

ILLINOIS POLLUTION CONTROL BOARD
April 21, 1994

JAMES M. TONNE and)
JEANINE F. TONNE,)
)
Complainants,)
)
v.) PCB 93-44
) (Enforcement)
)
LEAMINGTON FOODS,)
)
Respondent.)

ORDER OF THE BOARD (by E. Dunham):

On March 3, 1994, the Board ordered the parties to show cause why this matter should not be dismissed as no substantive action has taken place in this matter since the complaint was filed in March of 1993. On March 21, 1994, the Board received a letter from the Tonnes. Leamington Foods did not file a reply to the Board's order.

The Tonnes report that Leamington Foods no longer a tenant of the building in question and the refrigeration fans have not been operating. However, the building is currently being offered for rent to other food stores. In the letter the Tonnes inquire of the Board, if a violation is found, if the Board can "'Red Tag' (temporarily condemn) the equipment until certain modifications and tests are completed". The Tonnes also question whether this matter should be indefinitely postponed until a time when the fans are in operation.

The letter does not address why this matter should not be dismissed but makes inquiries of the Board and seeks guidance from the Board on which way to proceed in this matter. Such inquiries of the Board are inappropriate, because the Board is prohibited from discussing substantive matters with a party in a matter pending before the Board. (35 Ill. Adm. Code 101.200.) However, the Board recognizes that the Tonnes are appearing pro se and directs the complainants to Section 33 of the Environmental Protection Act which describes final actions by the Board. (415 ILCS 5/33 (1992).) In addition, the Board notes that it is averse to postponing a matter indefinitely.

Upon the filing of a citizen complaint, the Board makes a determination on whether the complaint is duplicitous or frivolous. (35 Ill. Adm. Code 103.124.) On March 25, 1993, the Board determined that the complaint in this matter was not

duplicitous or frivolous.¹ However, considering that the fans are no longer in operation and Leamington Foods no longer occupies the subject facility, the Board reconsiders that prior determination.

The complaint alleges violations of the noise provisions of the Environmental Protection Act (415 ILCS 5/23 and 24 (1992)) and requests the Board to order the respondent to cease and desist from further violations. If after presentation of evidence, the Board were to determine that the operation of the fans caused a violation of the Act, an order could be entered against Leamington Foods requiring Leamington Foods to cease and desist from further violations of the Act. To conform to the Board's order Leamington Foods would be required to modify the operation of the fans to achieve compliance or cease operating the fans. As Leamington Foods is no longer an operator of the refrigeration fans it does not possess the authority to test or modify the refrigeration fans. While the Board could enter an order as requested if a violation were found, the Board believes that because Leamington Foods is no longer in control of the subject property such an order would be unenforceable. Considering the circumstances in this matter, the Board finds that because Leamington Foods has vacated the property, the Board is unable to effectively grant the relief requested in this matter. Where the Board is unable to effectively impose relief, the Board must dismiss the case as frivolous.

The parties have failed to show cause why this matter should not be dismissed and the Board has determined that this matter is frivolous. Therefore, the Board dismisses this matter.

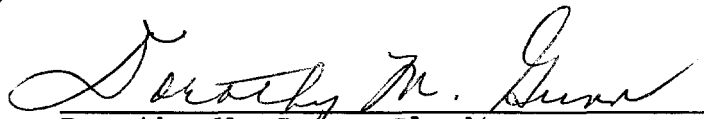
Today's action in no way prohibits the complainants from filing a new complaint if the refrigeration fans resume operation. In addition, the Board notes that the parties may file a motion for reconsideration of this final order pursuant to 35 Ill. Adm. Code 101.246.

IT IS SO ORDERED.

¹ A complaint is frivolous if it fails to state a cause of action upon which relief can be granted. (See, Fore v. Midstate Kart Club (October 7, 1993) PCB 93-171; Mandel v. Kulpaka PCB 92-33 (August 26, 1993); In re Duplicitous or Frivolous Determination (June 8, 1989), RES 89-2, 100 PCB 53.)

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), provides for appeal of final orders of the Board within 35 days of the date of service of this order. 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, hereby certify that the above order was adopted on the 21st day of April, 1994, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board