

ILLINOIS POLLUTION CONTROL BOARD
May 24, 1990

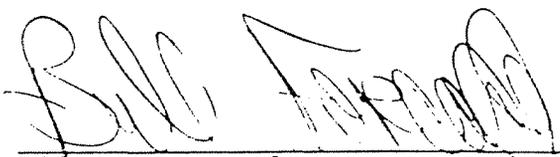
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY)
)
Complainant,)
)
v.) PCB 90-37
) (Enforcement)
NESCO STEEL BARREL COMPANY)
)
Respondent.)

DISSENTING OPINION (by B. Forcade):

Although I agree with the majority that Count I should not be dismissed, I disagree with the majority dismissal of Count IV. Accordingly, I dissent. In addition, I fear the Board is starting to equate the Section 31(d) notice with handing the respondent a draft copy of the complaint, complete with all the specifics. I find no requirement in the Act for such specificity.

Regarding Count IV, the majority reaffirms that compliance with the requirements of Section 31(d) is accomplished by actual notice to the respondent during the discussions with the Agency. See IEPA v. Mervis Industries, Inc., PCB 88-36 (May 5, 1988). The Agency has asserted that such discussions took place. In reply, Nesco attacks the Agency's lack of specificity, but does not specifically deny the validity of the claim, nor does Nesco provide factual support or assertions that it did not acquire actual notice under the theory of Mervis Industries.

If Mervis Industries is still good law, then the Board presently has a question of fact before it: whether such discussions took place as to provide Nesco with actual notice. Unfortunately, the Board has no facts before it. The Board has one ASSERTION from the Agency that such discussions took place, but that assertion is not supported by testimony or affidavit. Nesco did not even bother to ASSERT that such discussions did not take place. Accordingly, I am not able to decide this question of fact based on one unverified assertion and a failure to deny that assertion. Since Nesco must carry the burden in its motion to dismiss, I would deny the motion.



Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 5th day of January, 1990.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board