

ILLINOIS POLLUTION CONTROL BOARD
April 30, 1987

JOHN W. EILRICH,)
)
 Complainant,)
)
 v.) PCB 85-4
)
 JAMES SMITH, d/b/a)
 MAYWOOD SHELL CAR WASH,)
)
 Respondent.)

COMPLAINANT JOHN W. EILRICH APPEARED ON BEHALF OF HIMSELF.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board on the filing of a formal complaint on January 16, 1985, and an amended formal complaint on February 4, 1985, by John W. Eilrich. Complainant alleges that James Smith, doing business as Maywood Shell Car Wash, has operated the car wash facility "from March 23, 1984, and before, through January 12, 1985 and after", in violation of 35 Ill. Adm. Code 900.102 (Prohibition of Noise Pollution), 901.102(a) (Sound Emitted to Class A Land), and 901.103 (Sound Emitted to Class B Land).

Hearing was held on November 24, 1986 in Chicago, Illinois. Complainant attended the hearing and presented testimony and exhibits on his own behalf. Neither James Smith, nor anyone else representing him or Maywood Shell Car Wash, appeared at the hearing.

On February 5, 1987, the Board entered an Order requiring James Smith to respond in writing to the Board showing cause as to why the Board should not find him in violation of the regulations cited by Complainant. In so ordering, the Board cited 35 Ill. Adm. Code 103.220, which delineates the Board's authority in instances where a party fails to appear at hearing. That section reads in full as follows:

Section 103.220 Default

Failure of a party to appear on the date set for hearing or failure to proceed as ordered by the Board shall constitute a default. The Board shall thereafter enter such order as appropriate, as limited by the pleadings and based upon the evidence introduced at the hearing.

Respondent James Smith replied to the Board's February 5, 1987, Order by filing three documents on March 9, 1987. The first of these is a letter to the Board in which Smith asserts, among other matters, that he is not in violation of the regulations as cited by Complainant, that Shell Oil Company made a bona fide effort to correct the alleged problem and to satisfy Eilrich, that the claim of residential use of the Eilrich property is not justified, that Eilrich has sold his property, and that the complaint is a repeat of a previous complaint. The second document consists of a cover letter and eight-page report concerning an Illinois Environmental Protection Agency noise survey conducted at the site on September 16, 1983. The third document is copy of a release and agreement entered into by the Complainant and Respondent, dated March 21, 1984. For the purpose of this record, these three items are considered as Respondent's exhibits 1, 2, and 3 respectively.

DISCUSSION

The record attests that this dispute has long standing. As the Board can best reconstruct its history, Complainant initially sought to have Maywood Shell Car Wash reduce the noise emissions from its operations sometime no later than mid-1983. At that time two noise surveys were conducted, one on July 7, 1983, by the Illinois Environmental Protection Agency (Complainant's Exhibit 1), and the second on July 9, 1983, by SV Engineering, a private engineering firm employed by Complainant (Complainant's Exhibit 2). Both surveys revealed violations of the Board's noise emission regulations.

Within some time shortly following these two noise surveys, Maywood Shell Car Wash apparently installed noise control devices which were not able to eliminate the noise violations entirely, but which were successful in bringing the noise emissions down to levels acceptable to both the Agency and Complainant. This is attested to by a cover letter and second noise survey conducted by the Agency on September 16, 1983 (Respondent Exhibit 2), testimony of Mr. Eilrich, and the agreement signed by Mr. Eilrich on March 21, 1984 (Respondent Exhibit 3). The cover letter to the second noise survey, addressed to Mr. James I. McLaughlin, Senior District Engineer, Shell Oil Company, noted "the effectiveness of the noise reduction measures you have taken to date" at the Maywood Shell Gas Station, but that "violations of ... the Illinois Noise Pollution Control Regulations still exist ...". Eilrich also noted at hearing that "At the time they put these curtains and sound containment materials in place, it was agreed by everybody since they did seem to exhibit a good faith try that even though they still were not in compliance, it was good enough" (R. at 9-10).

This first phase of the dispute then terminated with the signing of the aforementioned March 21, 1984, agreement. In this agreement Complainant gave up, for a consideration, any claims due to alleged noises up to and including the date of the agreement.

The current phase of the dispute centers on subsequent activities of Respondent. Complainant asserts that at some unspecified time since March, 1984:

... they have removed 50 percent of the sound containment barrier, which is one entire set of vinyl curtains. The remaining set of curtains, 80 percent of the middle part has been taken out and the remaining three to four strips on either side have been thrown up over the blower system, in effect reverting back to the original measurements previously in the statement of the higher value of the decibel excess per the allowed limits. R. at 10.

CONCLUSION

The issue which the Board must decide in this matter is whether, as Complainant alleges, Respondent has been in violation of the cited regulations subsequent to March, 1984. Respondent's filings are not illuminating in this respect, since they deal with circumstances which existed prior to the time of the currently alleged violations. Additionally, as previously noted, Respondent did not attend the Board's hearing, and therefore made no attempt to dispute these allegations at hearing. In particular, Respondent has made no attempt to dispute that the previously existing noise abatement devices have been modified such as to cause a reversion to the noise conditions which existed prior to installation of the devices. Pursuant to 35 Ill. Adm. Code 103.220 the Board therefore finds Respondent in default.

The two July 1983 noise surveys clearly indicate that noise levels absent the control devices are excessive, and that such noise levels constitute violations. In view of the default of Respondent, the Board can only conclude that these excessive noise level exist once more. Accordingly, the Board finds that Respondent is in violation of the regulations as cited.

The Board will therefore levy a penalty of \$500 on Respondent, and order that Respondent immediately take actions necessary to abate the violations. The Board determined that a penalty is appropriate in this instance only after consideration of the factors enumerated in Section 33(c) of the Environmental Protection Act. Respondent has not attempted to refute Petitioner's evidence that noise emissions from the car wash are in excess of the applicable regulations. Excessive noise levels

can cause substantial interference with, and injury to, the health and general welfare of persons living and working nearby the source(s) of such emissions. The record indicates that persons both live and work in close proximity to the emissions from the Maywood Shell Car Wash (R. at 13; Complainant's Exhibit 1).

This notwithstanding, the Board notes that the Maywood Shell Car Wash has social and economic value, and that it may in fact be suitable to the area in which it is located since the area appears to be largely commercial in nature (Respondent's Exhibit 1). Even so, these factors are outweighed by the apparent ease with which the car wash's emissions might be reduced. The Board must assume that it is technically practicable and economically reasonable to reduce these emissions, for they have been so reduced before. The Respondent has introduced no evidence which could lead the Board to any other conclusion.

The Board will retain jurisdiction in this matter and require that Respondent give demonstration that he has complied with the Board's Order. Failure to do so may cause additional penalties to be levied against Respondent for continued violations of the Board's rules and regulations.

As a final matter, and in response to apparent suppositions to the contrary by both parties, the Board notes that it is statutorily incapable of awarding damages to any party in a dispute before it.

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

ORDER

1. The Board finds that Respondent James Smith, d/b/a Maywood Shell Car Wash, has violated 35 Ill. Adm. Code 901.102, 901.102(a), and 901.103.
2. Within sixty days of the date of this Order, Respondent shall, by certified check or money order, pay a civil penalty of \$500 payable to the State of Illinois. Such payment shall be sent to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, IL 62706
3. Respondent shall cease and desist from violations of the Board's regulations, and shall take immediate steps to prevent additional violations.

4. On or before May 29, 1987, Respondent shall have in functional operation noise abatement devices sufficient to prevent future violations of the kind alleged by Complainant.
5. Within sixty days of the date of this Order, Respondent shall notify the Board and Complainant in writing as to whether it has complied with the provisions of paragraphs 2 and 4 of this Order.
6. The Board retains jurisdiction in this matter.

IT IS SO ORDERED.

J.D. Dumelle and J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 30~~th~~ day of April, 1987, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board