

ILLINOIS POLLUTION CONTROL BOARD  
November 7, 2002

ANTHONY and KAREN ROTI, PAUL	)	
ROSENSTROCK, and LESLIE WEBER,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 99-19
	)	(Citizens Enforcement – Noise)
LTD COMMODITIES,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

This citizens' noise enforcement action concerns a trucking operation in Bannockburn, Lake County. Complainants, Anthony and Karen Roti, Paul Rosenstock, and Leslie Weber, filed a complaint alleging that respondent LTD Commodities' (LTD) trucking operation exceeds Illinois' numeric nighttime sound limits, impulse noise limits, and nuisance noise standards. Complainants contended that LTD therefore violated Section 24 of the Environmental Protection Act (Act) (415 ILCS 5/24 (2000)) and the Board regulations at 35 Ill. Adm. Code 900.102, 901.102(a), 901.102(b), and 901.104.

On February 15, 2001, the Board entered an interim opinion and order (Int. Op.), which it incorporates here by reference, finding that LTD violated the Board's nuisance noise provisions. 415 ILCS 5/24 (2000); 35 Ill. Adm. Code 900.102. However, the Board also found that the record lacked sufficient information regarding remedies and directed the parties to further address appropriate remedies at another hearing.

On October 21, 2002, after two hearing days on remedies<sup>1</sup>, the complainants filed a motion to reopen limited discovery and to compel LTD to produce information relating to its financial condition (Comp. Mot.). On October 25, 2002, LTD filed a response (Resp.) opposing complainants' motion to reopen discovery.

For the reasons set forth below, the Board denies the complainants' motion to reopen discovery. Hearings on the remedy have been continued until December 9, 2002, at which time complainants will cross-examine LTD's noise expert, Mr. Tom Thunder.

**MOTION TO REOPEN DISCOVERY**

Complainants request that the Board reopen discovery and compel LTD to produce financial information so the Board can consider whether it is economically reasonable, as

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<sup>1</sup> The hearing was held at Village Hall, 118 W. Cook Rd., Libertyville on October 15 and 16, 2002.

directed by Section 33(c) of the Act (415 ILCS 5/33(c)), for LTD to construct a noise barrier costing approximately \$625,000. LTD objected to the motion on two grounds: (1) that complainants waited too long to pursue discovery regarding LTD's financial condition; and (2) that the record contains adequate evidence regarding LTD's financial condition.

First, LTD argues that complainants waited too long to pursue discovery. Resp. at 1. LTD states that complainants should have requested a stipulation regarding LTD's financial ability soon after complainants disclosed a report by Dr. Paul Schomer, the complainants' noise expert, on April 30, 2002. The report increased the cost estimate of an appropriate noise wall from \$200,000 to at least \$623,350. Resp. at 2.

The Board disagrees with LTD's first contention. Both the Board and Supreme Court of Illinois have held that the burden to introduce evidence regarding technical feasibility and economic reasonableness under Section 33(c)(iv) lies with the respondent. IEPA v. Archer Daniels Midland, PCB 80-151, slip op. at 10 (Mar. 27, 1986); Slager v. PCB, 96 Ill. App. 3d 332, 421 N.E.2d 292 (1981), *citing* Processing and Books, Inc. v. PCB, 351 N.E.2d 865 (June 28, 1976). The Board has also held that when there is no evidence that alternative solutions were even investigated, the respondent has failed to meet its burden of proving economic infeasibility. Archer Daniels Midland, at 11-12. Once the complainants disclosed Dr. Schomer's report proposing a noise wall costing \$623,350, the burden was not upon the complainants to request a stipulation from LTD. Rather, LTD must provide evidence that either that the wall was economically unreasonable or that it had investigated other, less costly alternatives.

Second, LTD argues that the record contains adequate evidence of its financial condition and, thus, there is no reason to reopen discovery on this issue. Resp. at 2. There is information in the Board's interim opinion and order regarding the size and price paid for LTD's Bannockburn facility, the number of people employed at the facility, the amount LTD pays annually in real estate taxes, and the amount spent on two expansions of the warehouse. Int. Op. at 5-6.<sup>2</sup> Subsequent to the Board's interim opinion, LTD opened a facility in Naperville of equal size to LTD's Bannockburn facility. LTD leases the Naperville facility. Resp. at 4.

The Board agrees with LTD's second contention. It is true, as noted by the Board (Int. Op. at 28) and complainants (Comp. Mot. at 2), that LTD has not presented evidence regarding the value of its sales or profits. However, LTD has had the opportunity at evidentiary hearings to disclose additional financial information yet chose not to do so. Information on LTD's sales and profits could be helpful in fashioning an appropriate remedy. However, the Board does not require such information. The Board can order a proper remedy with what facts exist in the record at present and after the close of evidentiary hearings. Accordingly, the complainants' motion to reopen discovery and compel production of financial information is denied.

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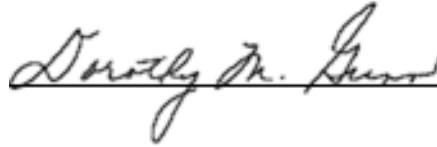
<sup>2</sup> LTD paid \$6.6 million for its initial purchase of property; \$3.9 million for vacant land to make an additional expansion; between \$1.5 and \$2 million for its first warehouse expansion; \$6 million for a subsequent expansion; and LTD pays more than \$300,000 each year in real estate taxes. LTD regularly employs 600 people at its facility.

**CONCLUSION**

For the above reasons, the Board denies the complainants motion to reopen limited discovery and compel production of financial information.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 7, 2002, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board