ILLINOIS POLLUTION CONTROL BOARD
April 11, 1991

PEOPLE OF THE STATE OF ILLINOIS, Complainant,	)	
v.	)	PCB 90-62 (Enforcement)
SURE-TAN, INC., an Illinois Corporation Respondent.	)	

MR. JOSEPH WILLIAMS APPEARED ON BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS, NEIL F. HARTIGAN, ATTORNEY GENERAL, COMPLAINANT.

MR. V. JOHN SURAK APPEARED PRO SE AS RESPONDENT.

ORDER OF THE BOARD (by J. C. Marlin):

This matter is before the Board upon a Complaint filed April 17, 1990 by the People of the State of Illinois, on behalf of the Illinois Environmental Protection Agency against Respondent, Sure-Tan, Inc. ("Sure-Tan"). The Complaint alleges that Sure-Tan violated Section 9(b) of the Illinois Environmental Protection Act ("Act") (Ill. Rev. Stat. 1989, ch. 111 1/2 par. 1001 et seq.) and Board regulations by its failure to obtain the required construction and operating permits for its leather goods manufacturing processes, found at 35 Ill. Adm. Code 201.142 and 201.143.

Hearing was held December 18, 1990 in the City of Chicago, Illinois.[1] Mr. V. John Surak appeared pro se. No members of the public attended. No post-hearing briefs were filed in this matter.

STATUTORY AND REGULATORY FRAMEWORK

Section 9(b) of the Act, Ill. Rev. Stat., ch. 111 1/2, par. 1009(b) (1989), provides:

> No person shall:
>
> > Construct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air

On February 15, 1991 Sure-Tan filed its Motion to Reconsider Denial of Hearing Reopening. The Board had previously denied Sure-Tan's Motion of February 1, 1991 to reopen the hearing in this matter. Sure-Tan's motion for reconsideration is also denied.

> pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit;

Section 201.142 of the Rules and Regulations of the State of Illinois, 35, Ill. Adm. Code 201.142, titled "Construction Permit Required", provides in pertinent part:

> No person shall cause or allow the construction of any new emission source or any new air pollution control equipment, or cause or allow the modification of any existing emission source or air pollution control equipment, without first obtaining a construction permit from the Agency ... .

Section 201.143 of the Rules and Regulations of the State of Illinois, 35 Ill. Adm. Code 201.143, titled "Operating Permits for New Sources", provides in part:

> No person shall cause or allow the operation of any new emission source or new air pollution control equipment of a type for which a construction permit is required by Section 201.142 without first obtaining an operating permit from the Agency ... .

At hearing, the Complainant moved to amend the Complaint to add a violation of Section 201.144 for operation of existing sources with out a permit (R.95). The Hearing Officer allowed the amendment over Respondent's objection (Id.). That section reads, in pertinent part:

> No person shall cause or allow the operation of any existing emission source or any existing air pollution control equipment without first obtaining an operating permit from the Agency ... .

BACKGROUND

Sure-Tan conducts business at 1464-70 W. Webster Street in Chicago, Cook County, Illinois. Mr. V. John Surak is the president of Sure-Tan. The business was incorporated in 1973. The manufacturing process at the facility involves the shaving, sanding, and buffing of animal hides into leather goods. The tanning operation started at that location in 1965 (R.69).

The operation takes in hides, such as cowhides and sheepskin, and tans them (R.61). The hair is removed from the hide by a chemical process called "soaking." The hide is then removed to a vat bath which cleans the fat off the hides. The hides are then preserved by pickling. After pickling, they are tanned by chromium salt, or, on a few occasions, with vegetable tan. The hides are then dried in a drying room, milled to soften them, placed into bundles and shipped (R.62-63). Some of the leathers are buffed as part of the process.

The facility has two shaving machines, which are currently permitted. One of the machines was replaced in 1972. The facility has one buffing machine, which was installed in 1964 (R.69).

The facility's operating permits for its emission sources expired December 10, 1984. The facility next received operating permits in August 1990. The facility did not have any operating permits during this interim (R.68).

ALLEGATIONS

The People allege that Sure-Tan required construction and operating permits for its potential air emission sources. The sources are alleged to be the equipment at the facility, namely shaving, sanding and buffing equipment. Sure-Tan's defense is that the equipment does not cause significant air emissions. Sure-Tan also submits that the reason Sure-Tan applied for the permits in the first place is that it was under threat of enforcement to do so (R.166-67).

DISCUSSION

An Agency inspector,, Mr. Mohammed Ali, inspected the facility on May 10, 1989. It was in full operation, except for the buffing machine, which was not operating at the time. The buffing machine was however, surrounded by dust (R. 15,16). The witness testified that the emissions from the operation would be small particulate matter (R.17). A cyclone machine, an apparatus to remove the particulates from the air, stood near the buffer (R.17,26).

Several exhibits were introduced via Mr. Ali. Exhibit D-1, a letter from the Agency to respondent, dated October 21, 1985, gave notice pursuant to Section 31(d) of the Act, that the respondent was in violation of Section 201.144 for failure to renew operating permits for the leather buffing machines, Section 201.161 for operation of the leather buffing machines in a manner which violated the permit, Section 201.141 and 202.322 for operations in excess of emission standards and Section 201.141

for operations which unreasonably interfered with the enjoyment of life and property. A letter of November 7, 1985 to Mr. Surak requested a pre-enforcement conference with the Agency (Exh.D-2). Paragraphs 6 through 9 of Attachment A to the letter alleges again that respondent was in violation of Section 201.144, 201.161 and 201.141 of the Act.

Following the pre-enforcement conference of December 12, 1985, the Agency sent a letter dated January 24, 1986 to Mr. Surak outlining a compliance plan and schedule asserted to have been reached during the pre-enforcement conference (Exh.D-3). According to paragraph 7 of that exhibit, Sure-Tan, Inc. was to have filed the necessary permit application forms for the twin cyclones, three buffing machines, two shaving machines, two splitting machines, three dehairing tanks, three tanning drums, and two fleshing machines on or before January 12, 1986. The letter stated that due to difficulties respondent was having obtaining data and information to complete the permit application forms, the Agency was extending the application deadline to February 12, 1986. A letter of March 24, 1986 from the Agency to Mr. Surak stated that Mr. Surak's failure to comply with this item, as well as others, had caused the Agency to refer the case to the Enforcement Division. The forms were received by the Agency on June 20, 1990 (Exh.C). The forms show permits from the two buffing machines, two shaving machines and a cyclone dust collector were applied for. The emission rates for the buffing and shaving machines are shown as 0.75 lbs./hr. (Exh.C). Mr. Surak received the operating permits on August 5, 1990 (R.23). The permits were for all potential emission sources (R.24).

On examination by Mr. Surak, Mr. Ali admitted that he did not check the cyclone during his inspection. He also admitted that he did not know if any of the machines were in operating condition at the time of his visit (R.27,37).

Mr. Ali assisted Mr. Surak in filling out the application forms (R.25,35). When asked by Mr. Surak why the Agency asked Surak to apply for permits if they had not been known to emit anything, Mr. Ali explained that all potential emission sources needed a permit under the rules (R.40). The applicant must renew existing permits unless the applicant notifies the Agency that a change in operations makes it unnecessary (R.42). The original determination of whether a permit is needed at all is done by an Agency engineer reviewing the applicant's submitted information (R.44).

On re-direct examination, Mr. Ali testified that there would be emissions from the buffing machine if it were in operation (R.49). In assisting Mr. Surak in filling out the application, Mr. Ali did not supply Mr. Surak with any numbers on the form (R.51). Mr. Ali stated that Mr. Surak never told him that certain pieces of equipment were not in operation (R.52-3).

Mr. Surak was called by the People as an adverse witness. Mr. Surak testified that the operating permits for some of his machinery expired December 10, 1984. The next time he received a permit for air emission sources was August of 1990 (R.68).

He currently has permits for his two shaving machines (R.11). He doesn't recall when he told Mr. Ali that some of his machines were no longer in operation (R.70-3). The reason he applied for the permits, he stated, was because he was threatened with sanctions unless he did so (R.74-5). Mr. Surak testified that he did not comply with the original conditions attached to his agreement to apply for permits with the Agency because "nobody was pushing" (R.75,91).

Mr. Surak stated that since 1984 the buffer has not been in operation. The glove manufacturer who bought buffed leather from him went out of business. The company didn't use the machines until at least September 1990 (R.89). Upon re-examination Mr. Surak admitted that his present operating permit included the leather shaving and buffing machines (R.92). The emission rate from these sources was .08 pounds per hour as reflected upon his amended permit application (R.93).

Mr. David Blustein, an industrial hygienist, testified as an expert witness for Respondent. He performed the tests which led to an estimation that the facility emitted .08 pounds per hour of air emissions from its sources (R.98,9). A worker, equipped with a tie-on breathing zone sampler collected particles by operating the shaving machine over a four hour period. A pre-weighed filter was again weighed to determine particulate accumulation (R.101-2). The test showed .08 milligrams per cubic meter being emitted. He stated that OSHA standards refer to this level of emissions as nuisance dust (R.102).[2] Mr. Blustein's study was offered as Respondent's Exhibit No.1. He believes the particles emitted are too large aerodynamically, to be airborne for large periods of time. Unless the Agency has other measurements to suggest the facility is a source, he believes it is not (R.116-7).

Upon examination by the People, he stated that it was his estimation that .75 pounds per hour were the maximum emissions, per line 15 (a) of the original application (R.125). This was the best information he had at the time (R.130). On his visit to the facility on November 14, 1990 the shaving equipment was in operation (R.132). He did not measure emissions from the buffing machine as it was not in operation (R.133).

[2] The Agency objected to the exhibit because it had never seen it prior to hearing admission. We affirm the Hearing Officer's ruling.

ANALYSIS

In order to prevail upon its complaint against Sure Tan, the People must prove that Sure-Tan's operations included sources which could potentially emit air pollution and that Sure-Tan failed to obtain operation or construction permits for these sources. We believe that the People have met their burden.

Operating Permits

With regard to the allegations concerning operating permits, it is undisputed that Sure-Tan's operations include shaving and buffing machines. The Agency inspector stated that these machines were "emission sources" which the regulations define as "any equipment of a type capable of emitting specified air contaminants to the atmosphere". See 35 Ill. Adm. Code 201.102. Sure-Tan originally held operating permits for these emission sources and allowed them to expire. Sure-Tan presently holds operating permits for these sources. Their original and amended permit application of 1990 lists these machines as potential sources. At least for the shaving machine, Sure-Tan's own expert witness stated the machine had measurable emissions. The Agency inspector noted the presence of dust around the buffing machine. The specified contaminant for each is particulate matter. We conclude therefore that these were existing emission sources for which Sure-Tan was required to obtain an operating permit. 35 Ill. Adm. Code 201.144.

Construction Permits

In considering the allegations concerning construction permits for new emission sources, Sure-Tan operated a shaver and a buffer from inception of operation in 1965. Later, in 1972, Sure-Tan replaced a shaving machine. It has not been shown when in 1972 Sure-Tan made this change. 35 Ill. Adm. Code 201.102 defines a "new emission source" as "any emission source, the construction or modification of which is commenced on or after April 14, 1972." Because the People have not shown the machine to have been installed after the named date, we cannot find that the shaver constitutes a new emission source. At closing argument, the People did not attempt to argue this count. (R.168-70). The Board finds that Sure-Tan has not violated Section 201.143 for operating a new emission source without first obtaining an operating permit from the Agency.

The Complaint also alleges a violation of 35 Ill. Adm. Code 201.142 for causing or allowing the construction or modification of an existing emission source without first obtaining a construction permit. "Construction" as defined by the regulations, includes "installation of an on-site emission

source." The evidence shows Sure-Tan operated existing sources with permits until their expiration. The modification to their operation, if any, was in the addition of the new shaving machine sometime in 1972. We do not find that the People have demonstrated any other construction or modification of Sure-Tan's operations. We do not find, from our review of the record, that installation of the shaver was unpermitted. Hence Sure-Tan has not "constructed" an "emission source" as that term is defined in applicable regulations. Again, at closing argument, the People seemed to abandon this allegation. We also find that Sure-Tan has not violated 35 Ill. Adm. Code 201.142.

Section 9(b) of the Act

Finally, we find that Sure-Tan has violated Section 9(b) of the Act. The discussion relating to violations of Section 201.144, infra, supports our finding that Sure-Tan 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). The emissions shown to be emanating from Sure-Tan's operations, even if minimal, are capable of causing or contributing to air pollution. Therefore, Sure-Tan has violated Section 9(b) of the Act.

RESPONDENT'S DEFENSES

Sure-Tan has interposed a defense that the Agency compelled it to apply for permits when there was no showing they were needed. Our review of the evidence does not show that Respondent's attempted "defense" based upon "force" shows anything other than an effort to make Sure-Tan comply with the applicable laws and regulations.

Likewise, Sure-Tan's defense based on non-operation of the buffing machine from 1984 onward is not a total shield against enforcement. The People's Complaint does not contain individual counts for individual machines. Count I alleges that Sure-Tan caused or allowed construction of a new emission source by beginning operations of its facility in 1973. Count II alleges that Sure-Tan failed to obtain operating permits for the shaving, buffing tire and roller sander after its permits expired in October of 1984. The amendment allowed at hearing added an allegation that Sure-Tan allowed the operation of existing emission sources without Agency operating permits. Sure-Tan's purported defense to these allegations, therefore, only reaches one aspect of its operation: its buffing machine.

Under our review of the evidence we find Sure-Tan's contention to be proven as true. Mr. Surak testified that the buffing machine was not operating from 1984 until late 1990.

Sure-Tan's expert witness also testified it was not operating during the times he visited the plant. The Agency inspector could not say that the machine had been in recent operation. The evidence does not show that the buffing machine was operating from 1984 to 1990. It is, however, the applicant's duty to report such changes in his operations. See 35 Ill. Adm. Code 201.123.

PENALTY DETERMINATION

Any person who violates the provisions of the Act or any regulations adopted by the Board shall be liable to a civil penalty of not to exceed $10,000 for said violation and an additional penalty of not to exceed $1,000 for each day during which violation continues, Ill. Rev. Stat. 1989 ch. 111 1/2, par. 1042.[3] Sure-Tan operated its facility without the requisite operating permits for its shaving equipment from December 10, 1984 until August 5, 1990, some 5 years and 9 months. Under the terms of the Act, Sure-Tan is potentially liable to a penalty in excess of two millions dollars.

Section 33(c) Factors

Section 33(c) provides the minimum factors which must be considered in reaching a penalty assessment. As we stated in our Allen Barry decision, these will be considered by the Board in each penalty determination to the extent relevant evidence exists. These factors affect the calculation of the penalty by increasing or decreasing the penalty amount depending on whether the statutory factor, when evaluated by the Board, weighs in favor of a larger or smaller penalty within the range of penalties derived pursuant to the first part of the penalty evaluation. IEPA v. Allen Barry, PCB 88-71 (May 10, 1990)

The statutory penalty criteria are:

* All the facts and circumstances. Section 33(c)
* Character and degree of injury or interference. Section 33(c)(1)
* Social and economic value of the pollution source. 33(c)(2)
* Suitability/unsuitability of pollution source to its locale. Section 33(c)(3)

[3]The maximum penalties in Section 42(a) were increased to $50,000 for violation and $1,000 per each day which the violation continued by P.A. 86-1014, effective July 1, 1990.

* Technical practicability and economic reasonableness of pollution abatement. Section 33(c)(4)

* Economic benefits of non-compliance. Section 33(c)(5)

* Any subsequent compliance. Section 33(c)(6)

The Board finds that its review of all the facts and circumstances of this case demonstrates that a penalty should be imposed on Sure-Tan. From December 1984 until August 1990 the Respondent operated its tanning facility without operating permits from the Agency. The record does not establish any pollution caused by the violation, Section 33(c)(1). Such action served to undermine the permitting process set up through the Act and Board regulations, Section 33(c)(1). The Board finds that operation of Sure-Tan's tanning facility has social and economic value. However, operation of such facilities without operating permits for its air emission sources diminishes such value as it violates the law Section 33(c)(2). We do not find Section 33(c)(3) and (4) to be applicable. We do find, however, that non-compliance saves permitting fees. It may also lead to the non-discovery of unregulated emissions, Section 33(c)(5). The Board further finds that Sure-Tan's ultimate, though unwilling, compliance indicates that a slightly lesser penalty should be imposed, Section 33(c)(6).

Section 42(h) Factors

Section 42(h), effective September 7, 1990 (P.A. 86-1363), sets forth additional factors which the Board is authorized to consider when setting a penalty. It states:

(h) In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2) or (b)(3) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

(1) the duration and gravity of the violation;

(2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

(3) any economic benefits accrued by the violator because of delay in compliance with requirements;

(4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

(5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

Ill. Rev. Stat., 1990 Supp., ch. 111 1/2, par. 1042(h).

As a general rule prospective application of statutes is to be preferred to retroactive, or retrospective, application. Rivard v. Chicago Fire Fighters Union, 122 Ill.2d 303, 308. This presumption may or may not apply depending upon the characterization of the statute. A procedural statute may have retroactive effect while a substantive one cannot. Illinois v. Zeisler, 125 Ill.2d 42, 48. Procedure embraces pleading, evidence and practice whereas substantive law, in contrast, establishes the rights whose invasion may be redressed through those procedures. Rivard, 122 Ill.2d 310, 311. Under these rules it can be fairly said that Section 42(h) is procedural and can be retroactively applied.

This doctrine is revised if the particular statute or provision can be characterized as punitive. If a punitive law has an ex post facto effect, retroactive application is not allowed. People v. Shumpert, 126 Ill.2d 344, 352.

The Board chooses to apply this procedural statute retroactively. The Board will consider applying the Section 42(h) factors in those cases where hearing was held following the effective date of Section 42(h). Should evidence concerning these factors be introduced at hearing, the parties will then have the opportunity fully air these factors at hearing.

Turning then to the Board's consideration of these factors, the permit violations by Sure-Tan lasted five years and nine months. (Section 42(h)(1)). As discussed above, Sure-Tan failed to renew the permits because, in its president's words, "nobody was pushing". (Section 42(h)(2)). Failure to renew permits saves the offender the time and expense of permit renewal. (Section 42(h)(3)).

The Board finds that imposition of a penalty will serve to deter further violation by the violator and to otherwise aid in enhancing voluntary compliance with the Act by the violator and others similarly subject to the Act. (Section 42(h)(4)). The

record does not reveal any previously adjudicated violations by Sure-Tan. (Section 42(h)(5)).

Considering the facts and circumstances of this case, and after weighing both the 33(c) and 42(h) factors the Board finds that a penalty of $10,000 for violation of 35 Ill. Adm. Code 201.144, should be imposed against Sure-Tan. The Board notes that this is orders of magnitude less than the maximum penalty allowable. No additional penalty is imposed for violation of Section 9(b) of the Act.

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

ORDER

1. The Respondent, Sure-Tan, Inc., has violated Section 9(b) of the Illinois Environmental Protection Act and 35 Ill. Adm. Code 201.144.

2. 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 $10,000, 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

Sure-Tan, 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, ¶10-1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

3. Sure-Tan, Inc. is hereby ordered to cease and desist from all violations of the Illinois Environmental Protection Act and from Board regulations.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111 1/2, par. 1041, provides for appeal of final

Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

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 11th day of April, 1991 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board