ILLINOIS POLLUTION CONTROL BOARD
July 11, 1991

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| Complainant, | ) | |
| v. | ) | PCB 89-157(A & B) (Enforcement) |
| CLYBOURN METAL FINISHING COMPANY, | ) | |
| Respondent. | ) | |

JOSEPH WILLIMS, JOSEPH ANNUNZIO, MICHELLE JORDAN, AND JACK BAILEY, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF COMPLAINANT.

BETRAM A. STONE, STONE, POGRUND, ROREY AND SPAGAT, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board by the Attorney General's complaint against Clybourn Metal Finishing Company ("Clybourn") filed on October 6, 1989. The Attorney General alleges that Clybourn violated Ill. Rev. Stat. 1989, ch. 111-1/2, par. 1009(b) and 35 Ill. Adm. Code 201.143 in that the company operated and released emissions into the air without a permit between May 17, 1987 and August 25, 1989. Hearing was held on August 23, 1990. At that time, the Attorney General amended the complaint, without objection, to change the appropriate section of the Code to 201.144 (existing sources) from 201.143 (new sources). Although the hearing officer set up a briefing schedule at the close of hearing, neither party submitted post-hearing memoranda.

FACTS

Clybourn is located at 2240 North Clybourn in Chicago, Illinois. As part of its operation, the company engages in buffing and polishing of metal objects. In the course of its business, Clybourn uses equipment which must be permitted pursuant to state regulations because it emits particulates as well as organic matter. (Tr. at 28). The company did possess the necessary permits from May of 1982 until May of 1987. Moreover, according to counsel's representation Clybourn possessed the requisite permits dating back until 1972. (Tr. at 15; See also, Exhibit Q). From May of 1987 until August of 1989, however, the company did not have the permits mandated under the Illinois Environmental Protection Act ("Act") or the regulations pursuant thereto.

DISCUSSION

Clybourn does not dispute the fact that it was without the

required permits for the timeframe in question. Rather, the company maintains that it did not receive a renewal notice as per Agency custom. Clybourn argues that its failure to receive notification of permit renewal is a defense to operating without a permit. Based on the testimony at hearing, it is virtually impossible for this Board to ascertain whether or not Clybourn received such a notice. Harish Desai, a unit manager in the Permit Section of the Air Division, testified that renewal notices were sent out routinely via computer as a matter of courtesy. (Tr. at 29-31). Clybourn's counsel, however, stated in opening argument that "...the State of Illinois failed to send them [Clybourn] the proper notification for an automatic renewal, admittedly because the computer did not have their name properly." (Tr. at 15).

Because no briefs were filed by the parties and Clybourn's only offer of proof at hearing consisted of the costs of obtaining a permit in 1989, we conclude Clybourn's only defense is that espoused in opening argument (i.e., that the Agency had a duty to notify the company and its omission to do so relieved Clybourn of its permitting requirements). At hearing, neither Clybourn nor any representative of the company testified that it did not receive a renewal notice. Hence, the record does not support Clybourn's bare assertion put forth in opening argument. During his deposition, however, Mr. Romaniuk, Secretary-Treasurer of Clybourn, testified that to his knowledge, the company did not receive a renewal notice from the Agency in 1987. (Ex. Q at 17). Assuming, arguendo, that the company did not receive notice of renewal, we remain unpersuaded that this constitutes a defense to operating without a permit. We therefore find Clybourn in violation.

Although we recognize that caselaw exists which binds administrative bodies to prior custom and practice, [See, Alton Packaging v. Pollution Control Board, 100 Ill. Dec. 689 (1986)], courts have only applied this rule when the custom or practice is related to the interpretation of an administrative rule. We do not find today's case to rise to this level. In those cases where a consistent practice of an administrative agency has been such that a person could conceivably rely on it, and that practice evolved as a result of a rule or regulation, only then have the courts bound the agency in question to that practice. Hetzer v. State Police Merit Board, 49 Ill.App.3d 1045 (3d. Dist 1977). In the instant case, the renewal notice issued by the Agency is a courtesy which is gratuitous in nature as opposed to a policy determination which has been systematically followed as a result of a rule.

For Clybourn to assert that its failure to receive a renewal notice absolves the company of responsibility to renew its permit is, at best, tenuous. Taking this proposition to its logical conclusion, all those entities subject to the regulations adopted to protect our environment would be exonerated of liability simply because the Agency failed to perform a gratuitous task. Although the Agency's renewal notification practice might be labeled as a

custom, it is not one which can be relied upon for establishing compliance with the law. An analogy can be made to license stickers required to operate automobiles. While the Secretary of State sends out renewal forms, they cannot possibly reach everyone. Indeed, in some cases, renewal forms might not be received by an individual through the fault of the Secretary of State. However, such an occurance in no way relieves a citizen of his burden to register his vehicle in accordance with the law. The same principle prevails in the case at bar. Clybourn was a permitted company since 1972. (Tr. at 15). The expiration date is printed on the permit itself. Clybourn has not provided this Board with any legal authority that the Agency has a duty to remind a business entity that one of the licenses it needs to operate will be expiring shortly. Just as the automobile owner knows when his fees are due, so too should the businessman whose operation depends on proper permitting.

33(c) FACTORS

Having found a violation, we must determine an appropriate penalty under the 33(c) factors contained within the Act.[1] Section 33(c) states:

> In making its orders and determinations, the Board shall taken into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> 1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> 2. the social and economic value of the pollution source;
>
> 3. 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;
>
> 4. the technical practicability and

[1]We use Section 33(c) rather than Section 42(h) here because hearing was held prior to September 8, 1990, when Section 42(h) became law. See People v. Sure Tan, Inc., PCB 90-62 (April 11, 1991).

> economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> 5. any economic benefits accrued by a noncomplying pollution source because of its delay in compliance with pollution control requirement; and
>
> 6. any subsequent compliance.

In relation to the instant case, factors (3) and (4) are inapplicable. Insofar as factors (2) and (5) are concerned, the record is sketchy. Even so, the Board presumes that a functioning business entity which employs people and supplies products on the open market has a certain degree of social and economic value. Based on the record, it is impossible to determine with any certainty the amount of economic benefits accrued by Clybourn as a result of its noncompliance with the regulations. At the very least, however, the company did save any applicable permitting fees.[2]

Further, there can be no doubt that Clybourn eventually came into compliance. As of August 25, 1989, the company has been operating with the necessary permit. However, Section 33(a) of the Act states:

> ...<u>It shall not be a defense to findings of violations of the provisions of the Act or Board regulations or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation</u>, except where such action is barred by any applicable State or federal statute of limitation. In all such matters the Board shall file and publish a written opinion stating the facts and reasons leading to its decision. (Emphasis added).

In the case at bar, no such statute of limitation applies and Clybourn's subsequent compliance is no defense to operating without a permit.

[2]At hearing, Clybourn submitted an offer of proof to the effect that the company expended $1,100 obtaining a new permit. These costs, however, were not substantiated through exhibits or other evidence and the Board will therefore not rely upon this representation as a mitigating factor.

This leads us to criteria (1), "interference with the protection of the health, general welfare and physical property of the people". This is the most significant factor in relation to the instant case. The permitting process is the nucleus of the Agency's regulatory scheme. Without the threat of penalties for non-compliance with the permitting process, companies will seek to avoid the necessity of obtaining permits. Without the permitting process, the air quality in Illinois would be threatened because the Agency would be unable to assess all the sources of air pollution and act accordingly.

This is a crucial point. The air permit system is designed to regulate all those pollution sources which contribute particulates and other matter into the Illinois airshed. The only way such a system can operate effectively is to be aware of all sources and permit accordingly. Without a comprehensive system, projections are skewed and air quality determinations as well as the goals thereof suffer. This is especially true in the Chicago, which is a non-attainment area under the provisions of the Clean Air Act. If the Agency is unable to ascertain the location and output of pollution sources, it would be impossible to regulate those sources towards the goals mandated under the Clean Air Act. The ultimate effect is detrimental to the "health, general welfare and physical property of the people".

In short, we find that Clybourn has violated section 9(b) of the Act as well as section 201.144 of the Board's regulations. The record amply demonstrates that Clybourn did "install, or operate any equipment, facility...capable of causing or contributing to air pollution, of any type designated by Board regulations, without a permit granted by the Agency..." Ill. Rev. Stat. 1989, ch. 111-1/2, par. 1009(b). Indeed, both at hearing and within its answer, the company has admitted operating without a permit and has opted to allege an affirmative defense, which we have today rejected. In that regard, the Board notes that Clybourn is potentially subject to a fine of $10,000 for this violation of the Act in addition to a $1,000 penalty for each day the violation continued. Thus the potential penalty could conceivably be $657,000. In light of this, the Board hereby assesses a penalty of $12,000, payable to the Environmental Trust Fund.

SECTION 42(f) APPLICABILITY

Finally, the complaint filed by the Attorney General asserts that the violation in this case has been willful, knowing or repeated. (Comp. at 3). We agree. We find today that Clybourn's failure to renew its permit was certainly "knowing". At hearing, the parties submitted Joint exhibit Q. This exhibit was a deposition of William Romaniuk, the Secretary-Treasurer of Clybourn Metal Finishing Company. Testimony at this deposition revealed that Mr. Romaniuk knew the specifics of the permitting process. To wit:

Joseph Williams, Assistant Attorney General

Q. Okay. To the best of your knowledge, has Clybourn ever applied for a permit for its buffing and polishing operations under the name of Clybourn Metal Finishing Company?

Mr. Romaniuk:

A. When I came to Clybourn we had a permit, so I assume that, you know, a permit was applied for at that time.

Q. Okay. Do you know what year that it was applied for once you came to the company?

A. I don't know what year it was actually applied for. I know my records indicate that -- go back far enough to 1972, in which the permit was renewed; so it was sometime before 1972.

Q. Okay. Now when you came to the company you said that Clybourn was operating under a permit. Do you know what the effective date and the expiration date was of that permit for the buffing and polishing operations?

A. When I came to the company -- well, I guess it's renewed every five years. So it was one from 72 -- 77, '77 to '82, '82 to '87.

Q. Okay. On May 17, 1982 the Agency sent Clybourn a renewal application that stated that if the buffing and polishing process had not been changed in any way, that to sign below and its permit would be renewed until 5-17-87. Is that true to the best of your knowledge?

A. From '82 to '87?

Q. Right.

A. Yes.

Q. Is not it a fact that the next time Clybourn submitted a document, called a renewal application, it was February 22, 1989?

A. That's correct.

Q. The February '89 application was subsequently denied, is that not true?

A. Correct.

Q. Clybourn, however, did not shut down but continued its regular course of business from May 17th of '87 to the present date, is that not true?

A. Correct.

Q. Is not it a fact that on August 25, 1989 Clybourn received a permit for its buffing and polishing operations that stated and expiration date of 1994; sometime in 1994?

A. I believe so, yes.

Q. Is not it a fact that before August the 25th, 1989 the only document that Clybourn had in its possession the stated operating permit, had an expiration date of 5-17-87?

A. To my knowledge, I believe that's true.

(Exhibit Q, pgs. 9-11.).

This testimony reveals that a corporate officer of Clybourn had knowledge of the permitting process and it pertained to the company. This exhibit further reveals that Clybourn has been permitted since 1972. From that time until 1987, it adhered to the regulations as they pertained to air permits. The duration of the permit is on the document itself. At the very least, this testimony substantiates the fact that Clybourn knew it was operating without a permit from February of 1989 until August of 1989. Moreover, there exists a very strong indication, that based on its permitting history, Clybourn was familiar with the process and knew it was operating outside the scope of the Act from May of 1987 until February of 1989. Accordingly, we find that the company possessed actual knowledge of its duty and therefore "knew" of its violation under the legal standard.

The Board notes that there exists precedent for the action we take in today's case. Although the "knowing" standard has never been litigated as it relates to section 42(f) of the Act, courts have addressed this issue generally. In Kampen v. Department of Transportation, 103 Ill. Dec. 884 (2nd Dist. 1986), the court held that imposing a civil penalty on anyone who "knowingly commits an act" in violation of the Act, required only that an individual act knowingly and not that he appreciate the illegality of the conduct. Citing United States v. International Minerals and Chemical Corp., 402 U.S. 558 (1971), the court decreed that ignorance is no excuse for failure to comply with the law; further, the court held that when an individual partipates in an endeavor which is regulated, there exists a presumption that the individual is aware of the applicable regulations.

These decisions are analougous to the issue in the instant case. In Kampen as well as International Minerals, the respective courts were willing to presume knowledge by the mere existence of regulatory standards. In the case at bar, no such presumption is necessary. Mr. Romuniak's testimony explicitly demonstrates that he was aware of the regulations, that he knew permits were renewed at five year intervals and that he realized Clybourn was operating without the required permit from 1987 until 1989. As such, we have no doubt that Clybourn's intentional inaction rose to the "knowing" standard as articulated within Section 42(f).

A finding that Clybourn's violation is knowing is significant in that it allows the Board to direct the Respondent to pay costs as well as reasonable attorney's fees into the Hazardous Waste Fund pursuant to Section 42(f) of the Act. This section states:

> The State's Attorney of the county in which the violation occurred, or the Attorney General, shall bring such actions in the name of the people of the State of Illinois. Without limiting any other authority which may exist for the awarding of attorney's fees and costs, the Board or a court of competent jurisdiction may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the State's Attorney or the Attorney General in a case where he has prevailed against a person who has committed a wilful, knowing or repeated violation of the Act.
>
> Any funds collected under this subsection (f) in which the Attorney General has prevailed shall be deposited in the Hazardous Waste Fund created in Section 22.2 of this Act. Any funds collected under this subsection (f) in which a State's Attorney has prevailed shall be retained by the county in which he serves.

Based on this provision, the Board will split this case into two subdockets. Today's Opinion and Order will constitute subdocket (A) and subdocket (B) will be created so as to allow the Attorney General to file an affidavit of costs and attorney's fees. The Attorney General is directed to file this affidavit within 30 days of this Order.

This Opinion constitutes the Board's findings of facts and conclusions of law.

## ORDER

1. The Respondent, Clybourn Metal Finishers, Inc., has violated

Section 9(b) of the Illinois Environmental Protection Act and 35 Ill. Adm. Code 201.144.

2. Within 30 days of the date of this Order the Respondent shall, by certified check or money order payable to the State of Illinois, designated to the Environmental Protection Trust Fund, pay the penalty of $12,000 which is to be sent by First Class Mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, Illinois 62794-9276

Clybourn Metal Finishers, Inc. shall also place its Federal Employer Identification Number upon the certified check or money order.

Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (Ill. Rev. Stat. 1990 Supp., ch. 120, par. 10-1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

3. Clybourn Metal Finishers, Inc. is hereby ordered to cease and desist from all violations of the Illinois Environmental Protection Act and from Board regulations.

4. The Attorney General may file an affidavit of costs within 30 days of this Order. These costs will be assessed in subdocket (B).

5. Docket (A) in this matter is hereby closed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111-1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

J. Anderson dissented.

B. Forcade, J. Marlin and J.T. Meyer concurred.

I, Dorothy M. Gunn, clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 11th day of July, 1991 by a vote of 6-1.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board