ILLINOIS POLLUTION CONTROL BOARD

February 21, 1974

ARBOR THEATRE CORP., an Illinois Corporation	)	
vs.	)	PCB 72-317
CAMPBELL SOUP COMPANY, a New Jersey Corporation	)	

Mr. Lloyd Dyer, counsel for Arbor Theatre Corporation.
Mr. John Ward, counsel for Campbell Soup Company

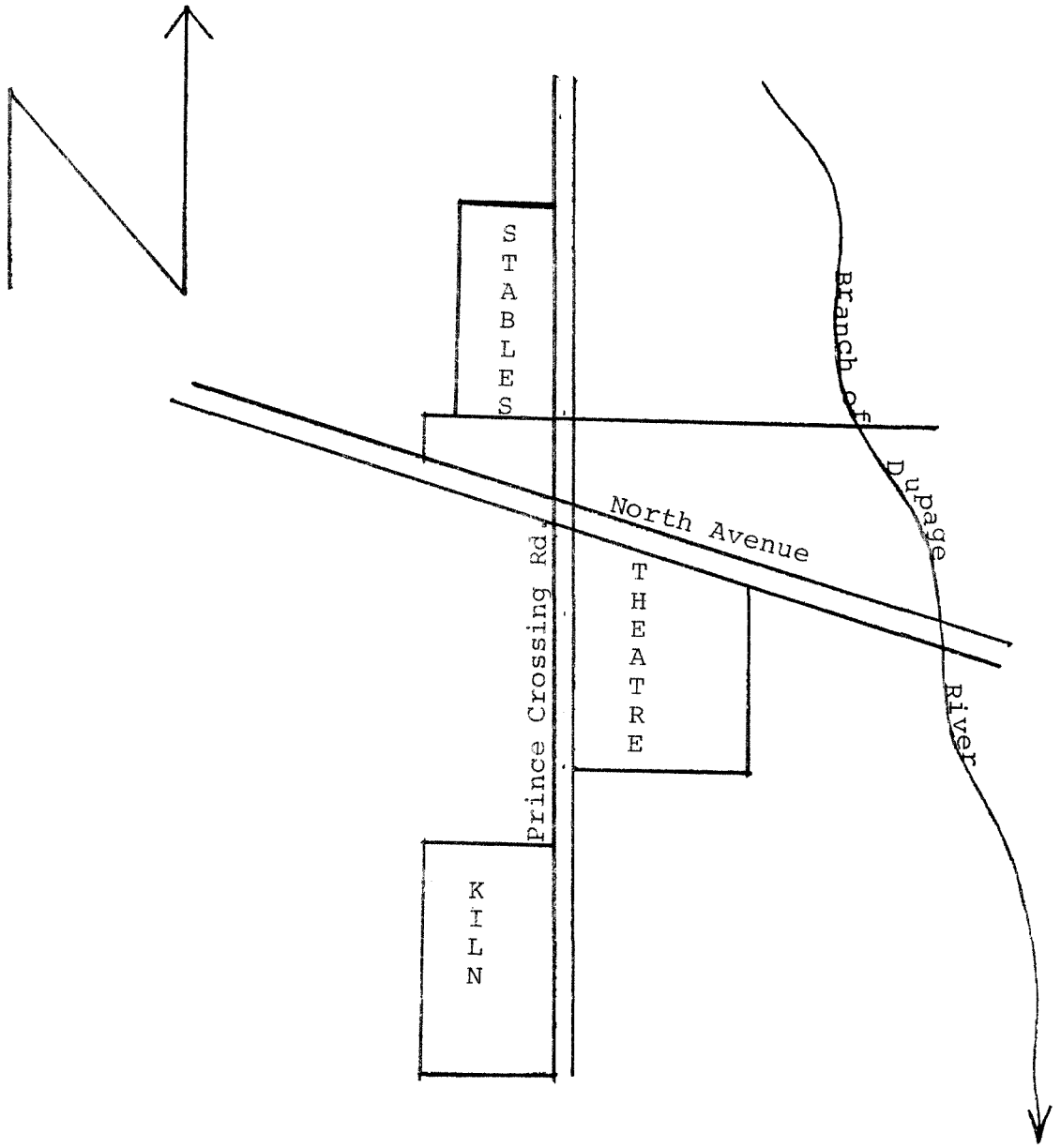
OPINION AND ORDER OF THE BOARD (by Dr. Odell)

Arbor Theatre Corporation (Arbor) filed a Complaint against Campbell Soup Company (Campbell) on July 28, 1972, alleging violations of Sections 9(a) and (b) of the Environmental Protection Act (Act) and Rule 802 of Chapter Two, Air Pollution Regulations (Chapter Two). The Complainant averred that Respondent discharged certain gaseous materials into the air creating an odor problem and carried on its activities without an operating permit, the latter constituting a violation of Section 9(b) of the Act.

Campbell operates a facility west of Prince Crossing Road and south of North Avenue in West Chicago, Illinois (see map page 2). Campbell makes compost at the facility as well as operating a mushroom farm on the 200-acre plot. Compost is produced by combining hay, corncobs, manure and commercial fertilizer and cooking it in a rotary kiln. Ninety-ton daily batches (ricks) are produced on a year-round basis. Complainant, who operates a drive-in theatre within several hundred feet to the northeast of Respondent, argues that the odors emanating from the compost violate the Act and the Air Pollution Regulations.

Two hearings were held. The first one occurred on July 24, 1973; and the second took place on September 20, 1973. Briefs were filed by both parties.

Several motions were made by the parties in their briefs. First, each side requested that the Board award him attorneys' fees. Section 45(b) of the Act was cited by the parties. It states:


STABLES
Branch of
DuPage
River
North Avenue
Prince Crossing Rd.
THEATRE
KILN

NOT TO SCALE

> (b) Any person adversely affected in fact by a violation of this Act or of regulations adopted thereunder may sue for injunctive relief against such violation. However, no action shall be brought under this Section until 30 days after the plantiff has been denied relief by the Board under paragraph (b) of Section 31 of this Act. The prevailing party shall be awarded costs and reasonable attorneys' fees.

The parties have misread this Section. The purpose of this Section is to grant a court the power to award attorneys' fees when injunctive relief is sought after Board relief has been denied. The Board's power to grant attorneys' fees rests on Section 33(a) of the Act. Here, however, the burden of proof has not been met to show harrassment on the part of Complainant or total disregard for statutory duty on part of the Respondent. Attorneys' fees are therefore denied.

Second, Respondent Campbell sought to introduce into evidence (Resp. Ex. #2 for identification at R-214) Judgment Order No. 68-1982-G entered on October 15, 1971, in the case of Arbor Theatre Corp. v. Campbell Soup Company. The issue in that case was whether Campbell had created a common law nuisance in the way it ran its facility. Here, Respondent argued (R-216) "I would point out that the basic issue in both cases is identical, that of nuisance . . . as far as the central issue of whether or not nuisance existed, I think that is relevant . . .". We hold that the hearing officer was correct in not allowing the Judgment Order to be entered into evidence. A common law nuisance action is different from the statutory action permitted under Section 9(a). Whether or not a nuisance is established in a common law action has no res judicata effect here because a nuisance is not premised on the determination of the same issues that establish a violation under the Act.

Turning to the merits, we find that no violation has been established under Section 9(a) of the Act, but that Respondent has violated Section 9(b).

Section 9(a) is violated when air pollution is discharged into the atmosphere in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health or property or to unreasonably interfere with the enjoyment of life or property (Section 3b). No physical injury to human life was established. Several citizens complained that they could not sleep at times because of the odors (R-75, 81, 99).

The key issue in this case is whether an unreasonable interference with the enjoyment of life or property has occurred. Much citizen testimony was presented on both sides on the issue of whether the odors were "objectionable". The general pattern seemed to be that those who lived upwind of the odors were not bothered (R-105, 248), while those downwind were upset on occasion (R-19, 75, 85, 99, 118). On the other hand, testimony was introduced that the area is still rather rural (R-93). There are approximately 70 horses in the area, including 38 concentrated at the riding stables north of Respondent's property (Resp. Ex. #1A). One llama also resides in the community. Many citizens did not mind the "farm odor" (R-223) and one individual stated positively that he liked the smell (R-256). Testimony was introduced that fishy odors emanate from a branch of the Du Page River (R-234) which runs south approximately 600 feet east of the Complainant's property. Complainant introduced evidence that the odor problems have persisted since be began his drive-in theatre business in 1961 (R-31). He described the odor as fishy (R-38, 39, 40), while others said it smelled like rotting compost (R-48) or decayed straw or manure (R-255). It was generally agreed that the odor problems were the worst during the warm summer months and that the wind was a key factor in determining the extent of the problem. The intensity and frequency of the problem has decreased substantially during the last year (R-19, 75, 82, 88, 89, 98, 101, 107, 253). Testimony was offered that customers at the drive-in theatre complained of the odors (R-108) and that money had to be refunded sometimes (R-24).

All of this testimony established that there has been interference with life and property, but to find a violation of Section 9(a) we must find that the interference has been unreasonable. It is not every interference with life and property that establishes a 9(a) violation. In Moody v. Flintkote (70-36, 2 PCB 523; September 2, 1971) we stated:

> Air pollution is proved if the evidence shows a significant interference with the enjoyment of life and property that can be corrected by the employment of technology that is available at reasonable cost.

Here the interference has not been unreasonable. Life and property have been interfered with, but Respondent's attempts to control the pollution problem satisfy us that the interference is justified. More than a million dollars has been spent by Campbell since 1961 to control the odor problem (R-369). Campbell has installed the best available technology (R-317) as it has gained experience in dealing with its unique problem. Some of the efforts employed since 1961 (Resp. Ex. #7, R-319) include perfuming attempts in 1962 and 1969. These were discontinued because it created worse odor problems (R-298). A rotary kiln to "cook" the compost was install-

ed in 1964; its sole function is to reduce odors. No other Campbell compost-making operation in the United States utilizes such a kiln (R-299). A Schneible Scrubber was installed in 1965 (R-169) to remove particulate matter. Studies were undertaken in 1967 for the purpose of controlling odors emanating from the scrubber (R-300). The use of permanganate proved unworkable because it caused water pollution problems. Working with a small trial kiln, experiments utilizing an ozone generator were later carried out (R-301). The Carrier Corporation introduced a method which seemed promising, but the unit was withdrawn from the market in 1971 because of mechanical difficulties (R-304). Increasing technological data in ozone usage finally led to the installation in early 1973 of a packed (acid) scrubber and an ozonator (R-325, 326). The system is estimated to be 90% effective in reduction of organic materials. Although tests have been made of the remaining gases emitted from the stack, the low concentrations have made identification unascertainable and elimination impossible (R-327, 331).

To violate Rule 802, quantitative odor measurements using a Scentometer must be conducted as is outlined in Rule 802(d). Complainant introduced no evidence of Scentometer measurements. Since Rule 802 has not been violated, no transgression of Section 9(a) regarding regulation violations has occurred.

Turning to Section 9(b), we hold that a violation occurred. Under Rule 103(b) (2)A of Chapter Two, Respondent was obliged to have an operating permit for the operation of its rotary kiln by January 1, 1973 (see Chemicals and Allied Products Industry Operations as defined by Code 28 of the Standard Industrial Classification Manuel [1972 Edition] Group 287, Industry Number 2875). The operating permit (Resp. Ex. #10) was not issued by the Environmental Protection Agency until April 13, 1973.

This constitutes the findings of fact and conclusions of law of the Board.

ORDER

IT IS THE ORDER of the Pollution Control Board that:

1. Campbell Soup Company pay a penalty of $250.00 for operating its facility without a permit from January 1, 1973, until April 13, 1973. Payment by Respondent shall be by certified check or money order made payable to State of Illinois, Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706. Payment shall be mailed within 35 days of the adoption of this Order.

Mr. Dumelle will file a concurring opinion.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of February, 1974, by a vote of 5 to 0.

Christan L. Moffett, Clerk