COURT OF APPEALS
WYANDOT COUNTY, OHIO
THIRD APPELLATE DISTRICT

STATE OF OHIO, EX REL.
ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO

CASE NUMBER 16-91-7

PLAINTIFF-APPELLANT

v.

O P I N I O N

NATIONAL LIME & STONE COMPANY

DEFENDANT-APPELLEE

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: March 24, 1992.

ATTORNEYS:

MR. LEE FISHER
Attorney General
Mr. David G. Cox
Mr. Timothy Kern
Environmental Enforcement Section
30 East Broad Street
25th Floor
Columbus, OH 43266-0410
For Appellant.

MESSRS. MARSHALL & MELHORN
Mr. Thomas W. Palmer
Ms. Sara J. Streight
Attorneys at Law
Four SeaGate, Eighth Floor
Toledo, OH 43604
For Appellee.

HADLEY, P.J. Plaintiff-Appellant, State of Ohio, ex. rel. Attorney General of Ohio ("State"), upon the written request of the Director of the Ohio Environmental Protection Agency ("Ohio EPA"), appeals from a judgment entered by the Wyandot County Court of Common Pleas, granting summary judgment to Defendant-Appellee, National Lime & Stone Company ("National"), denying summary judgment to appellant and dismissing the amended complaint with prejudice.

National engages in stone quarrying, one of the products being hydrated quick lime. As part of the process of making its hydrated quick lime, National uses a piece of equipment known as a Raymond Mill. The Raymond Mill crushes and grinds the hydrate to meet customer fineness specifications. In 1927, National installed two Raymond Mills at its Carey plant, one known as the East Mill and one known as the West Mill. These two mills were given a single "permit to operate" (PTO) in January 1974. In January 1986, the PTO was split and each mill given its own permit. Sometime between 1986 and 1987, the East Raymond Mill was taken out of service. In April 1987, the West Raymond Mill needed to be replaced, due to its increasingly poor condition. In the same year, National replaced the West Raymond Mill with a new mill manufactured by Combustion Engineering, Inc.

The new mill consisted of over two thousand separate, individual parts which had to be assembled by National. The

new Raymond Mill is now in the same location the West Raymond Mill occupied. The replacement process of the West Raymond Mill with the new Raymond Mill took approximately thirteen days. National then proceeded to operate the new mill without securing a new PTO from the Ohio EPA. The new Raymond Mill performs essentially the same function of grinding hydrate as the old Raymond Mill. The new mill generates air particulates and differs from the old mill only in that it has an additional "roller" and a larger grinding ring.

In December 1988, National submitted to the Ohio EPA an application to renew the existing PTO on the West Raymond Mill, which was to expire on January 24, 1989. The Ohio EPA and National met to discuss the regulatory status of the new mill but no agreement could be reached. The Ohio EPA has not taken any action on the renewal application, pending the outcome of this suit. The Ohio EPA referred this matter to the Attorney General's office, pursuant to Chapter 3704 of the Ohio Revised Code for enforcement of this matter. The Attorney General brought suit in March 1990 claiming that National did not obtain a "permit to install" ("PTI") and a PTO prior to installing the new mill at the Carey facility. National argues that the definition of install, as set forth by O.A.C. 3745-31-01(I) does not explicitly or impliedly include replacement or renovation of an old piece of equipment. Further, it argues that since a new PTI was not

required, a new PTO was not required.

After both parties filed motions for summary judgment, the trial court granted National's motion for summary judgment. As a matter of law, the trial court found that the term "replace" did not fall within the definition of "install" or "modify", and the failure to include "replace" was intentional. Further, since National had a valid PTO for a Raymond Mill, it continued in force for the replacement mill and no new PTO was required. Finally, the trial court stated that for the Ohio EPA to prevail, a modification of its regulations would be necessary.

From this judgment, Appellant appeals and asserts the following assignment of error:

Assignment of Error No. 1

> The Trial Court Erroneously Held that the Replacement of an Existing Source of Air Contaminants by a New Source of Air Contaminants does not Constitute the Installation of a "New Source" as Defined by O.A.C. Rule 3745-31-01(K), for which a Permit to Install is Required per O.A.C. Rule 3745-31-02.

Appellant's first argument is that by the definitions set out in Ohio Adm. Code Chapter 3745-31, National should be required to obtain a PTI before further operation continues with the new Raymond Mill.

Ohio Adm. Code 3745-31-02(A) states that the "installation of a new source of air pollutants" will not be permitted unless a permit to install is first obtained from the Director of the Ohio EPA ("Director"). Resolution of

this issue requires an examination of "installation" and "new source." Both terms are defined in Ohio Adm. Code 3745-31-01. Installation is defined as:

> *** * * to construct, erect, locate, or affix any air contaminant source or any treatment works.**

Ohio Adm. Code 3745-31-01(I). The State argues that National's thirteen day act of assembling the new Raymond Mill, piece by piece before the new mill was operable, constitutes installation equivalent to "construct, erect, locate, or affix". Construct is defined as "to form, make, or create by combining parts or elements." Webster's Third New International Dictionary (1981) 489. Erect is defined as "to put up (as a building or machine) by the fitting together of materials or parts". Id. at 770. Locate is defined as "to set or establish in a particular spot or position". Id. at 1327. Affix is defined as "to attach physically". Id. at 36.

Words in statutes and regulations must be given their plain and ordinary meaning absent a contrary intention by those who promulgated the requirement. See Youngstown Club v. Porterfield (1970), 21 Ohio St. 2d 83. If there is plain and unambiguous language in the enactment, there is no reason to resort to the rules of statutory construction. State, ex rel. Shaffer v. Defenbacher (1947), 148 Ohio St. 465. Furthermore, if the language of the regulation is unambiguous, the language is not to be interpreted, but

rather, it is to be applied. Allen v. Tressenrider (1905), 72 Ohio St. 77.

The record establishes without question that the new Raymond Mill was "installed" as defined by Ohio Adm. Code 3745-31-01(I). It was made by combining and fitting parts together and set up at the Carey plant.[1]

Further, Ohio Adm. Code 3745-31-02 requires that before a PTI will be issued, not only must installation occur but also that there be a "new source." New source is defined as:

> *** * * any air contaminant source and/or disposal system for which an owner or operator undertakes a continuing program of installation or modification or enters into a binding contractual obligation to undertake and complete, within a reasonable time, a continuing program of installation or modification, after January 1, 1974, and which, at the time of installation or modification, would have otherwise been subject to the provisions of this chapter.**

Ohio Adm. Code 3745-31-01(K). This definition requires that three elements be present before a new source is found to be present: first, there must be an air contaminant source; second, the source must be installed; and third, which source was installed after January 1, 1974.

First, the term "air contaminant source", as used in the definition of "new source" is defined as:

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[1]We are not, by this decision, implying that the definition of install as defined in Ohio Adm. Code 3745-31-01(I) is complete or perfect. Different facts may require a court to find that a replacement piece of machinery has not been "installed."

> *** * * each separate operation or activity that results or may result in the emission of any air contaminant.**

Ohio Adm. Code 3745-31-01(D). It cannot be doubted that the operation of a Raymond Mill is an activity or operation which will or could result in the emission of limestone dust into the air. Thus, the Raymond Mill is an air contaminant source.

Secondly, the source must be installed. As noted in our discussion supra, the new Raymond Mill was "installed," pursuant to Ohio Adm. Code 3745-31-01(I).

Lastly, the air contaminant source must have been installed after January 1, 1974. The new Raymond Mill involved in this dispute was installed in April 1987, meeting this final requirement of "new source."

The word "new" as used in the regulation defining "new source" must be taken to also mean "different." Thus, any operation or activity which may result in the emission of an air contaminant and which undergoes installation or modification is a "new source." It is a "new source" because the installation or modification resulted in different machinery being in place which the EPA must examine and approve before installation.

Therefore, as a matter of law, National's replacement of the old Raymond Mill with the new Raymond Mill in 1987 constituted "installation of a new source of air pollutants", pursuant to Ohio Adm. Code 3745-31-02(A) and

appellant's assignment of error must be sustained. This judgment is reversed and the cause remanded to the trial court for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

EVANS and SHAW, JJ., concur.
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Attorney General
Lee Fisher

M E M O R A N D U M

TO: Kate O'Malley, Chief Counsel
D.C.C. T.K.

FROM: Gary Cox & Tim Kern
Assistant Attorneys General
Environmental Enforcement Section

DATE: March 31, 1992

RE: Court of Appeals Decision in State v. National Lime & Stone

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Please find attached a Court of Appeals decision, Third District, which reverses the lower court's decision and remands the case to the lower court. The Court of Appeals held that, in this case, the replacement of one air contaminant source with another air contaminant source constitutes the "installation" of a "new source", which first requires that a permit to install (PTI) be issued by the Director of Ohio EPA before such installation can occur.

The Court's holding was based on an application of the relevant definitions and regulations which, in the Court's opinion, were clear, unambiguous and could be understood in their plain, common sense meaning If there is anything further that you need, please do not hesitate to contact us.

DGC:dae
cc: Jack Van Kley
All EES Attorneys
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