

ILLINOIS POLLUTION CONTROL BOARD  
March 26, 1992

RONALD. E. TEX and SUSAN D. TEX, )  
 )  
 Petitioners, )  
 )  
 v. ) PCB 90-182  
 ) (Enforcement)  
 S. SCOTT COGGESHALL and )  
 COGGESHALL CONSTRUCTION CO., )  
 CHESTER BROSS, JEFF BROSS and )  
 CHESTER BROSS CONSTRUCTION CO., )  
 )  
 Respondents. )

ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the March 12, 1992 motion for reconsideration filed by respondents Chester Bross, Mike Bross, Jeff Bross and Chester Bross Construction Company (collectively Bross). Bross seeks reconsideration of the Board's February 6, 1992 order denying Bross' motion to dismiss Bross as respondents.

As noted in the Board's February 6, 1992, the hearing officer granted respondent Coggeshall's motion to add Bross as respondents because Bross managed and controlled the asphalt plant which is the subject of this citizen enforcement action during period of the alleged violation. Bross sought dismissal on the basis that it is no longer in control of the property and, therefore, cannot cease and desist from any alleged violations or bring the plant into compliance. The Board denied the motion to dismiss reasoning that while Bross may not be able to cease and desist from future violations, the Board could direct Bross to pay a penalty upon a finding of violation. The Board noted that it may impose a penalty even if none was requested by complainant. (See Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1042(a).)

In its motion for reconsideration, Bross asserts that, in denying the motion to dismiss, the Board did not consider the questioning between the hearing officer and complainant concerning the scope of relief sought. Bross contends that the record establishes that complainant restricted its relief to a cease and desist order. Bross argues that they should be dismissed because "Bross was never given notice of the any potential imposition of penalties" and was "allowed to leave the hearings based on the fact that only cease and desist orders were requested and that those were the only issues before the hearing officer." According to Bross, their due process rights would be violated if the Board imposed a penalty against them because "they were not able to examine or cross-examine witnesses or

submit other evidence at the hearing." Bross also argues that the imposition of penalties in this case would be inappropriate.

The record establishes that a discussion took place at the January 8, 1992 hearing concerning the type of relief sought by complainant. (Tr. 8-12.) The hearing officer stated that because this was a citizen complaint, he was not aware that there could be any type of monetary damages or attorney fees awarded. (Tr. 8, 12.) Complainant stated that they wanted a cease and desist order and "would be asking ... that the Pollution Control Board grant any and all relief that it had the authority to grant. So if it has any authority beyond that, we would not simply limit it to that." (Tr. 11.) Again, the hearing officer asked if there was any authority for any relief beyond a cease and desist order or an order to bring respondent into compliance stating that he was not aware of any. (Tr. 11.) Complainant again stated that they would want a cease and desist order and to achieve compliance. (Tr. 12.) Bross then made an oral motion to dismiss to which complainant and Coggeshall responded. The hearing officer stated that he did not have the authority to rule on Bross' motion to dismiss. (Tr. 13, 16.) After a short recess, the hearing officer noted for the record that Bross' attorney had left the hearing and that Bross would not be represented for the remainder of the hearing. (Tr. 20.) At the next day of hearing, the hearing officer stated:

[T]he Bross Group is represented in this proceeding by Mr. [Charles R.] Svoboda and his firm were not dismissed by me. I did give Mr. Svoboda leave to ... file a motion to dismiss. However, off the record, I did explain to him before he decided to leave the proceeding that he is still a party to this proceeding and that his leaving was with whatever risk there may be to him as far as any possible fines or penalties that may be assessed against his client. (Tr. 1/9/92 at 190.)

Based upon a review of the transcripts, the Board finds Bross' statement that they were "allowed" to leave the hearing a gross misrepresentation of what actually occurred at hearing. Mr. Svoboda left the hearing choosing not to present testimony or cross-examine witnesses knowing full well that Bross' motion to dismiss was not, and would not be, ruled on by the hearing officer. It is ludicrous for Bross to now complain that they were denied due process because they did not participate at hearing when their attorney left a hearing at which Bross was still a party. Additionally, while the record reveals that the hearing officer did not advise the parties that the Board has the discretion to impose penalties, the Environmental Protection Act (Act) does so provide (Ill. Rev. Stat. 1989, ch. 11 1/2, par. 1042(a)) such that Bross' counsel should have been aware that the imposition of a penalty could result from a finding of violation.

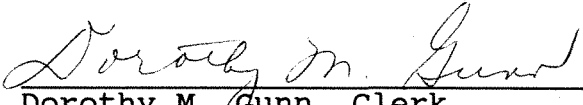
The Board also notes that a finding of violation alone, absent any cease and desist order or penalty, has certain adverse ramifications for a respondent. (See e.g., Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1042(h)(5).) Contrary to Bross' contention, the Board is certainly under no obligation to advise each and every respondent of the provisions set forth in the Act.

Bross voluntarily chose not to participate in the hearing based upon its mistaken belief that the only possible remedy would be a cease and desist order or directives aimed at achieving compliance. By doing so, Bross has taken the risk that the Board may find them in violation and impose a penalty in a case where they chose not to exercise their right to present evidence and conduct cross-examination. Bross' remaining arguments regarding whether imposition of a penalty is appropriate in this case are irrelevant to determining whether the Board should reconsider its denial of Bross' motion to dismiss. Whether or not complainant has established that Bross committed a violation of the Act and whether any remedy or penalty will be imposed against Bross will be determined by this Board after a complete review of the record.

The Board has reconsidered its February 6, 1992 order denying Bross' motion to dismiss and finds no basis upon which to reverse its denial.<sup>1</sup> The Board again finds no basis to dismiss Bross as respondents in this action.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 26<sup>th</sup> day of March, 1992 by a vote of 7-0.

  
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 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board

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<sup>1</sup> Because the Board denies the motion to dismiss, it need not wait for the filing of a response. (35 Ill. Adm. Code 101.241(b).)