

ILLINOIS POLLUTION CONTROL BOARD
August 1, 1985

CITIZENS OF BURBANK,)
)
 Complainants,)
)
 v.) PCB 84-124
)
 OVERNITE TRUCKING,)
)
 Respondents.)

MRS. CAROL HARDING, APPEARED PRO SE, ON BEHALF OF COMPLAINANTS;
AND
MR. JOHN WOOD FAHM, GENERAL COUNSEL, APPEARED FOR RESPONDENTS.

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

On August 13, 1984, Citizens of Burbank ("Citizens")¹ filed a complaint with the Board charging Overnite Trucking with violations of Sections 23 and 24 of the Environmental Protection Act ("Act"), respecting Noise Pollution and Sections 8 and 9 of the Act, respecting Air Pollution. Hearing was held December 13, 1984. Both parties waived final briefs.

On May 20, 1985, complainants filed a letter containing information pertaining to the subject matter of this case. This information is not a statement under oath and has not been subject to cross-examination. Consequently, the Board has not considered this information in its deliberations. The requirements of sworn testimony and the opportunity for cross-examination are for the protection of both parties in a contested case proceeding such as this one. Since the May 20 letter meets neither requirement, the Board, on its own motion, must strike the letter.

The facility in question, Overnite Transportation Company ("Overnite"), is located between West 75th Street and West 77th Street at approximately South Natoma Avenue. The property is approximately 600 feet wide in an east-west direction and 1300 feet long in a north-south direction. There are two predominant structures on the property: a centrally located terminal

¹ "Citizens" consists of residents from five (5) locations near Overnite including: Mr. & Mrs. James Harding, Mr. & Mrs. Vincent Bavirsch, Mr. & Mrs. Ken Myslik, Mr. & Mrs. Edward Myslek and Mr. & Mrs. Frank Lojas. As the complainants were identified by signature only, the Board apologizes for any misspelling of names.

building (approximately 550 feet by 100 feet) and a smaller shop or maintenance building (approximately 80 feet by 100 feet) at the southern end of the property (Resp. Ex. 1).

Overnite's operations involve the collection and distribution of freight in the Chicago area, as well as the transfer of freight from Overnite's terminal to terminals in other locations in the United States. Four types of activities are of concern here: (1) trucks entering or leaving the Overnite facility destined for customers or other terminals; (2) tractors and trailers being moved from one location on Overnite's property to another; (3) miscellaneous trucking activities including tractor-trailer repair, fueling and startup; and (4) the public address system. Overnite's operations, as is standard in the industry, depend on the pick-up and delivery schedules established by its customers. Consequently, very little activity occurs in the terminal or "yard" during the day time. Most activity is from six o'clock in the evening until six o'clock the next morning (R. 89-97). While Overnite has occupied the location since May of 1984, the location has been occupied by other trucking companies for many years preceding Overnite's acquisition of the property.

The complainants in this proceeding are residents from the area south of Overnite's facility. Testimony was provided at hearing by Mrs. Alice Bavirsch, who lives 7717 South Natoma, on the east side of the street, approximately 125 feet south of Overnite's southern fence line; Mr. Frank Lojas who resides at 7702 South Nashville, which would appear to be less than 100 feet from Overnite's southern fence line; and from Mrs. Carol Harding who resides at 7701 South Natoma, directly south of the maintenance building, which would appear from the testimony to be less than 50 feet from Overnite's southern fence line. In addition, two letters from other local residents similarly situated were admitted into evidence (Pet. Exs. 2, 3).

The complainants in this proceeding allege that Overnite's operations violate statutory provisions respecting noise and air pollution. The two aspects will be evaluated separately.

NOISE

Title VI of the Act provides the procedures and standards for noise control. Sections 23 and 24 of that Title provide:

TITLE VI: NOISE

Section 23

The General Assembly finds that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities,

increases construction costs, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the quality of our environment.

It is the purpose of this Title to prevent noise which creates a public nuisance.

Section 24

No 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, so as to violate any regulation or standard adopted by the Board under this Act.

The Board has implemented these statutory sections in two ways. First, the Board has adopted specific numerical limitations on the characteristics of sound that may be transmitted from source to receiver. As no numerical test data were presented in this matter, those portions of the regulations are not at issue. The second method of implementing the noise provisions of the Act are found in 35 Ill. Adm. Code Sections 900.101 and 900.102.

Section 900.101 Definitions

* * *

Noise pollution: the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity.

* * *

Section 900.102 Prohibition of Noise Pollution

No person shall cause or allow the emission of sound beyond the boundaries of his property, as property is defined in Section 25 of the Illinois Environmental Protection Act, so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter.

In effect, these two sections adopt a regulatory public nuisance provision for noise control using the statutory phrase "unreasonable interference with the enjoyment of life or with any lawful business or activity" as the standard. The pleadings, testimony and exhibits of the complainants, regarding noise, are founded in this public nuisance theory.

The judicial interpretation of Sections 900.101 and 900.102 which is most closely related to the facts of this case is Ferndale Heights Utilities Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 44 Ill. App. 3d 962, 358 N.E.2d 1224 (First District, 1976), (hereinafter "Ferndale"). In that case, which involved the exact statutory and regulatory language at issue in the instant proceeding², the Board found that Ferndale Heights Utilities Company had violated the regulatory public nuisance standard in their operation of a pumping station. On appeal, the Utility Company argued that the regulatory language of Section 900.102 was unconstitutional in that it did not contain sufficient standards for determining what constitutes "noise pollution" and argued that the narrative testimony at hearing lacked sufficient specificity to sustain a finding of violation of noise pollution. The Ferndale Court found the regulatory language, when viewed in the entire statutory framework, including the factors listed in Section 33(c) of the Act, was sufficiently specific to pass Constitutional muster. In evaluating the adequacy and specificity of the citizen testimony, the court stated:

Ferndale next asserts that the Board's order should be reversed because its finding of a violation of Rule 102 is contrary to the manifest weight of the evidence. Specifically, Ferndale argues that the Pierson testimony failed to provide dates and times of noises, failed to show any disturbance in his house, failed to show physical damage to himself or any person or property, failed to show that he never lounged or entertained guests in his yard and failed to show when and how often he did not lounge or entertain guests in his yard. Other alleged testimonial deficiencies involve failure to cite dates and times when activities such as patio parties were prevented or when the various witness' sleep was interrupted. However, agency witnesses used such terms as "almost constant this summer", "five times this past summer" and "awakened once or twice this year" to describe generally how often they were disturbed by the noise emanating from the pumping station. Terms such as "a great source of irritation," "disturbing", "like ten air conditioners running at the same time" and

² Prior to Codification in the Illinois Administrative Code, Section 900.101, "Noise Pollution" was found at Illinois Pollution Control Board, Rules and Regulations, Chapter 8, Rule 101(j). Section 900.102 was Rule 102 of that same Chapter. The actual regulatory language was not modified.

"[like] a lawnmower running all day under my window" were used to describe the effect of this sound upon the individuals.

Based upon such testimony the Board properly found that the character and degree of interference with the enjoyment of life and lawful activity occasioned by sounds emanating from Ferndale's pumping operations to be "unreasonable." Our review of the record does not mandate a contrary conclusion. (Id.)

These statutory, regulatory and judicial standards provide the guidance by which the Board must evaluate the record in this proceeding.

At hearing, Mrs. Alice Bavirsch testified:

"But the smell is bad and the noise is bad. There is no doubt about it (R. 13).

* * *

Q. When is the noise the heaviest, what time of day?

A. "Well, if you don't get to bed by 9:00 o'clock, you are up all night fighting it. And, of course, the smell seeps right through, right into the bedroom area, and we are used to it now." (R. 14)

* * *

Q. Okay. Is there anything that you want to say about that maintenance building at Overnight?

A. "They are noisy. You could hear the banging of whatever they are doing. I don't know what they are doing. But you could hear it all the time. And I guess they must have a weighing station, the way I look at it. The trucks go right in there and they stop and then they go around and they keep going around and around, and it is noisy." (R. 15)

Mr. Lojas provided the best testimonial description of the frequency of the problem:

Q. Could you estimate the frequency that you have, the kinds of problems that you have been talking about, on a weekly or a

monthly basis with Overnite? Are you talking about once a week you get waked up, or once a month, or what?

A. "During the summertime, when our windows are open, usually during the night we are woken up.

One example is we were told there was going to be no repair at the facilities. Yet we found a few times that people were pounding late at night which woke us up, and the fellows were pounding out trailers. They had some damage to the trailers. They had ladders on there, and they were pounding them out."

Q. How often did that kind of thing happen?

A. "That happened about three or four times. We were awakened by P.A. systems, where people were talking over the P.A. system. In fact, one of my neighbors next to me, the home south of me, complained that he even got up one night and walked out into the back alley area and hollered at the terminal, telling them to shut up because his kids were being woken up."

Q. On a monthly basis during the summer, how many times do you think that you were disturbed yourself, or your family?

A. "I would say about two-thirds to three-fourths of the time."

Q. So does that mean 20 times a month?

A. "Yes." (R. 36-37)

This testimony meets the Ferndale standard of providing a description of the noise, explaining the type and severity of interference caused by the noise (sleep interruption) and providing information on the frequency and duration of the interference. This type of testimony must be provided in any proceeding for the Board to make a finding regarding interference with the enjoyment of life.

Mrs. Carol Harding testified:

THE WITNESS: "Okay. My name is Carol Harding. My address is 7701 South Natoma. I am the last house on the street there, and I

am dead center with the maintenance building of Overnite.

My bedroom windows and my kitchen windows face the north, and I don't appreciate being kept up nightly because of heavy truck movement going on in that maintenance area."

* * *

To me, that is a lot of heavy polluted air that you are putting into my lungs, which I don't appreciate, and a lot of heavy noise. My house vibrates. I have to keep my TV on high if I want to sit down and try and enjoy watching my TV." (R. 50-51)

To support the testimony, Complainants introduced Pet. Gr. Ex. 5 which includes a listing of the dates and times that Mrs. Harding recorded "very unnecessarily loud noises" or odor problems from Overnite (R. 59). That exhibit contains 21 listings for June of 1984.

In addition to testimony from local residents, complainants provided testimony by Mr. Winfield Ferry, an enforcement officer from the Cook County Department of Environmental Control. While Mr. Ferry did not take noise level readings, he did express an opinion on the noise levels.

Q. Did you take any decibel readings at any point when you conducted this investigation?

A. "Let me read --"

Q. Did you take any yourself? Did you use a meter in the field to take any? I am not asking whether they violated the ordinance or not.

A. "It was not necessary to take a reading at this time because I can tell from my experience, and I have been an inspector for a while, that the noise is sufficient to warrant corrective action." (R. 76)

Overnite made no attempt to dispute or impeach the complainants' testimony on the severity or frequency of the noise problem. In discussing the issue, Counsel for Overnite tacitly admitted the problem:

MR. FAIN: "This is correct. We are not saying this is going to alleviate your

problem; and it will never alleviate the problem. That is part of the problem with living next door to a property that is zoned industrial and has a truck line sitting there. But we think these measures will appreciably help." (R. 125-126)

Based on the above-cited evidence, the Board finds that noises emanating from Overnite's facility, specifically from vehicle movement, maintenance, horns and the public address system, are causing interference with the sleep and normal leisure time activities of adjacent residents. Further, the Board finds this interference is frequent and severe.

ODOR

The Environmental Protection Act, Board regulations and judicial interpretations adopt a similar approach to controlling odor problems. The Act defines and prohibits unreasonable interference with the enjoyment of life or property from odors.

Section 3

- b. "AIR POLLUTION" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

Section 9

No person shall:

- a. Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

Board regulations at 35 Ill. Adm. code Sections 201.102, "Air Pollution" and 201.141 "Prohibition of Air Pollution" contain identical language to the Act. Similar judicial interpretations apply to the "unreasonable interference" odor pollution cases. See: Incinerator, Inc. v. Pollution Control Board, 59 Ill.2d 290, 319 N.E.2d 794 (1974); Mystic Tape, Div. of Borden, Inc. v. Pollution Control Board, 60 Ill.2d 330; 328 N.E.2d 5 (1975); Processing & Books v. Pollution Control Board, 64 Ill.2d 68, 351 N.E.2d 865 (1976).

The hearing testimony on odor is similar in character to the testimony on noise:

"Well, if you don't get to bed by 9:00 o'clock, you are up all night fighting [the noise]. And, of course, the smell seeps right through, right into the bedroom area, and we are used to it now.

Q. Okay. What type of relief are you trying to seek here today?

A. Well, if they would limit their operations to daytime hours and, I don't know, sometimes when they start up those trucks the smog is so thick you could choke.

I used to walk my dog there every morning, and it was just overpowering. You could hardly breathe. And that just drifts all the way across to my yard, and I am 150 feet away." (R. 14)

* * *

"Usually, you park cabs over there, usually three to six cabs. They have a tendency to start up in the morning, and when they do start up and the wind is out of the north, we get a foul smell and taste into our kitchen area, and this happens many times around breakfast time." (R. 32)

* * *

"When you figure you have trucks lining up, getting ready to fuel, we get all the smell. This is all coming towards us.

If you get inversions it keeps it down on the ground, and we are finding that it does bother us. It affects our sleep, it affects our way that we operate during the day, because we could not relax during the night and get our proper sleep, or even during the days it affects your thinking because it cuts down the air, oxygen that you are taking in." (R. 34)

* * *

"From, I would say, five o'clock at night, you will have up to 15 trucks waiting to fill up in this pumping area; up to 15 trucks, I counted.

To me, that is a lot of heavy polluted air that you are putting into my lungs, which I don't appreciate, and a lot of heavy noise." (R. 50-51)

In addition, Pet. Gr. Ex. 5 contains references from Mrs. Harding to "excessive odors of truck fumes" and "heavy odors" during June of 1984. Additionally, Pet. Ex. 1 (A through EE) contains photographs which show smoke surrounding truck tractors on Overnite's property. While the photographs certainly cannot demonstrate odor, they support the conclusion that Overnite is the source for the odor.

Again, Overnite made no attempt to dispute or impeach the complainants' evidence on severity or frequency of the odor problem.

Based on the above-cited evidence, the Board finds that odors from Overnite's facility, specifically truck operation, start-up and fueling, are causing interference with the sleep, food consumption and normal leisure time activities of adjacent residents. Further, the Board finds this interference is frequent and severe.

Section 33(c)

The Board may find severe and frequent interference with the enjoyment of life solely based on testimony describing the impacts of noise or odor. However, to evaluate whether those noise or odor impacts are "unreasonable," the Board must evaluate a series of factors listed in Section 33(c) of the Act:

Section 33

* * *

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

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

The "unreasonableness" of the noise or odor pollution must be determined in reference to these statutory criteria. Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978); Mystic Tape, supra; Incinerator, supra, City of Monmouth v. Pollution Control Board, 57 Ill.2d 482, 313 N.E.2d 161 (1974). However, complainants are not required to introduce evidence on these points. Processing & Books, supra.

In evaluating the first of the Section 33(c) factors, the Board finds there is a frequent and severe interference with sleep, food consumption and normal leisure activities of adjacent residents caused by noise and odor from Overnite's facility. This interference goes far beyond trifling interference, petty annoyance or minor discomfort. The noise and odors constitute a substantial interference with the enjoyment of life and property.

Concerning the second of the Section 33(c) factors, the Board finds that Overnite is of substantial social and economic benefit in that it provides valuable services in the local and national movement of freight (R. 90-93) and employs many people (R. 109). However, the social and economic benefit is significantly reduced by the nature of noise and odor emissions from the property.

The third Section 33(c) factor concerns suitability of the pollution source to the area in which it is located and priority of location. The record contains very little descriptive information on the area beyond complainants' and defendant's property. It is clear that complainants' property is in the City of Burbank, while defendant's property is "across the street" in the Village of Bedford Park (R. 8, 49). While the property which Overnite's facility occupies was originally zoned for residential use R4 by Bedford Park, that zoning use was changed and the facility is in compliance with current Bedford Park zoning uses (R. 18, 32-33, 38). The Board finds that Overnite's facility is suitable for the area in which it is located if noise and odor problems can be reduced to acceptable levels.

On the priority of location issue, the Board finds that complainants have the clear priority. The record is undisputed that local area residents generally, and several complainants in particular, lived in the area in 1967 when the facility in question was undeveloped and uninhabited prairie land (R. 32).

Concerning the last of the Section 33(c) factors, the Board finds that there are technically feasible and economically reasonable methods of making some reductions in noise and odor levels, that Overnite has begun to implement some of these measures, but that the record is insufficient to support a detailed Order commanding what specific steps must be taken, by what certain time, and what steps will be necessary to completely cure the problems.

Additionally, the Board finds that to curtail all nighttime activities would amount to an Order for Overnite to cease operation and go out of business (R. 98). However, lack of a technologically feasible method of reducing the pollution is not an absolute defense to a finding of violation by this Board. Wells supra, Chicago Magnesium Casting Co. v. Pollution Control Board, 22 Ill.App.3d 489, 317 N.E.2d 689. The Board believes that the report required in today's Order will provide information on specific workable methods of reducing the noise and odor problems to acceptable levels without facing the difficult closure issue.

Based on the Board findings of substantial interference with the enjoyment of life and after consideration of the factors listed in Section 33(c), the Board finds that noise emissions from Overnite's facility are unreasonable and constitute a violation of 35 Ill. Adm. Code 900.102 and Section 24 of the Environmental Protection Act. Based on the Board findings of substantial interference with enjoyment of life and after consideration of the factors listed in Section 33(c), the Board finds the odor emissions from Overnite's facility are unreasonable and constitute a violation of 35 Ill. Adm. Code 201.141 and Section 9 of the Environmental Protection Act.

Additional Information

Throughout this proceeding, steps were mentioned which would have the effect of reducing the noise and odor emissions from Overnite's facility. These include:

1. Operational changes, such as rerouting on-site truck movement patterns;
2. Moving the electric hot lines from the south end of the terminal to decrease truck start-up at that location;
3. Building an acoustical barrier along the southern perimeter; and
4. Enclosing the maintenance building fuel bay area.

While these options were discussed favorably at hearing, certain informational deficiencies exist. For example, prior truck traffic patterns were not compared to future traffic patterns, plans for the acoustical barrier were produced and discussed at

hearing but not introduced as evidence, discussions of fuel bay enclosure were very general in nature, and most importantly, no attempt was made to quantify the reduction in noise and odor that would be accomplished by implementing these steps.

Additionally, the Board is concerned that moving certain operations may only shift the impact to persons not present in this proceeding. Therefore, the Board will order Overnite to prepare a report evaluating, to the maximum extent possible, the type and degree of noise and odor reductions possible by changes in operation or construction of noise and odor reduction devices. This report should be prepared by a competent individual or firm, and should evaluate all methods of control (not just those already discussed). Each control option should include anticipated pollution reductions, cost of implementation and an estimate of a reasonable time for implementation.

The Board will retain jurisdiction in this case pending receipt of the report, and final disposition of this matter. The report is to be filed with the Board and complainants' representative, Mrs. Carol Harding, not later than November 1, 1985. Unless a motion requesting a hearing on the contents of the report is received by November 30, 1985, the Board will proceed to issue a final Order regarding compliance as soon as possible thereafter.

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

ORDER

1. The Board finds that Overnite Trucking has violated 35 Ill. Adm. Code Sections 900.102 and 201.141, as well as Sections 24 and 9 of the Environmental Protection Act.
2. Overnite is Ordered to submit to the Board and complainants, not later than November 1, 1985, a report on methods of reducing or eliminating noise and odor pollution at its facility consistent with the Opinion.
3. The Board will retain jurisdiction in this matter pending receipt of the report. Unless a motion for hearing on the contents of that report is received by November 30, 1985, the Board will proceed to issue a final Order in this matter.

IT IS SO ORDERED

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim Opinion and Order was adopted on the 1st day of August, 1985, by a vote of 7-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board