

ILLINOIS POLLUTION CONTROL BOARD
February 27, 1992

PEOPLE OF THE STATE)
OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 89-158
) (Enforcement)
)
GILBERTSON-CLYBOURN, INC.,)
an Illinois Corporation,)
)
Respondent.)

JOSEPH ANNUNZIO, JACK BAILEY, JOSEPH WILLIAMS AND MICHELLE JORDAN,
ASSISTANT ATTORNEY GENERALS, APPEARED ON BEHALF OF COMPLAINANT.

BERTRAM A. STONE, STONE, POGROUND, ROREY & SPAGAT, APPEARED ON
BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board by the Attorney General's complaint against Gilbertson-Clybourn, Inc. ("Gilbertson") filed on October 6, 1989. Count I of the complaint alleges that Gilbertson violated Ill. Rev. Stat. 1991, ch. 111 1/2, par 1009(b) and 35 Ill. Adm. Code 201.143 by operating its electroplating equipment without the required operating permits. Count II of the complaint alleges that Gilbertson violated Ill. Rev. Stat. 1989, ch. 111 1/2, par 1009(b) and 35 Ill. Adm. Code 201.142 by constructing its electroplating equipment without the required construction permit. Hearings were held on August 23, 1990 and September 6, 1990. At the end of the hearings, the parties waived oral arguments and the hearing officer set a schedule for the filing of briefs. On February 11, 1991, the Complainant filed its Post Trial Memorandum. Respondent did not file a post trial brief.

FACTS

Gilbertson is located at 2240 North Clybourn in Chicago, Illinois. As part of its operations, Gilbertson operates electroplating equipment consisting of seven rinse tanks, one nitric acid tank, one hydrochloric acid tank, one sulfuric acid tank, one copper strike tank, one cyanide strip tank, one dragout tank, one silver strike tank, one silver plating tank, one nickel plating tank, one gold plating tank and one brass plating tank. In 1986, Gilbertson moved its operation from 1307 South Wabash in Chicago to empty space at Clybourn Metal Finishing ("Clybourn") Co. at 2240 North Clybourn in Chicago. Gilbertson is a subsidiary of Clybourn.

In November of 1987, the Illinois Environmental Protection Agency ("Agency") sent a letter to Gilbertson stating that they were operating without a valid air pollution control operating permit and enclosed the necessary forms for Gilbertson to apply for a permit. (Exhibit A). Gilbertson informed the Agency in a letter dated December 28, 1987, that it had moved and was operating under Clybourn's permit. (Exhibit B). On October 3, 1988 the Agency informed Gilbertson that it was operating without a permit and should file a permit application. (Exhibit C). On October 10, 1988, Gilbertson referencing its letter of December 28, 1987, informed the Agency that it was operating under Clybourn's permit. (Exhibit D). On January 13, 1989 the Agency informed Gilbertson that Clybourn's permit had expired in May of 1987, therefore Clybourn had been operating without a permit for twenty months and Gilbertson needed to file a permit application. (Exhibit E). On February 22, 1989, Gilbertson and Clybourn filed a joint application with the Agency. (Exhibit F). On April 18, 1989 the Agency denied the permit application but offered to re-evaluate the application if additional information was received. (Exhibit I). Gilbertson and Clybourn filed amended applications with the Agency on May 25, 1989. (Exhibit J). Clybourn was issued a permit on August 25, 1989 that included the electroplating operations of Gilbertson. (Exhibit K). On October 3, 1989 Gilbertson made an inquiry to the Agency as to the status of its permit application. (Exhibit L). On January 2, 1990 the Agency issued an operating permit to Gilbertson. (Exhibit O).

DISCUSSION

Section 9(b) of the Act prohibits constructing, installing or operating any equipment capable of causing or contributing to air pollution without a permit.

At hearing Mr. Harish Desai of the Agency's Air Pollution Control Division testified on the type of emissions that are commonly found in an electroplating process and the permit requirements for the installation and operation of an electroplating system.

Q. Does this Electroplating process produce an air emissions source?

A. Yes, it is.

Q. What is emitted into the air through the process of electroplating?

A. Through the process of electroplating, it can produce Oxygen, Hydrogen and Cyanide gas, and when that gas is being produced, it can also carry the liquid droplets to the atmosphere.

(Tr. at p. 18 & 19)

Q. To install electroplating equipment is there any type of permit that's needed from the Agency?

A. Yes, sir.

Q. What is it?

A. Prior to construction, a construction permit; and prior to operation an operating permit.

(Tr. at p. 26 & 27)

Mr. Romaniuk, Secretary-Treasurer of Clybourn Metal Finishing, stated in his deposition taken June 18, 1990, and entered at hearing as exhibit N, that Gilbertson-Clybourn did not have a permit prior to January 2, 1990.

Q. To the best of your knowledge, had Gilbertson, under the name of Gilbertson-Clybourn, Inc., ever received a permit for its electroplating equipment prior to 1-2-90?

A. Let's see. Not prior to that, no.

(Exhibit N at p. 12)

Gilbertson claims that between 1986 and 1990, they were operating under the permit of Clybourn. Clybourn engages in the buffing and polishing of metal parts. This Board fails to see how Gilbertson could believe that its operations were covered by Clybourn's permit when Gilbertson engages in a different operation, requiring different equipment and procedures. However, the argument is moot since Clybourn did not have a valid permit between May of 1987 and August of 1990. People v. Clybourn Metal Finishing, PCB 89-157, (July 11, 1991). Therefore, Gilbertson violated Section 9(b) of the Act as well as Section 201.143 of the Board's regulation by operating an emission source without an operating permit from January 1987 to January 1990.

Section 201.142 requires a construction permit to be obtained from the Agency prior to modifying any existing emission source. Gilbertson installed the electroplating equipment in the facility on Clybourn Ave. in 1986 without obtaining a construction permit. Mr. Desai testified that a construction permit was needed for this installation.

Q. If electroplating equipment is moved from one location to another, is a construction permit mandated by your Agency?

A. Yes.

(Tr. at p. 28)

According to Mr. Romaniuk's deposition Gilbertson did not apply for or receive a construction permit. (Exhibit N at p.12). Therefore, Gilbertson is in violation of Section 9(b) of the Act as well as Section 201.142 of the Board's regulations by failing to obtain a construction permit.

DEFENSE

Respondent claims that its failure to obtain the necessary permits was the direct result of either the confusion of the Agency or the negligence of its personnel. Gilbertson contends that the Agency was negligent in not responding to Gilbertson's letter of December 28, 1987 and the Agency was confused as to the relationship between Gilbertson and Clybourn Metal Finishing. Gilbertson claims that this confusion led to the Agency issuing Clybourn a permit that included the electroplating operations of Gilbertson when Gilbertson had a separate application before the Agency.

Mr. Desai testified as to why the Agency did not respond to Gilbertson's letter of December 28, 1987.

Q. With that letter (Exhibit B) you tell me how you, as unit manager, made a determination that no further response was necessary and that a permit application was forthcoming?

A. It's very simple. In letter that we stated on November 25, 1987, clearly states that you require an operating permit. And this December 28th letter of 1987 did not have any application for operating permit.

Q. But when they stated in that letter that they were going to be operating under Clybourn Metal Finishing Company permit, did the Agency do anything to say you can't do that, you have to have a separate permit?

A. This letter does not require any response from the Agency because we do not really know what it means that they are operating under the operating permit.

(Tr. at p. 53 & 54)

Mr. Desai also explained why one permit was initially issued.

A. On document that we received in February '89 which is from the Clybourn Metal Finishing, it is APC 205, an

application form for renewal of operating permit, APC 205, which indicates two names, one name as the operator, Gilbertson-Clybourn, and other name as an owner, Clybourn Metal Finishing.

The APC 205 indicates that at one place that Gilbertson-Clybourn Company and other place indicated Clybourn Metal Finishing.

Not exactly knowing, that's what's misleading to us, that they both are the same company, and that's why both applications that we received are put in one folder of Clybourn Metal Finishing.

By Mr. Stone

Q. Mr. Desai, was that your determination that that was one company?

A. That was my conclusion.

* * * *

So we do not know what at that time, when we received the application in May '89, we did not know whether that's still the two separate company or just the one company.

Q. Did you bother to inquire?

A. No, we did not.

Q. Why?

A. Every week we receive about eighty applications for our review, so we make the best conclusion based upon the paperwork we have in front of us.

And if you start calling every time somebody sends some kind of misleading information, then obviously it takes us a lot more time for us, so we make the conclusion best we can with the information in front of us. And that was the conclusion made at that time. And that matter was cleared up later on when the company wrote a letter sometime I believe in September or October of '89.

(Tr. at p. 62 - 65)

The Agency's conclusion that the December 28, 1987 letter did not warrant a response was a reasonable conclusion. It is the duty of the applicant not the Agency to see that the requirement to have a permit is satisfied. While there appears to have been some confusion at the Agency as to the relationship between Gilbertson and Clybourn that confusion is partly due to actions on the part of

Gilbertson. The initial permit application referred to both Gilbertson and Clybourn and the second set of applications were sent to the Agency together.

The Agency originally contacted Gilbertson in November of 1987, informing them that a permit was required. In January of 1991, Gilbertson obtained its own operating permit from the Agency. From the Agency's first letter to the ultimate issuing of the permit is a period in excess of three years. While the confusion and delay extended the time prior to the issuance of the permit it does not account for the length of time that Gilbertson was operating without a permit. While the Agency did not directly respond to Gilbertson's letter of December 1987, a second letter was sent to Gilbertson in October of 1988. This letter and the resulting correspondences between the Agency and Gilbertson resulted in the filing of the joint application on February 22, 1989. If the Agency had an obligation to respond to the letter, its failure to respond would have accounted for about 9 months of the three year period. However, the letter from Gilbertson did not require a response from the Agency.

The confusion as to the relationship between Gilbertson and Clybourn resulted in one permit being issued to Clybourn in August of 1990. Since Gilbertson was issued its own permit in January 1991, this confusion delayed the issuance of Gilbertson's permit by about 4 months. In its complaint the Agency references August 25, 1990 as the date that Gilbertson came into compliance with the operating permit requirements. The complaint also refers to Gilbertson as operating without a permit since at least January 1987 while the fact is that Gilbertson has not had any permit at any time prior to January 2, 1990.

While the confusion may have delayed the issuance of the permit, it does not constitute a legal defense to operating without a permit. Any delay in issuing the permit will be considered as a mitigating factor in determining the amount of penalty to be assessed against Gilbertson.

33(c) FACTORS

Having found violations, we must determine an appropriate penalty under the 33(c) factors contained within the Act.¹ Section 33(c) states:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances

¹We use Section 33(c) rather than Section 42(h) here because hearing was held prior to September 8, 1990, when Section 42(h) became law. See People v. Sure Tan, Inc., PCB 90-62 (April 11, 1991).

bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

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, discharges or deposits resulting from such pollution source; and
5. any economic benefits accrued by a noncomplying pollution source because of its delay in compliance with pollution control requirement; and
6. any subsequent compliance.

In relation to the instant case, factors (3) and (4) are inapplicable. Insofar as factors (2) and (5) are concerned, the record is sketchy. Even so, the Board presumes that a functioning business entity which employs people and supplies products on the open market has a certain degree of social and economic value. Based on the record, it is impossible to determine with any certainty the amount of economic benefits accrued by Gilbertson as a result of its noncompliance with the regulations. At the very least, however, the company did save any applicable permitting fees.

Further, there can be no doubt that Gilbertson eventually came into compliance by obtaining an operating permit. As of January 2, 1990, the company has been operating with the necessary air operating permit. However, Section 33(c) of the Act states:

..It shall not be a defense to findings of violations of the provisions of the Act or Board regulations or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation, except where such action is barred by any applicable State or Federal statute of limitation. In all such matters the Board shall file and publish a written opinion stating the facts and reasons leading to its

decision. (Emphasis added).

In the case at bar, no such statute of limitation applies and Gilbertson's subsequent compliance is no defense to operating without a permit.

This leads us to criteria (1), "interference with the protection of the health, general welfare and physical property of the people." This is the most significant factor in relation to the instant case. The permitting process is the nucleus of the Agency's regulatory scheme. Mr. Desai testified to the importance of the permitting process.

- A. The permitting process is established by the Legislature of State of Illinois under the Environmental Protection Act they give the authority to the Agency to control the emissions from the industry -- from any emissions source such that we have improved environment for the people.

(Tr. at p. 16)

Without the threat of penalties for non-compliance with the permitting process, companies will seek to avoid the necessity of obtaining permits. Without the permitting process, the air quality in Illinois would be threatened because the Agency would be unable to assess all the sources of air pollution and act accordingly.

This is a crucial point. The air permit system is designed to regulate all those pollution sources which contribute particulate and other matter into the Illinois airshed. The only way such a system can operate effectively, is to be aware of all sources and permit accordingly. Without a comprehensive system, projections are skewed and air quality determinations as well as the goals thereof suffer. This is especially true in Chicago, which is a non-attainment area under the provisions of the Clean Air Act. If the Agency is unable to ascertain the location and output of pollution sources, it would be impossible to regulate those sources towards the goals mandated under the Clean Air Act. The ultimate effect is detrimental to the "health, general welfare and physical property of the people."

In short, we find that Gilbertson has violated Section 9(b) of the Act as well as Section 201.142 and 201.143 of the Board's regulations. The record amply demonstrates that Gilbertson did "install, or operate any equipment, facility...capable of causing or contributing to air pollution, of any type designated by Board regulations, without a permit granted by the Agency..." Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1009(b). Indeed, the company has admitted operating without a permit and has opted to allege an affirmative defense, which we have today rejected. In that regard, the Board notes that Gilbertson is potentially subject to a fine of \$10,000 for each violation of the Act in addition to a daily

penalty on each violation of \$1,000 for each day the violation continued. Thus the potential penalty could conceivably be in excess of \$1,000,000.

In light of this, the Board hereby assesses a penalty of \$14,000, payable to the Environmental Trust Fund. This penalty is necessary to aid in the enforcement of the permit requirements. The permit program was established in 1972. This program required operations such as Gilbertson to obtain a permit. Gilbertson obtained its first permit in 1990. The penalty amount is based on a \$3000 fine for each violation (2 violations - \$6000 fine) plus \$8000 in daily fines for operating without a permit from January 1987 until February 22, 1989. This period was selected based on the time period alleged in the complaint, the year that Gilbertson moved into the facility on Clybourn and the date that the first permit application was made. The date of the first permit application was selected to allow for any delays that Gilbertson experienced in obtaining its permit.

Section 42(f)

The complaint alleges that the violations were wilful, knowing or repeated. If the Board finds that the violations were wilful, knowing or repeated, the Board may pursuant to Section 42(f) of the Act, award costs or reasonable attorney's fees to be paid by the Respondent. The Attorney General did not pursue this issue at hearing. The Board does not find sufficient evidence to find that the violation was wilful, knowing or repeated. Gilbertson responded to the Agency's letters and did obtain a permit.

The testimony of Mr. Romaniuk shows that he was not familiar with the permitting process.

- Q. Okay. Who is in charge, or whose responsibility is it, at Gilbertson-Clybourn, Inc. to make sure that Gilbertson has met all of its legal permit requirements? Is that your responsibility?
- A. Probably mine more so than anyone. Yes.

* * *

- Q. ...Would you say that the completion of a permit application is a relatively simple task or would you say it would be burdensome upon your company?
- A. Well, initially I thought it was a simple task, but as I was enlightened, in time I could see it was a very complicated procedure.

* * *

- Q. Okay. Does specifically the electroplating process cause any emissions of any kind to go into the atmosphere?
- A. To my knowledge, there's steam. We have a blower system that -- you know, just that there's steam.

While ignorance of the law is not a defense for not following the permit requirements it does not support a finding that the violation was wilful, knowing or repeated.

This Opinion constitutes the Board's findings of facts and conclusions of law.

ORDER

1. The Respondent, Gilbertson-Clybourn, Inc., has violated Section 9(b) of the Illinois Environmental Protection Act and 35 Ill. Adm. Code 201.143 by operating without a permit since at least January 1987 until obtaining a permit in January 1990.

2. The Respondent Gilbertson-Clybourn, Inc. violated Section 9(b) of the Illinois Environmental Protection Act and 35 Ill. Adm. Code 201.142 in 1986 by installing electroplating equipment at its Clybourn Ave. facility without a construction permit in 1986.

3. Within 30 days of the date of this Order the Respondent shall, by certified check or money order, payable to the State of Illinois, designated to the Environmental Protection Trust Fund, pay the penalty of \$14,000.00 which is to be sent by First Class Mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, Illinois 62794-9276

Gilbertson-Clybourn, Inc., shall also place its Federal Employer Identification Number upon the certified check or money order.

Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (Ill. Rev. Stat. 1990 Supp., ch. 120, par. 10-1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not occur during the pendency of an appeal during which payment of the penalty has been stayed.

4. Gilbertson-Clybourn, Inc., is hereby ordered to cease and

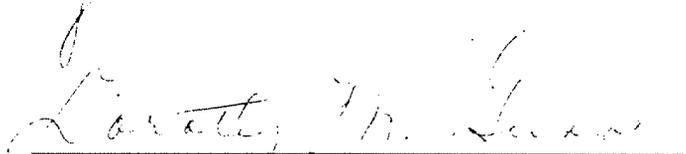
desist from all violations of the Illinois Environmental Protection Act and from Board regulations.

5. This matter is hereby closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111 1/2, par. 1041, provides for appeal of final Opinion and Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois established filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of February, 1992 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board