. Sangamon County is hereby directed to file a statement of its hearing costs, supported by affidavit, with the Board and with service on respondent Donley, Inc., within 14 days of this order. Within the same 14 days, the Clerk of the Board shall file a statement of the Board's costs, supported by affidavit and with service upon respondent Donley, Inc.
3. Respondent Donley, Inc. is hereby given leave to file a reply to the filings ordered in paragraph 2 within 14 days of receipt of that information, but in no case later than 40 days after the date of this order.
4. After the deadline for filing such information and reply thereto has expired, the Board will issue a final order assessing the statutory penalty, and making the appropriate award of costs.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the 15th day of September, 1994, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board