ILLINOIS POLLUTION CONTROL BOARD
September 6, 2001

ROGER L. YOUNG and ROMANA K. YOUNG,	)	
Complainants,	)	
v.	)	PCB 00-90
	)	(Citizens Enforcement - Noise)
GILSTER-MARY LEE CORPORATION,	)	
Respondent.	)	

DISSENTING OPINION (by T.E. Johnson and R.C. Flemal):

We respectfully dissent from the majority opinion. Based on the evidence presented in this proceeding, we do not agree that the respondent's Chester, Illinois, plant unreasonably interferes with the enjoyment of the complainant's property, and we believe that the Board, in today's order, has incorrectly applied Section 33(c) of the Environmental Protection Act (415 ILCS 5/33(c) (2000)) in reaching this determination.

As discussed in the majority opinion, the Board performs a two-step test to determine whether noise emissions rise to the level of a nuisance noise pollution violation. First, the Board determines if the noise constitutes an interference in the enjoyment of complainants' lives, and second, the Board considers Section 33(c) in determining whether the interference is unreasonable. We agree with the majority's opinion regarding step one of the test, and find that the noise emissions from the plant do interfere with the complainants' enjoyment of life. However, after a review of the evidence presented, we are not convinced that the complainants have met their burden of proof in showing that the emissions unreasonably interfere with their enjoyment of life using the factors listed in Section 33(c).

UNREASONABLE INTERFERENCE, SECTION 33(C) FACTORS

As stated, the complainants have the burden of proving a violation of the Act or Board regulations. The Board may only find in the complainants' favor if they have proven each element of the claim by a preponderance of the evidence. People v. Chalmers, PCB 96-111, slip op. at 4 (Jan. 6, 2000).

The Character and Degree of Injury, 33(c)i

The Board's first consideration under Section 33(c) concerns the character and degree of injury or interference resulting from the emission. Although conflicting testimony exists, noise emissions from the respondent's plant do substantially and frequently interfere with the complainants' enjoyment of life. Thus, we agree with the majority opinion, and this 33(c) factor is weighed in favor of the complainants.

The Social and Economic Value of the Pollution Source, 33(c)ii

The Board's second consideration under Section 33(c) involves social and economic value. The respondent's facility is the largest private employer in Chester, Illinois. The facility also pays property taxes and bolsters the local economy in a number of ways as referenced in the transcript. We find, as does the majority, that the respondent's facility has a high social and economic value. This 33(c) factor is weighed in favor of the respondent.

The Suitability of the Pollution Source, 33(c)iii

The Board's third consideration under Section 33(c) is 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. Neither party disputes that the respondent has priority of location. The respondent established the plant in question in the early 1960s, while the complainants inherited their house in 1995, and moved into the house in 1997. Priority of location is, and should be, a prime consideration in noise nuisance determinations. The Illinois Supreme Court has stated that when complainants move to the nuisance, they are put on notice of the possibility that some of the existing emissions present "could affect them, and this fact considerably diminishes the potency of their complaints." Wells Mfg. Co. v. PCB, 73 Ill. 2d 226, 236, 383 N.E.2d 148, 152 (Ill. 1978). The Board has recognized this importance in prior Board decisions. In Dettlaff v. Boado, PCB 92-26 (July 1, 1993), the Board cited to Wells Manufacturing in determining that the noise emissions in Dettlaff did not constitute unreasonable interference. The Board stated that complainants should have been aware of the possibility of noise from the respondent when they moved into the area, and that a further influencing factor was that the respondent's property was zoned commercial at the time the complainants moved. Dettlaff, slip op. at 13. The same circumstances exist in the instant case: respondent's facility is in compliance with the zoning code, and does have a priority of location.

In the majority opinion, the Board correctly states that a respondent cannot rely on priority of location as a mitigating factor if emissions are substantially increased. However, the majority errs in finding that the respondent has substantially increased its operations to a sufficient extent to disallow reliance on priority of location as a mitigating factor. The record does not indicate that operations at the plant have substantially increased. The complainants testified that noises increased in the summer of 2000. Tr. at 112, 114-15. Ron Tretter, the general superintendent and vice president of operations for respondent's Chester facility, testified that he believes there has been a slight growth in the institutional department of the plant. Tr. at 351. However, Mr. Tretter also testified that the hours per week the plant is in operation have decreased since 1999. Tr. at 347. A further review of the record reveals that the respondent has used the same number of shifts, three, since 1980. In addition, no evidence was presented at hearing that the respondent has increased the size of the plant or the number of employees working at the plant. The complainants bear the burden of establishing a substantial increase in emissions. Wells Manufacturing, 73 Ill. 2d at 237, 383 N.E.2d at 153. The complainants have not met that burden in this case. Therefore, both the priority of location and the facility's compliance with the zoning code support respondent's suitability for its location, and this factor should be weighed in favor of the respondent.

The Technical Practicability and Economic Reasonableness of Reducing Emissions, 33(c)iv

The fourth issue to consider under Section 33(c) is the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the alleged pollution source. As stated in the majority opinion, when considering this factor, the Board must determine whether technically practicable and economically reasonable means of reducing or eliminating noise emissions from the respondent's facility are readily available to the respondent. Once again, the complainants bear the burden of proving by a preponderance of the evidence that emission reduction is practical and reasonable.

The complainants elicited testimony from Greg Zak of the Illinois Environmental Protection Agency that suggested measures that they believe are technically feasible and economically reasonable. Mr. Zak suggested the following five steps to reduce noise from the plant: (1) enclose the flour unloading station; (2) enclose the trash unloading station; (3) impose a contractual obligation upon its carriers to shut off their engines; (4) construct an acoustic barrier on the sides of the complainants' house; and (5) construct and operate a continuous noise monitoring system. The respondent argues in detail that the proposals are neither technically feasible nor economically reasonable. Testimony was provided illustrating various technical difficulties with complainants' proposed remedies. As an example, Ron Tretter testified that in order to enclose the flour unloading station the respondent would have to encroach across a sidewalk and out onto the street. Tr. at 332. Mr. Tretter and the respondent's noise expert, Dr. Weissenburger, further testified that the structure could lead to operational difficulties if constructed "just slightly larger than truck dimensions," as proposed by complainants. Tr. at 331, 378. Additionally, Dr. Weissenburger testified that the respondent has taken all technically feasible and economically reasonable steps to reduce noise at the Chester plant. Tr. at 378.

We have cited one example, but the transcript is rife with testimony regarding technical impracticalities of the complainants' proposals. Tr. at 71-73, 98, 331-39. The testimony is largely uncontroverted. The only testimony provided by the complainants on reduction of emissions was elicited from Mr. Zak. Mr. Zak suggested remedies, and provided an estimated cost for each remedy. Mr. Zak did not, however, address whether the proposed remedies were technically practical or economically reasonable. In fact, the complainants did not offer any actual evidence on the technical practicability or economic reasonableness of their proposed solutions. Therefore, the complainants did not meet their burden of proof in this regard, and this factor is weighed in favor of the respondent.

Any Subsequent Compliance, 33(c)v

The Board has found that this factor is not relevant to a determination about whether the noise experienced by a complainant is unreasonable because no need for compliance exists until a noise is determined to be unreasonable. Sweda v. Outboard Marine Co., PCB 99-38 (Aug. 5, 1999). However, the Board has considered a respondent's efforts to reduce noise emissions before any violation has been determined as a mitigating factor. *See* Sweda, slip op. at 13.

The record shows that the respondent has undertaken a number of voluntary steps in an

effort to reduce noise emissions. Initially, the respondent contacted Mr. Zak of the Agency to consult about the noise complaints. Tr. at 71, 262. Respondent then took noise measurements to locate the source of the noise. Tr. at 23-24. The respondent moved its flour unloading station to a location further from complainants' property. Tr. at 46-47. According to respondent, this move resulted in approximately a 9 dB decrease of noise. Tr. at 372, 375. The respondent has limited the hours of flour unloading to 7:00 a.m. until 10:00 p.m. each day. Previously, flour was unloaded 24 hours per day. Tr. at 67, 347-48. The respondent has placed silencers on the blowers its trucks use to transfer flour and has instructed other carriers who deliver to the plant to install silencers on their trucks. Tr. at 69-70, 89-90, 259. The respondent has also instructed its trucks not to idle near the complainants' house, and has reduced the use of its lot adjacent to the complainants' house. Tr. at 66-68. The respondent has made other reduction efforts including: (1) altering its trash unloading procedures; (2) fixing noisy louvers at a building near the complainants' house; (3) adding dampening ductwork to a building near complainants' property; (4) quieting louvers located at the top of its flour tanks; and (5) instructing its employees to be quiet when near the complainants' house. Tr. at 42, 57, 62-67

The complainants have argued that not all these changes have been effective. However, the fact remains that respondent has made a number of good faith efforts to reduce the noise at the facility, and this fact should be weighed in favor of the respondent.

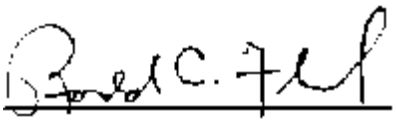
CONCLUSION

We find that the noise from respondent's plant has not unreasonably interfered with the complainants' lives. Although noise emissions from the respondent's plant do substantially and frequently interfere with the complainants' enjoyment of life, the respondent's plant is suitably located with priority of location, has social and economic value, and the complainants have not shown that technically practicably and economically reasonable solutions are available to alleviate the interference. The complainants moved to the nuisance when they took residence in a location with known noise emissions. Finally, the respondent has exhibited good faith in attempting to reduce the noise emissions.

While we do not agree with the majority, we understand that complainants' situation is less than desirable. However, we cannot look past the insufficiencies in the record, and the fact remains that the complainants have not proven their case as required by law.

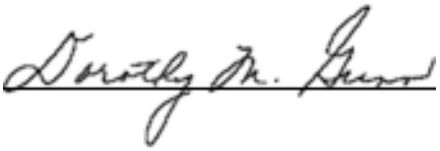
For the above stated reasons, we respectfully dissent.

Thomas E. Johnson



Ronald C. Flemal

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that I received the above dissenting opinion on September 10, 2001.



Dorothy M. Gunn
Illinois Pollution Control Board