

ILLINOIS POLLUTION CONTROL BOARD
September 1, 1977

WINNETKANS INTERESTED IN PROTECTING)
THE ENVIRONMENT (WIPE),)
)
Complainant,)
)
v.) PCB 75-363
)
VILLAGE OF WINNETKA,)
)
Respondent.)

Mr. George E. Bullwinkel appeared for the Complainant.
Mr. Harvey M. Sheldon appeared for the Respondent.

OPINION AND ORDER OF THE BOARD (by Mr. Young):

This matter is before the Board on a Complaint filed on September 16, 1975, by a citizens association, Winnetkans Interested in Protecting the Environment (WIPE), charging that the Village of Winnetka operated Boiler No. 8 in violation of Rule 203(g)(1) of the Air Rules and without an operating permit as required by Rule 103(b)(2) of Chapter 2 and by Section 9(b) of the Act. In an Order dated February 19, 1976, and on Motion of Respondent, the Board dismissed as moot that portion of the Complaint alleging violation of Rule 203(g)(1). This action followed the ruling of the Supreme Court in Commonwealth Edison v. PCB, 62 Ill. 2d 494, 343 N.E.2d 865 (1976), wherein the adoption of Rule 203(g)(1) was remanded to the Board for further consideration. The Board refused to dismiss that portion of the Complaint involving the alleged permit violation and on May 6, 1976, stayed the proceedings in this matter pending Respondent's resubmission of a new permit application to the Agency.

On April 23, 1976, WIPE filed an Amended Complaint adding Count II which alleged that Respondent had operated Boiler No. 7 using coal as fuel without an operating permit in violation of Section 9(b) of the Act and Rule 103(b)(2) of Chapter 2.

A hearing was held in this matter on March 9, 1977, in Chicago, Illinois. After the conclusion of Complainant's case in chief, which included an opening statement of counsel and the introduction of a Joint Stipulation (WIPE Exh. 1), Respondent moved to dismiss. The Hearing Officer properly reserved to the Board a ruling on the Motion to Dismiss in accordance with Rule 308(e) of the Board's Procedural Rules.

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The Board therefore will rule on the Motion to Dismiss Count I and Count II based upon the record established prior to the Motion to Dismiss and will only consider testimony offered after the Motion as is necessary to dispose any alleged violations remaining after ruling on the Motion to Dismiss.

COUNT I

Count I alleges violation by Respondent, through operation of Boiler No. 8, of Section 9(b) of the Environmental Protection Act and Rule 103(b)(2) of Chapter 2 of the Board's Rules and Regulations. Section 9(b) provides that no person shall operate any equipment capable of causing or contributing to air pollution without a permit granted by the Agency; Rule 103(b)(2) prohibits the operation of any existing emission source without first obtaining an operating permit from the Agency.

The Joint Stipulation (WIPE Exh. 1) establishes that Respondent owned and operated a fossil-fueled boiler, designated as Boiler No. 8, used in the generation of electricity during the period alleged without a permit issued by the Illinois Environmental Protection Agency (WIPE Exh. 1, p. 1-2).

The basis for the Motion to Dismiss made by Respondent (R. p. 8-9) was that the Complainant had "failed to introduce sufficient evidence with respect to the various factors, and technical feasibility, economic reasonableness, and other factors set forth in Section 33 of the Act to enable the Board to make a conclusion on the basis of that case, whether or not there has been a violation and even if there could be a bare conclusion of a violation, there is absolutely by statement by counsel, no statement whatsoever with respect to there being any aggravation, or other circumstance which would merit any penalty.

Section 31(c) governs the burden of proof in enforcement actions before the Board and provides "... the burden shall be on ... Complainant to show ... that the Respondent has violated ... any provision of this Act or any rule or regulation of the Board If such proof has been made, the burden shall be on the Respondent to show that compliance with the Board's regulations would impose arbitrary hardship."

In Processing and Books, Inc. v. Pollution Control Board, 351 N.E.2d 865 (1976) the Illinois Supreme Court stated at p. 869:

"The Appellate Court (in 328 N.E.2d 338, 341) apparently concluded that this court's opinion in the Incinerator case (Incinerator, Inc. v. Pollution Control Board (1974) 319 N.E.2d 794) had placed upon the Agency the burden of proving, by evidence which

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it offered, the unreasonableness of Respondent's conduct in terms of each of the four criteria mentioned in Section 33(c). No such result was intended by our decision in Incinerator."

The law would now appear to be settled on this point; the Supreme Court has stated that a complainant bears the burden of persuasion on the essential elements of the offense charged (Incinerator), but that to hold that complainant bears the burden of proof with respect to each of the criteria of Section 33(c) would render redundant or contradict the allocation of the burdens of proof in Section 31(c) (Processing and Books, p. 869).

It should be further noted that Count I does not allege that type of violation which unreasonably interferes with the enjoyment of life or property of others. In the instant case a finding of unreasonableness or otherwise is not necessary to the finding of a violation. It is the opinion of the Board that the essential elements necessary to the finding of a violation were established by the Complainant through the Joint Stipulation entered into the record and the Motion to Dismiss Count I of the Complaint must be denied.

Complainant did not choose to offer any evidence in aggravation (R. p. 8). In mitigation the Board notes that although Respondent applied to renew a prior operating permit in early 1975 (WIPE Exh. 1, par. 5), that permit was denied by the Agency on May 7, 1975, for failure to demonstrate compliance with Rule 203(g)(1) of Chapter 2. Following discussions with the Agency, and several more re-applications and denials, Winnetka agreed to provide the Agency with data collected in a new stack test (Resp. Group Exh. 1). On May 6, 1976, the Board granted a stay of these proceedings to allow Agency consideration of the stack test results. An operating permit for Boiler No. 8 was issued by the Agency to the Respondent on July 15, 1976 (WIPE Exh. 1, par. 5).

A complicating factor in the proceedings on this Complaint lies in the fact that the rule relied upon by the Agency in denying the permit application on May 7, 1975, was Rule 203(g)(1). Rule 203(g)(1) was vacated by the Illinois Supreme Court (Commonwealth Edison Co. v. PCB (1976) 343 N.E.2d 459) subsequent to the filing of the Complaint in this case. Following the decision in Commonwealth, Respondent filed a Motion to Dismiss contending that the Supreme Court ruling and the invalidity of Rule 203(g)(1) provided a complete defense to the charge of violation of Section 9(b) of the Act and Board Rule 103(b)(2).

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On February 9, 1976, the Board refused to dismiss that portion of the Complaint alleging violation of Section 9(b) and Rule 103(b)(2) stating that even if it were established that the permit was not issued solely on the basis of non-compliance with the vacated Rule 203(g)(1)(a) such fact would not constitute a defense but would be considered solely in mitigation. On April 8, 1976, the Board refused to reconsider the Order of February 9, 1976, stating, in part, as follows:

"In order to receive a permit, an applicant must prove to the Agency that the operation of the facility will not cause a violation of the Act or Regulations. Section 39 of the Act gives the Agency authority to withhold permits if the application does not contain such proof. When the Agency denied the permit in this case, it cited as grounds a regulation which then assured compliance both with the Act, the Regulations and ambient air quality standards. Since that regulation has been subsequently held invalid, Respondent is not entitled to a permit without any further action on his part, but must re-submit an application with proof that the facility will comply with the provisions of the Act and any other regulations. Our concept of justice and fair play requires this procedure. If the Board were to accept Respondent's position, any future judicial ruling holding a regulation invalid would result in a de facto issuance of permits to parties who had not challenged an Agency permit denial. This result will not be permitted and a resubmission of a permit application will be required to ensure compliance with the Act and any applicable Regulations."

The Board believes that in circumstances such as that presented above and if an expeditious re-application results in the issuance of the requisite permit, complete mitigation should be allowed. Applying the foregoing discussion to the facts in this case, the Board finds that Respondent made an expeditious re-application which resulted in issuance of the permit, and although the Respondent is found in violation as alleged in Count I, no penalty will be assessed for the violations.

COUNT II

Count II alleges violation by Respondent, through operation of Boiler No. 7, of Section 9(b) of the Act and Rule 103(b)(2) of Chapter 2. In consideration of the Motion to Dismiss Count II, the Board finds that while the Joint Stipulation (WIPE Exh. 1) establishes that Boiler No. 7 is a coal-fueled boiler (par. 7),

that Respondent did not have a permit for Boiler No. 7 (par. 5), and that Boiler No. 7 was operated during the period alleged, the Joint Stipulation does not include the essential fact necessary to establish that Respondent is owner and operator of Boiler No. 7. This is a fatal defect in the proof and the Board finds that Count II as to Boiler No. 7 must be dismissed.

Because of this determination the Board would normally not engage in any further discussion of the alleged violation. This case, however, provides one circumstance worthy of comment. In March, 1975, Respondent filed a petition (PCB 75-107) seeking in part an extension of a prior variance to allow the use of Boiler No. 7 under conditions similar to those which were testified to as the conditions of use in the instant case. (See condition (a)(3) of the Order in PCB 74-180, 13 PCB 587, 589.) On January 22, 1976, the Board denied and dismissed PCB 75-107 on the ground that the Board does not grant speculative emergency variances (19 PCB 713, 714). Mr. Wilbur F. Legg, an attorney and one of the Trustees of the Village of Winnetka and Chairman of the Village Council's Public Utilities Committee, testified that he interpreted the Board's opinion to mean that Respondent could operate the boiler under emergency circumstances without a permit (R. p. 72). As recognized by counsel for Respondent is his closing remarks (R. p. 100), Respondent might be well advised to file an updated petition for variance if similar future use of the unit is contemplated.

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

ORDER

1. Respondent, Village of Winnetka, is found to have operated its Boiler No. 8 in violation of Rule 103(b)(2) of Chapter 2 of the Board's Rules and Regulations and Section 9(b) of the Environmental Protection Act.

2. Count II of the Amended Complaint is hereby dismissed.

IT IS SO ORDERED.

Mr. Jacob D. Dumelle concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 1st day of September, 1977 by a vote of 5-0.

Christan L. Moffett (pk)
Christan L. Moffett, Clerk
Illinois Pollution Control Board

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