

ILLINOIS POLLUTION CONTROL BOARD
July 8, 1971

ENVIRONMENTAL PROTECTION AGENCY)
)
) PCB #71-50
)
M. S. KAPLAN COMPANY)

Opinion of the Board (By Mr. Aldrich):

C. Dana Eastman, Jr. for Environmental Protection Agency
William D. Stiehl for M. S. Kaplan Company

The Environmental Protection Agency ("Agency") filed a complaint against M. S. Kaplan Company ("Kaplan") alleging violations of the Environmental Protection Act and of the regulations with regard to air pollution. Kaplan, which operates a railroad salvage facility in Madison, Illinois, is alleged to have disposed of railroad cars by open burning on a number of occasions in 1971. The complaint also alleges that Kaplan caused or tended to cause air pollution by the flame cutting of railroad cars and related equipment. The Agency asks for the entry of a cease-and-desist order and for the assessment of money penalties.

At the hearing Kaplan admitted that it had conducted open burning on the dates alleged and indicated it would agree to a cease-and-desist order prohibiting any further burning. The Company sought only to present evidence in mitigation of the claim for monetary damages.

In May of 1969, Kaplan filed an Air Contaminant Emission Reduction Program (ACERP) with the Air Pollution Control Board (APCB). The Company proposed a plan whereby its practice of open burning would cease completely within two years. During the interim, the burning operation would be phased out at the rate of ten percent per quarter. At the end of two years installation of smoke control equipment would be completed (Kaplan Ex. 1). The APCB gave its approval for the ACERP in June of 1969 (Kaplan Ex. 2). A witness for Kaplan testified that the Company had progressively reduced the number of cars burned and had otherwise complied with the terms of the ACERP (R. 13,14). Since April 3, 1971, there has been no further burning.

The essential question raised in this case concerns what protection from enforcement action is afforded Kaplan by its ACERP. The matter is not without precedent. In EPA v. Commonwealth Edison, PCB 70-4, we held that an ACERP could legally have been granted only for a period of one year. Since the ACERP in the instant case was approved

in 1969 and never renewed, it provides no defense to an enforcement action in 1971. Nevertheless, as we noted in the aforementioned case, it is not our desire to impose money penalties on anyone who has been operating in good faith under an approved program. It is clear that Kaplan has already suffered hardship in complying with the terms of its ACERP. No alternative method of salvaging railroad cars has proved satisfactory (R. 19). The Company has been required to abandon virtually all salvage operations at its Madison facility. Furthermore, Kaplan may be liable for damages for cancelling contracts it had previously made. Kaplan testified that 132 railroad cars had been returned to the senders in abrogation of contracts (R. 16). Returning the cars to the source does not solve the problem of constructive salvaging and recycling at least of the steel component. An acceptable technique is needed. Money penalties would add unjustifiably to the hardship already suffered by Kaplan. We will not impose such penalties.

In order to dispel any false sense of security harbored by others in a position similar to Kaplan's, the Agency should notify all holders of ACERPs that these programs are now invalid. We reiterate that the APCB could legally issue ACERPs for a maximum of one year. That period has now passed. Those who need additional time to come into compliance with the laws of the State must secure a variance from this Board. Only then is any protection from enforcement action conferred.

In the instant case Kaplan stipulated only that it would cease and desist the open burning of railroad cars. The Company did not agree to cease its flame cutting operations. The record is incomplete as to the amount and types of pollutants generated in these operations. The Agency did not, in fact, present any evidence in support of its allegation that the operations are in violation of the Environmental Protection Act. The charge is therefore dismissed.

Kaplan is hereby ordered to cease and desist any further salvage by means of open burning.

This opinion constitutes the Board's findings of fact, conclusions of law, and order.

I CONCUR
David L. Currie
Samuel E. Aldrich
James P. Donnell
Thomas J. Ryan
Arthur J. Ryan

I DISSENT

I, Regina E. Ryan, Clerk of the Pollution Control Board, hereby certify that the Board adopted the above opinion and order this 8 day of July, 1971.

Regina E. Ryan