

ILLINOIS POLLUTION CONTROL BOARD
January 8, 1998

PEOPLE OF THE STATE OF ILLINOIS)
)
 Complainant,)
)
 v.) PCB 96-75
) (Enforcement - Air)
HARVEY CASH d/b/a CASH OIL)
COMPANY,)
)
 Respondent.)

AMY JACKSON OF THE OFFICE OF THE ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT; and

HARVEY CASH APPEARED PRO SE.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

This matter is before the Board on the October 4, 1995, complaint (Comp.) of the Attorney General, filed on behalf of the People of the State of Illinois (complainant) and at the request of the Illinois Environmental Protection Agency (Agency). The complaint alleges that Harvey Cash d/b/a Cash Oil Company (Cash or respondent) has violated the following Sections of the Illinois Environmental Protection Act (Act): Sections 9(a) and (c) (415 ILCS 5/9(a)(c) (1994)) by open burning demolition debris; Section 21(a) (415 ILCS 5/21(a) (1994)) by open dumping of waste; and Section 9.1(d)(1) (415 ILCS 5/9.1(d)(1) (1994)) by failing to give the Agency ten days prior notice of intent to demolish a commercial building located in Flora, Clay County, Illinois. Complainant requests that the Board find the violations and impose an appropriate civil penalty.

Hearing was held on September 22, 1997, (Tr.) before the Board's Chief Hearing Officer, Michael Wallace, pursuant to Section 33 of the Act (415 ILCS 5/33 (1996)). No members of the public attended the hearing. Complainant's brief (Comp. Br.) was filed on November 5, 1997. Respondent did not file a brief.

For the reasons given below, the Board finds Cash in violation of the Act as alleged. The Board orders Cash to cease and desist from further violations of the Act and imposes a civil penalty of \$1,500.

STATUTORY FRAMEWORK

Section 9(a) of the Act, 415 ILCS 5/9(a) (1994), provides:

No person shall:

- a. Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

Section 3.02 of the Act, 415 ILCS 3.02 (1994), provides the following definition:

‘AIR POLLUTION’ is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

Section 9(c) of the Act, 415 ILCS 5/9(c) (1994), provides:

No person shall:

* * *

- c. Cause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the burning of any refuse in any chamber not specifically designed for the purpose and approved by the Agency pursuant to regulations adopted by the Board under this Act;

* * *

Section 21(a) of the Act, 415 ILCS 5/21(a) (1994), provides:

No person shall:

- a. Cause or allow the open dumping of any waste.

* * *

Section 3.24 of the Act, 415 ILCS 5/3.24 (1994), provides the following definition:

‘OPEN DUMPING’ means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.

Section 3.31 of the Act, 415 ILCS 5/3.31 (1994), provides the following definition:

‘REFUSE’ means waste.

Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (1994), provides:

* * *

- d. No person shall:
1. Violate any provisions of Sections 111, 112, 165, or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto; or

The regulations on National Emission Standards for Hazardous Air Pollutants (“NESHAP”), 40 CFR Part 61 et seq. (1993), were adopted pursuant to Section 112 of the Clean Air Act, 42 USC 7412. 40 CFR 61.145 (1993), and provide, in pertinent part, as follows:

- (a) **Applicability.** To determine which requirements of paragraphs (a), (b), and (c) of this section apply to the owner or operator of a demolition or renovation activity and prior to the commencement of the demolition . . . thoroughly inspect the affected facility . . . for the presence of asbestos
- (b) **Notification requirements.** Each owner or operator of a demolition or renovation activity to which this section applies shall:
 - (1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

* * *

These provisions of 40 CFR 61.145 are commonly referred to as the NESHAP asbestos notification requirements. Tr. at 25-27.

BACKGROUND

Harvey Cash is self-employed, doing farm work, and building ponds, waterways, and brush removal. Tr. at 33. In June 1994 he had operated an oil field construction company for approximately 15 years. Tr. at 34. To supplement the declining oil field business, he contracted to demolish a building located at 121 South Main Street, Flora, Illinois (Comp. at 2), for the Flora Lumber Company. Tr. at 35. The wooden structure was uninsulated with a shingle roof and was built as a train depot in the late 1850’s. Tr. at 7, 25, 36. Flora Lumber Company used the structure for storage. Tr. at 36.

Cash hauled two dump truck loads of wood and logs to property outside the Flora city limits which was owned by Franklin Sandblasting. Tr. at 37-39. A pit was dug to burn the debris. Tr. at 7, 38. The debris was primarily reduced to ashes and coals when Cash was contacted by Agency personnel. Tr. at 42. Cash ceased hauling material to the site, allowed the fire to burn out and covered the remains. Tr. at 42. Cash hauled the remainder of the demolition debris to the landfill in Fairfield, Wayne County, Illinois. Tr. at 42.

Cash was paid \$5,000 by the Flora Lumber Company to demolish the building. Tr. at 43. The project cost Cash \$5600 to \$5700 to complete. Tr. at 43.

In early June 1994 the Agency received a complaint about open burning. Tr. at 10-11. On June 7, 1994, Agency employee, Mr. Scott Arnold, made a physical inspection of the demolition site and the burn site. Tr. at 12-13. Arnold determined that only wood was burned at the Franklin Sandblasting site. Tr. at 17. When Arnold observed the demolition site, the building was completely down. Tr. at 24. During the investigation Arnold learned that the building dimensions had been approximately 25 feet by 100 feet. Tr. at 25. Arnold also testified that the age of the building indicates that it was constructed prior to the use of asbestos. Tr. at 27.

Cash admitted hauling the two dump truck loads of demolition debris to the Franklin Sandblasting site and dumping the debris into a pit. Tr. at 38. Cash further admitted open burning the debris. Tr. at 44. Finally, Cash admitted that he did not provide prior notice to the Agency for the demolition of the Flora Lumber Company building. Tr. at 47-48. Cash did obtain a demolition permit from the City of Flora. Tr. at 48.

BOARD FINDINGS AND PENALTY ASSESSMENT

After reviewing respondent's admissions, as well as the testimony and evidence produced at hearing, the Board finds that Cash violated the following Sections of the Act: Sections 9(a) and (c) (415 ILCS 5/9(a)(c)) by open burning demolition debris; Section 21(a) (415 ILCS 5/21(a)) by open dumping of waste; and Section 9.1(d)(1) (415 ILCS 5/9.1(d)(1)) by failing to give the Agency ten days prior notice of intent to demolish the Flora Lumber Company warehouse. Having found respondent to be in violation of the Act, the Board must now determine the penalty to be assessed.

Complainant requests that the Board order respondent to cease and desist from further violation of the Act and require the respondent to pay a civil penalty that is reasonable in light of the violations. Comp. Br. at 7. In determining the appropriate civil penalty, the Board considers the factors set forth in Section 33(c) and Section 42(h) of the Act. See People v. Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park (April 20, 1994), PCB 92-164.

Section 33(c) Factors

Section 33(c) of the Act provides:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved, but not limited to:

- i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- ii. the social and economic value of the pollution source;

- iii. 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;
- iv. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges, or deposits resulting from such pollution source; and
- v. any subsequent compliance. 415 ILCS 5/33(c) (1994).

Section 42(h) Factors

Section 42(h) of the Act provides the following:

- h) In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of the Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
 - 1. the duration and gravity of the violation;
 - 2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
 - 3. any economic benefits accrued by the violator because of delay in compliance with requirements;
 - 4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
 - 5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (1994).

Penalty

In crafting a civil penalty, the Board has found that a reasonable starting point in deliberations is the maximum penalty allowed (see Kershaw). Pursuant to Section 42(a) of the Act (415 ILCS 5/42(a) (1994)) the maximum penalty could be \$50,000 per violation.

After a careful review of the record, in light of the 33(c) and 42(h) factors, the Board finds that a civil penalty of \$500 each for open dumping, open burning, and failure to notify

(for a total penalty of \$1500) is appropriate in this case. The Board's discussion of the 33(c) and 42(h) factors in determining the appropriate penalty follows.

33(c)(i) "the character and degree of injury to or interference with the protection of the health, general welfare and physical property of the people"

Cash admitted that he open burned demolition debris on one day over the course of approximately four hours. Tr. at 44. The burning led to a complaint from a citizen (Tr. at 22) which demonstrates interference in the life of a neighbor from the uncontrolled release of air contaminants. The burned waste was buried at the Franklin sandblasting site, which is not a sanitary landfill. Tr. at 22, 46. With regard to the failure to notify the Agency prior to demolition, Cash testified that the building was built in the 1850's and probably was not insulated. Tr. at 36. Agency employee, Arnold, testified that the age of the building indicates that it was constructed prior to the use of asbestos. Tr. at 27. While the age of the building, and the testimony of Cash and Arnold about the likelihood that asbestos was absent, may mitigate against a large penalty, the probable absence of asbestos does not absolve Cash of responsibility under NESHAPS to notify the Agency of a pending demolition. The Board finds that consideration of this factor warrants a civil penalty for open dumping, open burning, and failure to notify, but does not justify a severe monetary penalty.

33(c)(ii) "the social and economic value of the pollution source"

The demolition of the warehouse by Cash had some economic value to the Flora Lumber Company because it avoided increased land lease costs imposed by the railroad. Tr. at 36. Respondent's business undoubtedly has social and economic value and the demolition work was necessary to mitigate the declining oil field business. Tr. at 35. However, the social and economic values of respondent's activities do not rise above the illegal open dumping and open burning, and therefore, the Board finds that this factor justifies a civil penalty.

33(c)(iii) "the suitability or unsuitability of the pollution source to the area . . ."

Open burning without appropriate permits is unsuitable anywhere in Illinois. Open dumping anywhere other than an approved pollution control facility is likewise unsuitable. In relation to the violations of open burning and open dumping, the Board finds that this factor warrants a civil penalty.

33(c)(iv) "the technical practicability or economic reasonableness of reducing or eliminating the emissions . . ."

Cash testified that he hauled the remainder of the demolition debris to an approved landfill in Fairfield, Illinois. Tr. at 41. Therefore, the Board finds that it was technically feasible to properly dispose of the demolition debris. Cash also testified that he did not factor landfill costs into the cost bid that was accepted by Flora Lumber Company. Tr. at 40. Therefore, even though Cash testified that he lost money on the project, (Tr. at 43), the Board cannot make a finding that reducing or eliminating emissions was economically unreasonable

because landfill costs were not considered. Finally, the Board finds that it is both technically practicable and economically reasonable to provide prior notice of demolition to the Agency. After consideration of this factor, the Board finds that a civil penalty is warranted.

33(c)(v) “any subsequent compliance”

There is no evidence of non-compliance by Cash since the June 1994 incident. Comp. Br. at 10. Respondent testified that he learned from the experience. Tr. at 53. The Board finds that this factor mitigates against a severe penalty.

42(h)(1) “the duration and gravity of the violation”

Two dump truck loads of demolition debris were burned during a four hour period. Tr. at 39, 44. Agency employee Arnold testified that there was no evidence of any material other than wood in the burn pit. Tr. at 17. Therefore, the Board finds that the duration and gravity of the violation do not warrant a large penalty in this case. Further, while the failure to notify the Agency that the warehouse would be demolished warrants a penalty, the Board finds that the age of the structure, the primarily wood composition, and the unheated nature makes the presence of asbestos unlikely, which mitigates against a large penalty.

42(h)(2) “the presence or absence of due diligence . . .”

Cash testified that he procured demolition permits from the City of Flora, but he did not know that prior notice of demolition was required for the Agency. Tr. at 47-48. Cash also testified that prior to contact from Agency personnel, he was “totally confused on what is legal and what is not” in relation to open burning and open dumping. Tr. at 45. Cash did not exercise due diligence by neglecting to contact an Agency office to inquire about regulations concerning building demolition when he entered this type of business activity. The Board finds that consideration of the factor warrants a civil penalty.

42(h)(3) “any economic benefits accrued by the violation . . .”

Cash derived an economic benefit because he did not need to pay for landfill disposal for two dump-truck loads of debris (Tr. at 39) that were open burned and buried. However, he also testified that the entire job cost him 600 to 700 dollars beyond his 5000 dollar contracted payment because he did not factor the ultimate landfill disposal costs into his original bid. Therefore, the Board finds that Cash did not receive an economic benefit and this mitigates the penalty.

42(h)(4) “the amount of monetary penalty that will serve to deter further violations . . .”

Cash testified that he continues to perform one or two demolition activities per year. Tr. at 46, 50. Complainant requests that the Board determine a civil penalty amount sufficient to deter respondent from committing future violations. Comp. Br. at 12. Cash testified that he has learned a lesson from this experience and that he will do what he can to comply with the applicable laws now that he is aware of them. Tr. at 53. The Board finds that based on the circumstances of this case, a severe penalty is not warranted after reviewing this factor.

42(h)(5) “the number, proximity in time and gravity of previously adjudicated violations of this Act by the violator”

The record contains no previously adjudicated violations by this respondent. Therefore, the Board finds that consideration of this factor mitigates against a severe penalty.

Penalty Amount

After careful consideration of the 33(c) and 42(h) factors, the Board finds that a civil penalty approaching the \$50,000 statutory maximum per violation is not appropriate in this case. Instead, the Board finds that a lesser civil penalty similar to the 500 dollar per violation penalty levied for an administration citation pursuant to Section 31.1 of the Act (415 ILCS 5/31.1 (1996)) is appropriate. Therefore, the Board will levy a civil penalty of \$500 for open burning the demolition debris (in violation of Sections 9(a) and (c) of the Act); \$500 for open dumping the debris (in violation of Section 21(a) of the Act); and \$500 by failing to notify the Agency of intent to demolish the warehouse in violation of Section 9.1(d)(1) of the Act. The total penalty shall be \$1500, payable as ordered below.

CONCLUSION

The Board finds that Harvey Cash has violated the following Sections of the Act: Sections 9(a) and (c) of (415 ILCS 5/9(a)(c) (1994) by open burning demolition debris; Section 21(a) (415 ILCS 5/21(a) (1994)) by open dumping of waste; and Section 9.1(d)(1) (415 ILCS 5/9.1(d)(1) (1994)) by failing to give the Agency ten days prior notice of intent to demolish a commercial building in Flora, Illinois. The Board finds that a civil penalty of \$1500 is warranted in this case.

This opinion constitutes the Boards findings of fact and conclusions of law in this matter.

ORDER

1. The Board finds that Harvey Cash d/b/a Cash Oil Company (respondent) violated Sections 9(a) and (c), 9.1(d)(1), and 21(a) of the Illinois Environmental Protection Act (415 ILCS 5/9(a) and (c), 9.1(d)(1), and 21(a) (1994).
2. Respondent will cease and desist from violations of the Act and the Board's regulations.
3. Within 60 days of the date of this order, or on or before March 9, 1998, respondent shall pay a civil penalty in the amount of \$1,500 by certified check or money order made payable to the Environmental Protection Trust Fund. Respondent shall send the payment by First Class Mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 N. Grand Avenue East

Springfield, IL 62702

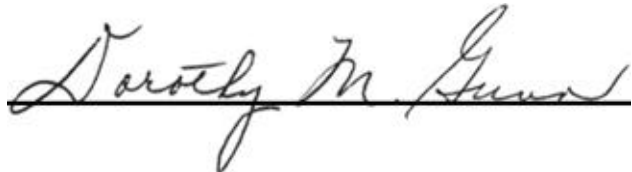
Respondent shall write the case name and number and his social security or federal employer identification number on the certified check or money order.

4. Penalties unpaid after the due date shall accrue interest pursuant to Section 42(g) of the Environmental Protection Act. 415 ILCS 5/42(g) (1996).

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 8th day of January 1998, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board