

ILLINOIS POLLUTION CONTROL BOARD
August 5, 1993

SCOTT AND KAREN THOMAS	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 91-195
	)	(Enforcement)
	)	
CARRY COMPANIES OF ILLINOIS	)	
	)	
Respondents.	)	

ROBERT P. ZAPINSKI AND CAREY S. ROSEMARIN APPEARED ON BEHALF OF THE COMPLAINANTS;

ARLENE R. HAAS AND LAURA L. LEONARD APPEARED ON BEHALF OF RESPONDENTS.

INTERIM OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on a complaint filed by Karen and Scott Thomas (Thomases) on October 16, 1991. The complaint alleges that noise and air pollution are generated from operations conducted on Carry Companies' (Carry or Respondent) property. The complaint alleges violations of Sections 9(a), 23 and 24 of the Environmental Protection Act (Act) (415 ILCS 5/9(a), 23 and 24 (1992)). Hearings were held on September 1, 1992, and September 22, 1992, in Decatur, Illinois. The Thomases submitted their final brief on October 13, 1992. The respondents presented their final brief on October 9, 1992. On October 28, 1992, the Thomases filed their reply brief. On October 27, 1992, respondent filed its reply brief.

Complainants allege that the noise and dust generated by respondent's truck wash and parking facility unreasonably interferes with their enjoyment of life and property. Specifically, they complain of noise from the washing and drying of tanker trailers, the start-up and idling of trucks and the hooking and unhooking of tractors and trailers.

BACKGROUND

During the pertinent times of this matter, Karen Thomas was in graduate school at Illinois State University working towards a master of arts in English degree. (Transcript at 99-100.)¹ Scott Thomas was a materials engineer for Caterpillar Corporation. (Tr. at 17.) The Thomases bought their present home in Decatur, Illinois, in December of 1989. Their property abuts Carry's facility on the Thomases' southern property line (Carry

¹ Hereinafter the transcript shall be cited as "(Tr. at ____.)".

Company's northern property line). (Tr. at 20.) In addition to the family home, there is a screened-in porch, a raised deck and an above-ground pool located on the Thomases' property. There are also several trees and bushes in the back yard. (Tr. at 19.)

Prior to Carry acquiring the property, two trucking companies occupied the site and ran a 24-hour-a-day operation. (Tr. at 401-3, 405-6, and 494-5.) Carry is located in an area that is zoned "light industrial". (Respondent's Exhibit Nos. 5, 6, and 7.) Properties to the immediate south and to the west also contain trucking park and wash terminals and construction companies. (Tr. at 354, 394, and 397.)

Carry is a specialized food hauling service which operates out of ten truck terminals located predominately in the Midwest. One such operation is located in Decatur, Illinois, and is the subject of this dispute. Carry's fleet includes approximately 300 tractors and 650 trailers. (Tr. at 344.) The bulk of Carry's fleet consists of liquid tankers and pneumatic (or dry bulk) tankers. Carry has developed a niche within the hauling industry as a hauler of water soluble food grade materials. Carry conducts a trailer washing and drying operation at the Decatur facility. (Tr. at 343-345.)

Carry purchased the Decatur terminal in approximately July 1990. At the time of purchase, the property contained a building with offices, a maintenance bay and two truck wash bays, located at the southern end of the property. (Tr. at 399-400.) In May, 1991, Carry laid gravel at the northernmost 60 feet of its property. This gravel area reaches almost to the property line shared with the Thomases. (Tr. at 27.)

HEARING TESTIMONY CONCERNING NOISE

The hearing in this matter took place over two days in September of 1992. At the hearing Scott Thomas, Karen Thomas, Gregory Zak and Debbie Hoffert testified for complainants. George VanDenend, Bobby Bradham, Joseph Stolte and Judy Brummerstedt testified for respondents.

During 1990, Mr. Thomas observed only occasional truck movement and was not affected by any activity on the Carry property. (Tr. at 22-23.) In the Fall of 1990, Mr. Thomas noticed the number of trucks using the facility had increased since the time they bought their home. (Tr. at 24-25.) Mr. Thomas testified that in the spring of 1991, the grassy patch of land at the northernmost portion of the Carry property was bulldozed and gravel was laid on the area. After the gravel was laid, trucks began to park right up to the fence at the property line. (Tr. at 28-29.) Mr. Thomas testified that at that time he first began to hear the moving and parking of the trucks on the

northern end of the Carry's property, as well as the idling of trucks. (Tr. at 30-31.)

Mr. Thomas testified that he and his wife could hear the truck tires on the gravel, the gears changing and a "large whooshing" of the brakes. (Tr. at 35.) He described the engine noise as the "most intrusive". (Id.) He testified that the engine noises are most intrusive when the trucks are in the northern lot, but it is also possible to hear the trucks when they are in the southern lot. (Tr. at 33 and 34.)

Mr. Thomas testified that the truck washing noise lasts anywhere from five to forty-five minutes. Mr. Thomas stated that the noise of the truck washer is "incredibly loud"; he stated that it was similar to being on the tarmac of a runway when a jet is whining. (Tr. at 40.) In addition, Mr. Thomas testified that "the whining of the washer penetrates the air, a high pitched loud whining can rattle the china in our house. It will rattle my coffee cup on the end table ... a very high pitched vibration can rattle the shower door in our house". (Tr. at 41.) He stated that he and his wife can hear the washer noises from anywhere on their property but the noise is the greatest when they are in their backyard. (Tr. at 42.) Mr. Thomas testified that it is hard for the Thomases to enjoy and relax in their backyard and has impeded their ability to have a normal conversation there. (Tr. at 50.)

The noises from the Carry property interfere with Mr. Thomases' ability to relax four or five times a week and wakes him up three or four times a week. (Tr. at 51.) There is no place in the Thomases' house where they do not hear the truck noises. (Tr. at 52.) Mr. Thomas stated that the noises from the other industrial properties located to the west of the Carry property are "non-intrusive" and do not disrupt or disturb his life. (Tr. at 33 and 34.)

Concerning the effect the noise has on their lives, Mr. Thomas testified

We cannot relax on (sic) our own home. We cannot do anything in our home without the noise or the threat of noise interfering. We cannot sleep on our bed at night, we cannot read the paper on the backporch, we cannot read the paper in the front room with the windows open....We cannot in general use our house for what we purchased it to use it for because it's so intrusive. The noise not only makes it very difficult to get a good night's sleep but can affect me at work the next day if I'm tired.

(Tr. at 45 - 46.)

Mr. Thomas believes the noise has increased in the past year but concedes that the noise is somewhat reduced by the closing of the garage doors. The Thomases have seen Carry close the doors "very little of the time." (Tr. at 54.) Mr. Thomas testified that the washing operation alone disturbs his wife and him five to eight times a week. (Tr. at 58.)

Mr. Thomas stated that he and his wife had cancelled social activities because of the noise; however at the deposition he stated "I don't believe that we've ever canceled those activities before we had planned them because of that." (Tr. at 84-85.) Also at the deposition, Mr. Thomas stated "[w]e don't notice truck noise on the side drive or the front of the building as far as I know." This contradicts his testimony at hearing where he complained of the noise from the trucks parked in the southern lot. (Tr. at 33, 34 and 95.)

Mr. Thomas testified that before purchasing the house, the Thomases did not drive around the area where the house is located, but they did walk around the backyard. They thought the business located behind the house was a truck parking lot. Mr. Thomas believes they paid a reasonable price for their house and believes that the expanded parking lot has devalued their property. (Tr. at 70-73.)

On June 27, 1991, Mr. Thomas wrote Carry and suggested that the Thomases would stop their complaints if Carry would pay them \$5,000 (or \$3,000 with tree planting). (Tr. at 76.) Mr. Thomas stated that he arrived at the \$5,000 figure because under Caterpillar's compensation policy, \$5,000 was the maximum amount of money they would lose if they could not sell the house for what they paid for it. (Tr. at 89.) Mr. Thomas characterized the letter as a means to settle the problem. (Tr. at 89-90.) In his correspondence and meetings with Carry, Mr. Thomas emphasized the devaluation of his property. (Tr. at 79.) Mr. Thomas stated that since the time he wrote the letter, the noise has increased. (Tr. at 89-90.)

Mrs. Thomas described the engaging and disengaging of cabs and trailers as "an incredible slamming, banging noise of metal against metal. It's more so than taking a hammer and hitting a piece of metal. It's just an intense explosive crash. It sounds like a car accident." She testified that she also hears the air brakes and air horns from trucks parked in the gravel lot. (Tr. at 126.) Mrs. Thomas estimated the truck fleet increased from ten trucks in the winter of 1991 to a fleet of 40 to 45 trucks in the summer of 1991. In addition, the use of the newly graveled area increased greatly. (Tr. at 112-113.)

Mrs. Thomas has observed trucks in the wash building at the same time she heard noise from the washing and drying operation. She is certain the noise comes from Carry. Mrs. Thomas described

the noise as a "high pitched whirring noise that circles and circles and drops down in on top of this low reverberating hum ... and then this high pitch scream just circles and circles..." (Tr. at 127) Mrs. Thomas stated the washing noise is only slightly less loud when the doors to the washing building are closed. (Tr. at 129.)

Mrs. Thomas can hear the noises from Carry anywhere in her home, including her front yard. She stated she can hear the noise when she is in the shower with the water running. She testified that the most successful way to minimize the noise is to keep the doors and windows shut and run the air conditioner. However, even with these measures she is still bothered by the noise. Mrs. Thomas testified that the noise is greatest in the summer and spring and on Friday nights to Saturday afternoons. (Tr. at 130-133.)

Mrs. Thomas has been awakened at all hours of the night on every night of the week. She testified that she is awakened by the noise from Carry on an average of four to five times a week and that applies to the summer of 1992 as well as 1991. (Tr. at 146.) She is often kept from falling back to sleep. Mrs. Thomas wears ear plugs to bed at night five to six times a week in order to muffle the noise from Carry. (Tr. at 149.) Mrs. Thomas testified that they will run their dishwasher or washer and dryer right before they go to sleep in an effort to drown out the noise from Carry. (Tr. at 146.)

Mrs. Thomas has stopped using her outdoor deck during the day because of the noise. The noise effects her enjoyment of "just about everything I do in the house, whether that be cooking or eating dinner or eating lunch or watching T.V." She testified that otherwise enjoyable activities such as eating "suddenly becomes a tense and aggravating thing". (Tr. at 136-141.) Mrs. Thomas stated that every aspect of her life has become affected and that she has become constantly on edge. Mrs. Thomas testified that she and her husband are less willing to invite people over and have begun to invite themselves over to other people's houses. They have consciously decided not to invite people over because of the noise. (Tr. at 143-144.) She stated that the washing noise is the loudest but the movement and hook-up noises of the trucks are the most frequent. (Tr. at 147.)

Mrs. Thomas kept a journal of the noise. The journal consists of 82 pages and describes incidents where Mrs. Thomas was disturbed by the noise. She stated that she never made an entry more than 24 hours after the recorded incident occurred. She testified that most events recorded in her journal were situations where she observed the source of the noise. Mrs. Thomas testified that she has heard noise from the other businesses west of Carry, but the entries in her journal report noise from Carry only. (Tr. at 192.) Mrs. Thomas stated that

she did not record every occasion when she was disturbed by the noise. (Tr. at 153.)

One journal entry describes a night where Mrs. Thomas was awakened at 12:55 a.m. and kept awake until 2:55 a.m. and then began to hear the noises again at 6:15 a.m. (Tr. at 153-161.) Another journal entry recounted a night where the Thomases were kept awake for the entire night by a variety of noises from Carry including truck horns and people yelling. (Tr. at 165.) Another entry describes an evening where Mrs. Thomas took an over-the-counter sleep aid but was still awakened at 2:00 a.m. by the sound of truck revving, the coupling and uncoupling of cabs and trailers and the grinding of gears. She recorded being awoken again every hour until she got up at 6:00 a.m. (Tr. at 169.)

Mrs. Thomas stated that she and her husband had met with George VanDenend of Carry Companies in October of 1991. She said that Mr. Vandenend assured them that Carry was making an effort to reduce the noise. These efforts included posting signs, oral and written memorandums, and instructing the washers to keep the doors closed while washing the trucks. In addition, Carry was treating the gravel with a tar treatment to reduce the dust. (Tr. at 166-167.)

Mrs. Thomas testified that she had not noticed any reduction in the noise since the time of the meeting with Mr. VanDenend. One of Mrs. Thomases journal entries describes the night of June 12, 1992, after the meeting with Mr. VanDenend, where Mrs. Thomas was awoken at 3:15 by the sound of the truck wash. Mrs. Thomas observed that the doors to truck wash facility were open. Mrs. Thomas estimated that she has heard the truck wash and observed the doors open forty to fifty times in calendar year 1992. She heard the truck wash and observed the doors closed ten to fifteen times during the same period. (Tr. at 170-173.) Mrs. Thomas believes that the Carry operation has reduced the value of her home. (Tr. at 181.)

Debbie Hoffert is a neighbor of the Thomases and testified on their behalf. Mrs. Hoffert stated she has also experienced problems with the noise from Carry. Mrs. Hoffert testified that she has experienced noise problems from Carry since the summer of 1991. She has been awakened at night by the noise from Carry. Mrs. Hoffert testified that there is "no question" that the noise comes from Carry. Mrs. Hoffert said she phoned Carry to complain about the noise and asked Carry to close the doors to the wash building when they are washing. She testified that Carry closed the doors immediately after the call but the next day the doors were open again during the wash operation. During the first two weeks of July in 1992, Mrs. Hoffert cat-sat for the Thomases when they were on vacation. She testified that the truck wash noise was much louder in the Thomases' home than it is in hers and that she left the Thomases' home rather than endure the noise. (Tr.

at 206-216.)

Gregory Zak is employed by the Illinois Environmental Protection Agency as a noise technical advisor. He has been involved in several thousand citizen complaint cases. (Tr. at 238.) Mr. Zak was accepted at hearing as an expert in noise abatement. (Tr. at 234.) Mr. Zak has visited the Thomases' property on three occasions. (Tr. at 245.) Mr. Zak placed the severity of the noise impact in the upper one third of all the noise cases he has worked on in the last twenty years. He classified the problem as "severe." (Tr. at 251.) Mr. Zak based his estimation of the severity of the problem on the close proximity to the Thomases and the testimony of the witnesses. (Tr. at 299.) In Mr. Zak's opinion, the Thomases are experiencing unreasonable interference with their life and property as a result of the noise from Carry. (Tr. at 251.)

At the hearing, Mr. Zak proposed several methods to reduce the impact of the noise on the Thomases. Mr. Zak proposed an acoustic barrier as a partial solution. (Tr. at 254.) Mr. Zak testified that a barrier fence of the sort he was recommending would cost approximately \$55,000. Mr. Zak described the barrier fence as the key element to the entire noise control proposal. (Tr. at 285.) He also recommended equipping the tractors with better mufflers, paving the parking lot and remodelling the wash building. (Tr. at 268-269.) Mr. Zak believes that it would cost between \$500 and \$1,000 per unit to replace the mufflers on the trucks. (Tr. at 277.) He stated that it would cost around \$2,000 to remodel the building. He also recommended that the trucks park only at the south end of the Carry property. (Tr. at 278 and 280.)

According to his own testimony, Mr. Zak has never set foot on the Carry site. He observed a total of two trucks in operation on the Carry property. He has not inspected the wash building and has only a rough idea of its exterior construction; he has never been inside the wash building. He does not have any first hand knowledge of the door construction or of the existence or lack of existence of weatherstripping. (Tr. at 295-298.)

George VanDenend is the president of Carry Companies, and he testified concerning Carry's operations. Carry employs thirty-one people at its Decatur plant. Carry paid \$4,451 in state taxes in 1990. (Tr. at 354-358.) Mr. VanDenend stated that it is necessary for the business to operate 24 hours a day, seven days a week. (Tr. at 351.) He stated that Carry would not be able to operate if its hours were restricted because they must be available when the customer dictates and they must also comply with Department of Transportation service restrictions. (Tr. at 350-351.) If their hours were restricted Carry "would not be able to operate." (Tr. at 351.) Mr. VanDenend testified that all of Carry's trucks which pull pneumatic trailers are equipped

with mufflers and silencers. These silencers are not standard equipment. (Tr. at 353.) Mr. VanDenend stated that to retrofit the trucks with the sort of mufflers Mr. Zak suggested would cost Carry more than a quarter of a million dollars. (Tr. at 382.)

Mr. VanDenend testified that he first became aware of noise complaints in May or June of 1991. He heard that someone had approached one of their managers and had asked for a sum of money to settle the problem. After Mr. VanDenend was served with the complaint, he inspected the Decatur facility. Mr. VanDenend stated that he found the operation to be very noisy and met with Bobby Bradham, the site manager, and to discuss ways to minimize the noise. They decided they would treat the gravel, post signs and dry the pneumatic trailers inside with the doors closed. (Tr. at 360-362.) After visiting the Decatur facility, Mr. VanDenend wrote the Thomases to communicate to them that their concerns were being taken seriously and that Carry would take steps to alleviate the problem. (Tr. at 366-367.) Mr. VanDenend subsequently met with the Thomases and agreed to try to reduce the noise. They also discussed the Thomases' property value. (Tr. at 367-372.)

Bobby Bradham is a regional vice president for Carry Transit. Mr. Bradham worked for Carry's predecessor, Kreider Company. He stated that Kreider ran 25 to 30 units daily, 24 hours a day, seven days a week. He stated that Kreider conducted the same trucking operation as Carry except that Kreider's operation was antiquated. He testified that at least one other business, Performance Transport, worked out of the Decatur location until the middle of 1990. (Tr. at 401-407)

Mr. Bradham examined a photo of the Carry Company neighborhood taken between 1989 and early 1991. He identified two construction companies, a trucking company and a truck storage company in the immediate area. One company that borders Carry, Otto Baum, stores heavy equipment such as back hoes and end loaders. Mr. Bradham has heard noise from Otto Baum as early as 6:00 a.m. and as late as 7:30 p.m. He testified that another trucking company in the area operates at all hours and makes noise associated with loading and off-loading freight. Mr. Bradham stated that a third trucking operation in the immediate area "alone would far and above shadow" Carry and the other trucking operations in the area. Some of these operations have gravel parking lots which produce dust. (Tr. at 407-415.)

Mr. Bradham stated that around 30% of the washing occurs during the nighttime hours. He stated that busy times are variable and that it depends on customer demand. (Tr. at 417-420.) Mr. Bradham stated that after Carry bought the site from Kreider, Carry added a layer of insulation, another layer of metal, a layer of two-by-fours and a layer of plastic sheeting to the interior of the wash building. Mr. Bradham stated that this

adds up to three walls on the interior of the building. He stated that the doors are insulated and watersealed. (Tr. at 400.) Mr. Bradham stated that they have installed new washing technology which will eliminate two spin cycles and which he believes will eliminate much of the noise. He stated that it is true that they do not close the doors at all times but stated that it is unnecessary to shut the doors when drying the liquid tanks because they are insulated and produce no noise. (Tr. at 421-424.)

Mr. Bradham stated that Mr. Thomas asked him for \$20,000 to settle the matter. Mr. Bradham produced a desk calendar which noted the meeting with Mr. Thomas and the notation "S. Thomas neighbor, noise and dust, 20,000 bucks." He stated he made that note during or right after his meeting with Mr. Thomas. (Tr. at 511.) He testified that at a subsequent meeting, Mr. Thomas asked for \$5,000 to settle the matter. Mr. Bradham stated that he was aware of only one other complaint besides the complaint from the Thomases. He said the other complaint concerned noise from a lawn mover. (Tr. at 424-433.)

Mr. Bradham has written memos and posted signs instructing the truck drivers to reduce the noise and park at the south end of the lot. Mr. Bradham believes that his employees are following these directives. (Tr. at 441.) Mr. Bradham believes that since they have responded to the Thomases' complaints in the late part of 1991 and early part of 1992, the noise has been reduced by 80%. (Tr. at 440 and 450.)

On cross examination, Mr. Bradham acknowledged that he failed to mention that Mr. Thomas had asked for \$20,000 in an earlier deposition. (Tr. at 456.) He also acknowledged that he had stated in the earlier deposition that Performance Transport was not using the wash operations in mid-1990. This contradicted his testimony at hearing. (Tr. at 405.) He also admitted that Kreider's operation was substantially decreased at the time the Thomases' bought their property and that Carry's business had substantially increased from 1990 to the time of the hearing. He also acknowledged that, in contradiction to his testimony at hearing, he was aware that they had received a complaint concerning the noise other than the Thomases'. (Tr. at 461-463.) On redirect, Mr. Thomas denied ever asking in a face-to-face meeting for monetary compensation and denied ever asking for \$20,000. (Tr. at 505-506.)

Mr. Joseph Stolte works for Carry as a wash bay personnel. He stated that on average two or three pneumatic tankers are washed at night during the week and an average of eight liquid tankers are washed per night. He testified that Carry has implemented procedures to reduce the noise. (Tr. at 484-487). Judy Brummerstedt is employed by Carry as a dispatcher and had also worked for Kreider. She testified that Kreider conducted a

truck washing operation on the site now owned by Carry. She also stated that Performance had washed their trucks at the facility. (Tr. at 491-500.)

HEARING TESTIMONY CONCERNING DUST

Mr. Thomas testified that in late June of 1992, the Thomases painted the outside of their house and had ample opportunity to observe the trucks. They witnessed the trucks kick up a cloud of dust which floated onto their property. Since the time the parking lot was expanded they have seen a vast increase in the amounts of dust on their property. (Tr. at 65.) They have to clean the screened-in porch more frequently and the pool filter has burned out. He testified that the pool must be cleaned once a day. They have to wipe down the furniture in the porch every time they want to sit out there but before the parking lot expansion, they had only to wipe the furniture once every couple of months. (Tr. at 66.)

Mrs. Thomas directly observed the dust float over from the Carry property. After the dust problem began, the Thomases didn't use their screened-in porch for the rest of the summer. The Thomases painted the outside of their house after the gravel lot was laid and found that the paint did not cover as well on the side of the house facing the gravel lot. (Tr. at 114-117.) The dust problem abated in the winter but Mrs. Thomas stated that the dust problem was as bad in the summer of 1992 as it had been in the summer of 1991. (Tr. at 124.)

Mr. VanDenend testified that the City of Decatur has initiated a court proceeding against Carry concerning the parking lot. The subject of the dispute is whether the new gravel area is a new lot or an expansion of an old one. Mr. VanDenend testified that the City requires new lots to be paved. He stated that a complication has arisen because if the lot is paved, the water will most likely run-off onto the Thomases property. The closest municipal storm sewer system is over 1,000 feet to the East from the Carry property. Mr. VanDenend reported that an engineering company is evaluating alternatives. (Tr. at 376-380.) Mr. Bradham testified that after he received the complaints from the Thomases, Carry oiled and chipped the lot in July of 1991 and that as a result there is "virtually no dust". (Tr. at 435; Respondent's Exhibit No. 14.)

ANALYSIS

The complainants allege that the respondents have violated Sections 9, 23 and 24 of the Act. The complainant does not rely on numerical quantification of the noise or dust emissions to prove a violation. Therefore, this is a "nuisance" case. In a "nuisance" case quantification of noise or dust is immaterial in determining whether such a violation has occurred. (Ferndale

Heights Utilities Co. v. Illinois Pollution Control Board (1st Dist. 1976), 44 Ill. App.3d 967, 358 N.E.2d 1224, 1228.) The Act and Board rules prohibit both noise and air pollution.

Regarding "nuisance noise", the prohibitions in the Act and Board regulations turn on the degree to which the noise interferes with a complainant's normal activities. Thus, Section 900.102 of the Board's rules provides:

No person shall cause or allow the emission of sound beyond the boundaries of his property ... so as to cause noise pollution in Illinois, or so as to violate any provision of this Chapter.

The rules define "noise pollution" as "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity." 35 Ill. Adm. Code 900.101 (1987). Section 24 of the Act prohibits noise pollution in almost identical terms:

No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act.

415 ILCS 5/24 (1992).

In addition, regarding air pollution, Section 9(a) of the Act provides:

No person shall cause 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.

415 ILCS 5/9 (1992).

Section 3.03 of the Act defines "Air Pollution" as:

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.

415 ILCS 5/3 (1992).

Thus, under the Act, the respondents have violated the nuisance noise or air provisions if the noise or dust have unreasonably interfered with the complainants' enjoyment of life or with their pursuit of any lawful business or activity. Unreasonable interference is more than an ability to distinguish sounds attributable to a particular source. It is also more than subjective "annoyance" due to the sounds. Rather, the sounds must objectively effect the complainant's life or business activities. (See Kvatsak v. St. Michael's Lutheran Church (Aug. 30, 1990), PCB 89-182, 114 PCB 765, 773 ; Kochanski v. Hinsdale Golf Club (July 13, 1989), PCB 88-16, 101 PCB 11, 20-21, rev'd on other grounds, 197 Ill.App.3d 634, 555 N.E.2d 31 (2d Dist. 1990).)

The Board now turns to consideration of whether the noise and dust create an unreasonable interference with the Thomases enjoyment of life and property.

UNREASONABLE INTERFERENCE

The Illinois Supreme Court has directed the Board to consider the facts of a "nuisance" case in light of the factors outlined by section 33(c) of the Act to determine unreasonableness. (Wells Manufacturing Co. v. PCB, 73 Ill.2d 226, 232-33, 383 N.E.2d 148, 150-51 (1978) ("nuisance" air pollution; first four factors only); see Ferndale Heights Utilities, 44 Ill.App.3d at 967-68, 358 N.E.2d at 1228.) Wells Manufacturing Co. v. PCB, 73 Ill.2d 226, 232-33, 383 N.E.2d 148, 150-51 (1978). The section 33(c) factors are as follows:

- (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 ... resulting from such pollution source; and

(v) any subsequent compliance.

415 ILCS 5/33(c).

Character and Degree of the Injury or Interference

Section 33(c)(1) directs the Board to consider the character and degree of any interference caused by the noise emitted from the Carry facility. The standard is whether the noise substantially and frequently interferes with complainants' enjoyment of life or a lawful business activity, beyond minor trifling annoyance or discomfort. (See, e.g., Brainerd v. Hagen (April 27, 1989), PCB 88-171, 98 PCB 247.)

Complainants allege that the noise and dust generated by respondent's truck wash and parking facility unreasonably interferes with their enjoyment of life and property. Specifically, they complain of noise from the washing and drying of tanker trailers, the start-up and idling of trucks and the hooking and unhooking of tractors and trailers. Respondents reply that complainants are in fact only concerned about property values.

The record establishes that Carry operates on a year-round basis. It operates 24 hours a day, seven days a week. The record indicates that the Thomases are awoken between three and five times a week. Every aspect of their lives have been impacted by the noise including eating, sleeping, watching T.V. and conversing. They report that Mrs. Thomas frequently wears ear plugs at night. Mr. and Mrs. Thomas have variously described the noise as: "incredibly loud"; similar to "being on the tarmac of a runaway when a jet is whining"; "a high pitched loud whining" which rattles the china in their house; "an incredible slamming, banging noise of metal against metal"; an intense explosive crash that "sounds like a car accident" and a "high pitch scream that circles and circles."

Mr. Zak placed the severity of the noise impact in the upper one third of all the noise cases he has worked on in the last twenty years and classified the problem as "severe." Mr. Zak based his estimation of the severity of the problem on the close proximity to the Thomases and the testimony of the witnesses. In Mr. Zak's opinion, the Thomases are experiencing unreasonable interference with their life and property as a result of the noise from Carry.²

² Carry asserts that the comments by Greg Zak should be given limited weight due to the fact that he personally observed only two trucks operating out of Carry and that he based his evaluation that the noise was "severe" on the testimony of the Thomases. The Board agrees that Mr. Zak's testimony must be considered in light of his

The Thomases report that the dust from Carry Company has burned out the filter in their swimming pool. They report that they have greatly decreased the use of their backyard patio due to the dust. They must clean off the backyard furniture every time they use it. They must hose down the screens frequently.

Carry asserts that the noise and dust emitted from Carry do not create unreasonable interference and that the true basis of the complaint is the Thomases' concern over property value. Carry supports this by asserting that on a number of occasions Mr. Thomas demanded money in order to settle the dispute. They point to Mr. Bradham's testimony that Mr. Thomas demanded \$20,000. Mr. Bradham produced a desk calendar for the date of the meeting where he had made the notation "S. Thomas neighbor, noise and dust, 20,000 bucks." However, Mr. Bradham did not mention the \$20,000 request prior to the hearing, including an earlier opportunity during a sworn deposition. Carry also points to letter written by Mr. Thomas which requested \$5,000. Under oath, Mr. Thomas denied having ever demanded \$20,000 in a face-to-face meeting.

Respondent contends that complainants' requests for money indicate that complainant's real concern is property value and therefore complainant is not truly experiencing unreasonable interference with life and property. (Tr. at 13.) The Board rejects this view. The Act expressly lists the depreciation of property values as an adverse effect of noise pollution.³ Therefore, it is foreseeable that a complainant may protest of depreciated property values while at the same time experiencing unreasonable interference with life and property. Moreover, Section 33(b) of the Act provides that the Board may impose civil penalties where appropriate. (415 ILCS 5/33(b) (1992).) However, this civil penalty is paid into the Environmental Protection Trust Fund and not to complainants. (415 ILCS 5/42 (1992).)

Carry further asserts that the noise and dust come from

limited exposure. However, Mr. Zak testified that the impact of the noise, rather than the noise itself, was severe.

³ Section 23 of the Act states:

The General Assembly finds that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities, increases construction costs, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the quality of our environment. (emphasis added)

neighboring industries. Carry contends that there are several operations in the area that produce noise and dust comparable to Carry. Carry concludes that the Thomases are mistaken as to the source of the noise.

Testimony from the Thomases, Greg Zak and Debbie Hoffert, refutes this claim by Carry. Mrs. Thomas stated that the majority of the entries in her journal were occasions where she directly observed the source of the noise. Mr. Thomas stated the noise from the other industrial properties located to the west of the Carry property are very rare and low in volume. He characterized the noise from other sources as "non-intrusive." Mrs. Hoffert testified that there is "no question" that the noise comes from Carry. Mr. Zak personally witnessed two trucks in operation at the time he heard the noise.

The Thomases testified that the dust problem began just after the Carry lot was graveled. They directly observed trucks on the Carry property kick up the dust and watched the dust settle on their property. In contrast to the direct testimony offered by complainant, Carry produced only attenuated evidence that the dust could have come from another source.

The Board concludes that the noise and dust complained of by the Thomases is produced by Carry. Furthermore, the Board concludes that the character and degree of injury to enjoyment of life and property experienced by the Thomases is beyond minor trifling annoyance or discomfort.

Social and Economic Value of the Pollution Source

Section 33(c)(2) directs the Board to consider the social and economic value of the pollution source. The record establishes that Carry has economic and social value. Carry employs 31 employees and paid \$4,451 in state taxes in 1990. Carry has developed a specialized niche within the hauling industry as a hauler of water soluble food grade materials.

Suitability or Unsuitability of the Source

Section 33(c)(3) directs the Board to consider 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.

Carry appears to be well suited to the area. Truck parking terminals and construction companies occupy the properties to the immediate south and to the west of Carry. The area that Carry is located in is zoned "light industrial." (Respondent Exhibits Nos. 5, 6, and 7).

The record indicates that the Thomases bought their present

home in Decatur, Illinois, in December of 1989 and that Carry purchased the Decatur terminal in approximately July of 1990. Mr. Bradham acknowledged that Kreider's operation substantially decreased between 1987 and 1990 (at the time the Thomases purchased their home) and that Carry's business had substantially increased between 1990 and the time of the hearing. Carry contends that while they did not own the site prior to the Thomases, the previous owner of the site conducted much the same operation as Carry.

The Board has previously addressed whether a substantial increase in activity mitigates priority of location.⁴ In Kaji v. Olson Mfg. Co., 41 PCB 245 (1981), aff'd, 109 Ill. App.3d 1168, 441 N.E. 2d 186 (1982), the Board "somewhat reluctantly" found that the respondent's activities did not constitute unreasonable interference. In reaching its determination, the Board stated "considering the character of the neighborhood and the fact that Kaji was aware of such character when he moved in, Kaji must reasonably have expected that additional manufacturing facilities could lawfully be added by Olson." The Board gave considerable weight to the determination that complainant's requested relief would have resulted in the closure of the entire plant. Moreover, respondent had already "reduced the sound emissions as much as is technically and economically practicable."

In Wells Manufacturing Co. v. Pollution Control Board, 73 Ill.2d 226, 237, 383 N.E.2d 148, 152 (1978) the Illinois Supreme Court stated "[t]he residents and school were on notice of the possibility that some annoyances present in heavy-manufacturing areas could affect them, and this fact considerably diminishes the potency of their complaints." The court went on to state "[a]n industry cannot, of course, substantially increase its odorous emissions and simultaneously rely on its priority of location in the area as a mitigating factor. This sort of changed circumstance, would, as the Board points out, undermine the industry's priority of location argument." In Wells Manufacturing, the court found that there was not sufficient evidence to demonstrate that Wells had substantially increased its emissions.

The record in this matter indicates that similar operations occurred on the Carry site prior to the time the Thomases bought their property. In Annino v. Browning Ferris (1988) PCB 97-139, the Board noted that, in general, a party is charged with constructive knowledge of land conditions that would be

⁴ See also Detlaff v. Boado (July 1, 1993) PCB 92-26)("Priority of location does not achieve the level of an absolute defense but it is to be considered with the other factors").

discoverable upon inspection. Thus the Thomases were on constructive notice that some sort of industrial activity would occur on the Carry site. Furthermore, as with the complainants in Kaji, the Thomases should have reasonably expected that additional activities could occur.

In this matter, as in Kaji, it is undisputed that activity substantially increased on the property. However, in Kaji, the Board gave great weight to the fact that complainant's requested relief would have closed the entire plant and that the respondent had already reduced the emissions as much as was technically and economically feasible. The record in this matter indicates that Carry can further reduce emissions without closing altogether and that Carry has not reduced emissions as much as is technically and economically possible. In Wells Manufacturing, the court held that changed circumstance undermines a priority of location argument. However, in this matter, in contrast to Wells Manufacturing, the record contains uncontroverted testimony that Carry has substantially increased it's operations.

The Board concludes that for the purposes of this dispute, Carry is suitable to the area. However, the Board also notes that at the time the Thomases bought their home, Carry did not own the adjoining property and the operations conducted on the Carry property was substantially less than Carry's level of activity. The increased activity mitigates Carry's claim of priority of location.

Technical Practicability and Economic Reasonableness of Control

Section 33(c)(3) directs the Board to consider the technical practicability and economic reasonableness of reducing or eliminating the emissions.

Mr. Zak proposed several methods to reduce the impact of the noise on the Thomases including an acoustic barrier, equipping the tractors with better mufflers, paving the parking lot and remodelling the wash building. He also recommended that the trucks park only at the south end of the Carry property. However, Mr. Zak has never set foot on the Carry site and has not inspected the wash building and has only a rough idea of its exterior construction; he has never been inside the wash building. He does not have any first hand knowledge of the door construction or of the existence or lack of existence of weatherstripping.

Mr. VanDenend stated that it is necessary for the business to operate 24 hours a day, seven days a week. If their hours were restricted Carry "would not be able to operate." Mr. VanDenend stated that to retrofit the trucks with the sort of mufflers Mr. Zak suggested would cost Carry more than a quarter of a million dollars.

The record indicates that the City of Decatur has initiated a court proceeding against Carry concerning the parking lot. The subject of the dispute is whether the new gravel area is a new lot or an expansion of an old one. New lots in Decatur must be paved. The dispute with the City of Decatur will likely have bearing on any further action taken by Carry to reduce dust emissions.

Subsequent Compliance

Mr. Bradham testified that after he received the complaints from the Thomases, Carry oiled and chipped the lot and that there was "virtually no dust." (Tr. at 435.) Mr. Bradham has written memos and posted signs instructing the truck drivers to reduce the noise and park at the south end of the lot. Mr. Bradham believes that his employees are following these directives. Mr. Bradham believes that since they have responded to the Thomases' complaints in the late part of 1991 and early part of 1992, the noise has been reduced by 80%.

Mrs. Thomas testified that she had not noticed any reduction in the noise since the time of the meeting with Mr. VanDenend. Several of the entries in her journal relate incidents that occurred in the summer of 1992, after the remedial measures had been instituted. Mr. Thomas stated that the noise has increased in 1992. Mrs. Hoffert testified that she has experienced noise problems from Carry since the summer of 1991.

The record indicates that a new wash system was brought on line just before the hearing. However, the record does not indicate whether this new system has substantially reduced the noise of the washing operation. Based on the testimony at hearing, the Board concludes that subsequent compliance has not effectively reduced the noise and dust generated by Carry.

Nuisance Finding

After considering the facts and circumstances of this case, including factors outlined in Section 33(c) of the Act, the Board finds that respondents' emissions of noise and dust constitute an unreasonable interference with complainants' enjoyment of life and lawful activity.

CONCLUSION

The complainants have shown that they have suffered unreasonable interference with their enjoyment of life as a result of the noise and dust emanating from respondent's property. While the Board finds that the facility does have social and economic value and appears to be in a suitable location, this value is reduced by the harm resulting from excessive noise and dust emitted by the facility. Moreover, the

interference suffered by complainants is beyond minor trifling annoyance or discomfort. Furthermore, Carry has substantially increased its emissions and this increase undermines any priority of location that Carry may assert. Therefore, after considering the facts and circumstances of this case, including the factors outlined in Section 33(c) of the Act, the Board finds that the respondent is emitting noise and dust that constitutes an unreasonable interference with the complainants' enjoyment of life and lawful activity, in violation of Sections 9(a), 23 and 24 of the Act.

REMEDY

The Environmental Protection Act authorizes the Board to impose sanctions on those it holds to have violated the Act or Board regulations. Section 42(a) authorizes the Board to impose a civil penalty. The fact that complainant in this case has not requested that the Board impose such a penalty, and a summary consideration of the factors of Section 42(h) of the Act in light of the facts in the record, induce the Board to conclude that such a penalty is unwarranted in this case at this time.

Section 33 of the Act authorizes the Board to issue an order as it deems appropriate under the circumstances. It would appear to be impossible to totally eliminate the noise emissions without shutting down the facility, but it does appear that some reduction is technically and economically possible. However, at this time the Board believes that the record lacks sufficient information for the Board to order specific controls. Therefore, the Board will issue this interim order directing the respondent to address methods of reducing noise and dust emanating from respondents property, including those suggested by Mr. Zak as well as other appropriate methods respondent may develop. Respondent is to file such study with the Board. The Board will allow the complainants an opportunity to respond to the study submitted by the respondents. The Board will then issue a final opinion and order describing the control methods the respondent shall take to reduce emissions from its facility.

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

ORDER

- 1) The Board finds that the respondent, Carry Companies', operations constitutes an unreasonable interference with the complainants' enjoyment of life and lawful activity in violation of Sections 9(a), 23 and 24 of the Act.
- 2) Respondent is hereby ordered to examine the economic reasonableness and technical feasibility of any control

options which it may deem appropriate to reduce the noise and dust emissions from its facility including those set forth by Mr. Gregory Zak in his testimony.

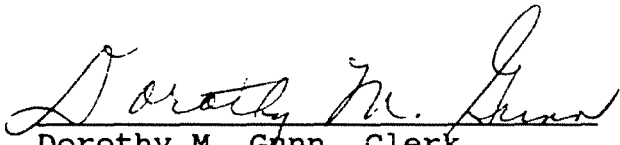
- 3) The above mentioned studies shall be completed no later than December 1, 1993, and filed with the Board and served on the complainant, by that date. The complainant shall file a response to the studies no later than January 15, 1994. The studies will be presented to the Board so that the Board may enter a final order describing the control methods the respondent shall take to reduce emissions from its facility.

IT IS SO ORDERED.

R.C. Flemal dissents and J. Theodore Meyer concurs.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above opinion and order was adopted on the 5th day of August, 1993, by a vote of 5-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board