

ILLINOIS POLLUTION CONTROL
November 21, 1991

MICHAEL L. CHRISTIANSON,)
)
 Complainant,)
)
 v.) PCB 90-59
) (Enforcement)
 THE AMERICAN MILLING CO.,)
)
 Respondent.)

MICHAEL CHRISTIANSON PRO SE.

MICHAEL C. O'NEIL, KECK, MAHIN & CATE, ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the April 16, 1990 filing of a formal complaint filed by complainant Michael L. Christianson (Christianson) against respondent The American Milling Company (American) pursuant to Section 31(b) of the Environmental Protection Act. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1031(b).) Christianson alleges that noise emitted from American's property unreasonably interferes with complainant's enjoyment of life and lawful activity. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1024; 35 Ill. Adm. Code 900.102.) Hearings were held in Pekin, Illinois on July 27, 1990 and September 6, 1990 at which members of the public attended.

FACTS

Christianson has lived in the Normandale area, outside the city of Pekin, for approximately ten years. (Tr. 15, 184.) Normandale is an isolated residential neighborhood in an area otherwise zoned as industrial. (Tr. 229.) The streets of the neighborhood are named after local industries. American is a grain processing plant located on the Illinois River. (Tr. 150.) American receives grain by-products by truck or rail into an unloading drag conveyor through a trough. (Id.) The conveyor discharges into an enclosed elevator leg which discharges into an enclosed 16-inch drag conveyor that extends over three hopper bins. (Id.) The grain by-product is discharged from the bins at variable speeds into screw conveyors which set the proportion of the feed mix. (Tr. 150-51.) The product is collected on another drag conveyor and is discharged into an enclosed elevator leg. (Id.) That elevator leg discharges into an enclosed pant leg bin with two hoppers. (Tr. 151.) Each of the hoppers discharges into a pellet mill before being discharged into a cooler. (Id.) After

moving through the cooler, the pellets are discharged to another conveyor and into a barge. (Id.)

In addition to American, the following facilities are located in the surrounding area: Commonwealth Edison and Pekin Energy operate 24-hour-a-day energy plants; Quaker Oats processing plant; Midwest Grain's alcohol production plant; and Tazewell Machine Works, a brass foundry. (Resp. Ex. 1; Tr. 233-41.) Two railroad lines abut the waterway below the Peoria Lock and Dam. (Tr. 229.)

Christianson's complaint alleges that all activities in and around his home, including sleep, have been disrupted as a result of the "loud and incessant noise generated by operations equipment, operators and vehicles." (Complaint at 13.) Christianson alleges that the noise occurs 24-hours-a-day except for an occasional brief shut-down. (Id.) Christianson requests that American be ordered to take whatever actions are necessary, suggesting use of "soundproofing, landscaping, noise barriers, limiting hours of operation and prohibiting drivers from pounding on trucks, trains and bins with hammers ..., installation of mufflers, noise deadeners or sound-cancelling devices." (Id. at 13-14.)

Mr. Christianson testified that the noise from American could be heard 24 hours a day. (Tr. 183.) The most disruptive noise is the pounding and hammering on the delivery trucks and train cars to loosen the gluten. (Tr. 184-85.) Christianson also complained about the vibrators used to loosen the grain, the idling of truck engines and crashing of end loaders. (Tr. 185.) Christianson testified that the noise from American disrupts every activity, including entertaining and sleeping. (Tr. 184, 186.) Christianson also testified that he was able to discern the sounds as coming from American's plant rather than from the other industrial facilities in the area. (Tr. 190-201.)

Several witnesses living in the Normandale area testified on behalf of petitioner. (Tr. 21-90.) Again the common complaint centered on the pounding on trucks and train cars, and the sound of vibrators, all hours of the day and night. (Tr. 23-27; 43; 56-57, 66; and 86.) The witnesses testified that the noise interfered with sleep and daily normal activity. (Tr. 27-29; 43; and 60.)

Dave Jump, owner of American, testified both as an adverse witness and on behalf of American. American began operations in September of 1985 (Tr. 228), employs 13 full-time employees (Tr. 241) and spends approximately \$20 million locally per year (Tr. 241). Jump testified that American had adopted a policy of not allowing its employees to beat on the trucks and cars to loosen the gluten and warned independent truckers that they would not be used if they violated this policy. (Tr. 99, 111 and 244.) Signs were posted telling drivers not to pound on the trucks. (Tr. 251.) Jump testified that American bought several trucks so that it would be able to control the pounding by using fewer independent truckers

and had enclosed the conveyors in part to reduce noise. (Tr. 111; 252.) Jump also testified that he could hear noises from other industries while at the American plant, including pounding and hammering from Pekin energy and Midwest Grain. (Tr. 258-59, 267.)

Scott Wenger, a part-time employee of American who lives in the Normandale Area, testified that he can hear noise from Commonwealth Edison, Pekin Energy and American and from the trains when in his backyard. (Tr. 461-62.) Wenger testified, however, that he cannot hear noise when he is inside and has no trouble sleeping. (Tr. 464.)

Bruce Stockmeier, manager of Industrial Hygiene Services and Environmental Science and Engineering, testified regarding a sound study prepared at the request of American. (Tr. 294; Resp. Ex. 7.) Christianson attempted to introduce the testimony of Gregory Zak, employed by the Illinois Environmental Protection Agency to supervise noise control at Superfund sites, and a study prepared by Zak suggesting certain remedial actions to reduce the noise emanating from American. (Tr. 477, 502-04.) However, the hearing officer granted American's objection to the introduction of both Zak's testimony and the study. (Tr. 508-09.)

DISCUSSION

This is a "noise nuisance" action pursuant to Section 24 of the Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1024) and 35 Ill. Adm. Code 900.102. (Complaint at 12.) Section 24 of the Act provides that "[n]o person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity" Accordingly, the Board's rules define noise pollution as "the emission of sound that unreasonably interferes with the enjoyment of life or lawful business or activity" and prohibit the emission of such noise pollution beyond the boundaries of one's property. (35 Ill. Adm. Code 900.101 and 900.102.) Various noise enforcement cases decided by the Board include: Kaji v. R. Olson Mfg. Co., Inc., PCB 80-46 (1981), aff'd, 109 Ill. App. 3d 1168, 441 N.E.2d 188 (1982); Citizens of Burbank v. Clairmont Transfer Co., PCB 84-125 (1986); John W. Eirlich v. John Smith, PCB 85-4 (1987); Thomas & Lisa Annino v. Browning-Ferris Industries, PCB 97-139 (1988); Anthony Kochanski v. Hinsdale Golf Club, PCB 88-16 (1989), rev'd, 197 Ill. App. 3d 634, 555 N.E.2d 31 (1990); William Brainerd v. Donna Hagen et al., PCB 88-171 (1989); Brian J. Peter v. Geneva Meat and Fish Market, PCB 89-151 (1990); Will County Environmental Network v. Gallagher Asphalt, PCB 89-64 (1990); Kvatsak v. St. Michael's Lutheran Church, PCB 89-182 (1990); Zivoli v. Prospect Dive and Sport Shop, PCB 89-205 (1991); Village of Matteson v. World Music Theatre, PCB 90-146 (1991).) The instant complaint does not rely on the Board's numerical sound limitations to prove a violation.

Before addressing the main issue in this case, the Board must address American's contention that "compliance with the objective regulatory standards governing sound emissions will preclude finding a violation of the public nuisance regulatory provision." (Resp. Brief at 12; Tr. 316.) According to American, "[t]he objective uncontroverted evidence of American's ... compliance with the regulations should be a complete defense to Complainant's action." (Id.)

It is well-established that a cause of action for noise pollution exists independent of the numerical noise standards set forth in Subtitle H of the Board's regulations. (Illinois Coal Operators Assoc. v. PCB, 59 Ill.2d 305, 319 N.E.2d 782, 785 (year); Annino v. Browning-Ferris Industries of Illinois, PCB 87-139 at 9 (August 18, 1988).) "[C]ompliance with one set of regulations (the numerical noise emissions values) does not present an absolute bar to a finding of violation regarding another set of regulations (the general nuisance noise prohibitions)." (Will County Environmental Network v. Gallagher Blacktop, PCB 89-64 at 8 (January 11, 1990).) Consequently, while a properly prepared study establishing compliance with the numerical noise standards may be relevant in a nuisance action, it does not preclude a finding of violation based upon unreasonable interference.

Section 900.103(b) of the Board's noise regulations sets forth measurement procedures and provides that "[a]ll measurements and all measurement procedures to determine whether emissions ... comply with 35 Ill. Adm. Code 901 shall be in conformity with ANSI ... and shall, with the exception of measurements to determine whether emissions ... comply with 35 Ill. Adm. Code 901.109, be based on LEQ averaging, as defined in 35 Ill. Adm. Code 900.101, using a reference time of one hour." (See also, In the Matter of: General Motors Corp. Proposed Amendments to 35 Ill. Adm. Code 900.103 and 901.104, R83-7 (January 22, 1987); Village of Matteson v. World Music Theatre, PCB 90-146 (September 12, 1991).) While the study introduced by American (Resp. Ex. 7) may or may not show compliance with instantaneous values (Tr. 402), the study is not based upon LEQ averaging using a reference time of one hour and was not prepared in accordance with Board regulations. (Tr. 372-73, 379, 480, 549-551.)

The threshold issue in any noise enforcement proceeding is whether the sounds have caused some type of interference with the complainant's enjoyment of life or lawful business or activity. If there is no interference, no "noise nuisance" violation is possible. (Zivoli v. Prospect Dive and Sport Shop, PCB 89-205 at 9 (March 14, 1991).) Interference is more than an ability to distinguish sounds attributable to a particular source. Rather, the sounds must objectively affect the complainant's life or business activities. (Id.; Kvatsak v. St. Michael's Lutheran Church, PCB 89-182 (August 30, 1990).)

The testimony given at hearing establishes that the sounds emitted by American have caused interference with the complainant's enjoyment of life and lawful activities. Christianson and the other witnesses from the Normandale area consistently described the pounding and hammering on trucks and train cars, the vibrators, the idling of truck engines and the banging of end loaders. (Tr. 23, 25, 43, 44, 55, 56, 66, 86, 184, 185.) While the record establishes that other facilities in the immediate area also emit sounds, the witnesses testified that they could distinguish the sounds as coming from American and several of them testified that they saw drivers pounding on trucks and cars at American. (Tr. 24, 37, 49, 50-54, 58, 190.) The witnesses also stated that the noise occurs on a 24-hour basis and that it interferes with sleep and normal enjoyment of life. (Tr. 26, 43, 56, 60-61, 183, 186.) Based upon these facts, the Board finds that interference with complainant's life and lawful activity has occurred.

Having found that the sounds have interfered with Christianson's enjoyment of life and lawful activity, the next issue is whether the interference is unreasonable. Sounds do not violate the Act or Board regulations unless they cause unreasonable interference with the enjoyment of life or lawful business or activity. The "reasonableness" of the noise must be determined in light of the factors set forth in Section 33(c) of the Act. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1033(c); Wells Manufacturing Co. v. PCB, 383 N.E.2d 148, 150-01 (1978); Ferndale Heights Utilities Co. v. PCB, 358 N.E.2d 1224 (1st Dist. 1976).) The relevant factors are: (1) the character and degree of injury to, or interference with, the protection of the health, general welfare and physical property of the people; (2) the social and economic value of the pollution source; (3) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; (4) the technical practicability and economic reasonableness of reducing or eliminating the emissions ... resulting from such pollution source; and (5) any subsequent compliance. (Ill. rev. Stat. 1989, ch. 111 1/2, par. 1033(c).)

Character and Degree of Injury

In assessing the character and degree of the injury or interference caused by the noise emissions from American, the Board looks to whether the noise substantially and frequently interferes with the use and enjoyment of life and property, beyond minor trifling annoyance or discomfort. (Kvatsak, PCB 89-182 at 9.) Here, the record establishes that Christianson's sleep has been affected by the noise, the noise interferes with entertaining at home because it can be heard throughout the house even with the windows closed. (Tr. 184-86.) Christianson testified that he cannot enjoy his backyard and that the 24-hour-a-day noise "disrupts every activity in our household." (Tr. 185-86.) Witnesses testifying on behalf of complainant reiterate these

complaints. Hence, unlike Kvatsak where nighttime interference was not at issue and the Board found that the record revealed only minor annoyance, the instant record establishes a substantial and frequent interference.

Social or Economic Value of the Source

The record establishes that American employs 13 full-time employees at a total annual salary of approximately \$250,000. (Tr. 242.) Annually, American spends \$20 million locally. (Tr. 241.) American provides valuable services and is an economic benefit to the community.

Suitability or Unsuitability of the Source

The record establishes that the Normandale area is an isolated residential community located in an area otherwise zoned industrial or commercial. (Resp. Ex. 1.) American is only one of many industries located around the Normandale area. (Id.; Tr. 229, 233-41.) Christianson testified that Pekin Energy is 6-8 blocks from his property and that Commonwealth Edison is approximately 1 mile from his home. (Tr. 189.) Industry has located in this area because of the accessibility to both a navigable waterway and railroads. Although complainant moved to the area prior to American, it is hard to conceive of an area more suited for American's facility.

Technical Practicability and Economic Reasonableness of Control

Initially, the Board must address complainant's continuing objection to the hearing officer's ruling excluding the charts prepared by Gregory Zak and Zak's testimony regarding possible abatement measures. (Tr. 486-512.) After testifying regarding the reliability of the noise study prepared by Stockmeier, Zak testified as to possible solutions to the noise problem and complainant attempted to introduce two exhibits prepared by Zak outlining possible abatement measures. (Tr. 486; Compl. Ex. 15 and 16.) American objected to this evidence because it was introduced on rebuttal rather than in complainant's case-in-chief, and because it was not disclosed in discovery. (Tr. 487-502.) The hearing officer granted American's objection finding that the testimony could not be presented on rebuttal and that the charts should have been disclosed in discovery. (Tr. 508-09.)

The record establishes that Christianson, as a pro se litigant, was afforded some leeway throughout the hearings. The Board agrees with the hearing officer's finding that the evidence should have been disclosed in discovery so that American would have an opportunity to respond and that it was not proper to present Zak's testimony on abatement measures during rebuttal when this issue was not addressed by American. Such evidence should have been introduced by complainant in his case-in-chief. The Board

upholds the hearing officer's ruling excluding both Zak's testimony regarding abatement and the exhibits prepared by Zak.

The focus of inquiry into the technical practicability and economic reasonableness of control measures is on what can be done about the allegedly offensive noise. (Zivoli, PCB 89-205 at 12.) In the absence of Zak's testimony, the record is sparse on this factor. It would appear to be impossible to totally eliminate the noise emissions without ordering that the facility be closed. Complainant does not suggest such action in his request for relief. (Complaint at 14.) Christianson does suggest use of mufflers and enclosure. (Id.; Comp. Brief at 2.) Jump testified that the fans were already partially enclosed and that it was not feasible to further enclose them. (Tr. 142-43.) Jump also testified that "all of the conveyors in the plant are enclosed. There are no belt conveyors, for instance, in the plant. All conveyors are either enclosed drag conveyors or screw conveyors there's processing equipment that just by its very nature is enclosed or has mufflers" (Tr. 251-52.) "The trucks, of course, all have mufflers The generator, of course, has a very, very large muffler." (Tr. 252.)

The record reveals that Christianson's primary complaint is the pounding and hammering on delivery trucks and trains cars to loosen gluten. (Tr. 184; Comp. Brief at 2.) This complaint was reiterated by complainants' witnesses as being the most disturbing noise. Jump testified that American adopted a policy against such activity and had posted signs prohibiting this conduct. (Tr. 99-111, 117, 244-51.) According to Jump, American purchased its own trucks in an attempt to control such conduct. (Tr. 111.) However, Jump also stated that it was not feasible to rely solely upon its own trucks for delivery. (Tr. 116.)

The Board finds that it is technically feasible and economically reasonable to make some reduction in noise levels. However, the Board cannot determine from the record what alternatives are available and the costs associated with such alternatives.

Subsequent Compliance

In addition to the enclosures and procurement of trucks discussed above, the record indicates that American posted signs prohibiting beating on trucks to loosen material, barred independent truckers who violated this policy and informed employees both orally and in a written memorandum that they must reduce noise emissions. (Tr. 244, 251; Resp. Ex. 2 and 3).

Conclusion on Unreasonable Interference

The Board finds that, based upon the facts of this case in light of the Section 33(c) factors, American's operations

constitute an unreasonable interference with complainant's enjoyment of life and lawful activity. Therefore, the Board holds that American has violated Section 24 of the Act and 35 Ill. Adm. Code 900.102.

REMEDY

Section 33 of the Act allows the Board to impose penalties, direct respondent to cease and desist from future violations and to enter a final order which it deems appropriate under the circumstances. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1033.) In the instant case, because Zak's testimony and charts were excluded from evidence, the record is insufficient to support a detailed order directing what specific steps must be taken, and under what time-frame, to abate the noise pollution. (See e.g., Will County Environmental Network v. Gallagher Blacktop, PCB 89-64 (January 11, 1990); Burbank v. Overnite Trucking, PCB 84-124 (August 1, 1985).) However, the record does clearly establish that the pounding and hammering on trucks and train cars to loosen gluten is a major source of the unreasonable interference. It is certainly technically feasible and economically reasonable for American to enforce its policy against such activity and cease and desist from such conduct at all times, day and night.

In order to fashion a remedy in this case, the Board believes that the Zak testimony and exhibits must be included in the record. Because American's primary objection to this evidence was that it was prejudiced by its inability to effectively respond, the Board directs American to either file a written response to the abatement measures suggested by Zak's testimony and two exhibits or prepare its own abatement study addressing methods of reducing noise and costs associated with those methods. To ensure that American has access to the two exhibits prepared by Zak, complainant shall serve the two documents on American no later than December 9, 1991. The Board retains jurisdiction over this matter pending receipt of American's response, Christianson's reply and final disposition of this case. American's response shall be filed with the Board no later than February 3, 1992. Christianson's reply shall be filed with the Board no later than February 24, 1992.

This interim opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

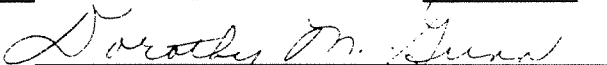
1. The Board finds that American Milling Company has violated Section 24 of the Act and 35 Ill. Adm. Code 900.102.
2. American is hereby ordered to enforce its policy of prohibiting employees and independent drivers from beating, pounding or hammering on trucks and train cars to loosen gluten at American's plant and is ordered to cease and desist

from such conduct at all times, day and night.

3. American shall file its response to the Zak testimony and exhibits or its own abatement study concerning methods of noise reduction and costs of such reduction with the Board no later than February 3, 1992. Complainant shall file its reply with the Board no later than February 24, 1992.
4. The Board retains jurisdiction over this matter pending receipt of American's report and complainant's response and final disposition of this case.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 3/24 day of November, 1991 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board