

This matter comes before the Environmental Board of Review (EBR) upon an appeal by Kent Sutton/Sutton's Service Center from an Order issued by the Director of the Environmental Protection Agency (OEPA) on January 16, 1992. Appellant Sutton Service Center (SSC) timely filed an appeal from this action on January 30, 1992. A de novo hearing was held before the entire Board on October 6, 1992. The issue at that hearing was the reasonableness of the Director's action in issuing the Order.

Steve List, Attorney at law, represented the Appellant; Athan Vinolus and Gary Cox, Assistant Attorneys General, represented the Director. Based on the evidence adduced at the de novo hearing, the pleadings and briefs of the parties and the Certified Record filed with the Board pursuant to section 3745.05 of the Revised Code, the Board makes the following Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. R.C. Sec. 3704.14 mandates that the Director establish a motor vehicle inspection program in specified counties in Ohio in order to comply with the federal Clean Air Act.

2. This program is generally referred to as the AIM (Automobile Inspection and Maintenance) Program.

3. The purpose of the AIM program is to reduce the precursors of smog and carbon monoxide in the atmosphere. To this end, automobiles in federally specified areas are inspected for compliance with laws regarding pollution control devices. Vehicles must pass the inspections for pollution control devices in order to register their vehicles in Ohio. (testimony, Compton)

4. To implement this legislative mandate, the Director licenses certain facilities to inspect vehicles in these counties.

5. Kent Sutton is the owner of Sutton Service Center, located at 6051 Lake Avenue, Elyria, Ohio.

6. On February 1, 1988 Sutton Service Center satisfied the requirements to qualify an official Automobile Inspection and Maintenance (AIM) facility. On that date it was issued a license enabling it to conduct inspections pursuant to O.A.C. 3745-26. (App'lee Ex. 1)(testimony Compton)

7. This license authorized Appellant's service center to conduct AIM inspections and to charge a fee of \$8.00 for each of those inspections.

8. Only authorized facilities may conduct the inspections and issue compliance certificates.

9. Further, inspectors at each facility must successfully complete a training course in order partake in the program. Each person must have an ASE (Automotive Service Excellence) certification to conduct inspections and issue certificates. (testimony Compton)

10. The inspection process is computerized, and all licensed inspection facilities use the same software. A computer screen lists the emission control components that are supposed to be installed on the particular vehicle being inspected, and an inspector is to enter a "P" for pass, "F" for fail, or "N" for not applicable as he proceeds through the inspection.(testimony, Rickenbacker)

11. The inspector is to physically check for each required emission control component, and to indicate its presence or absence by an "F" or "P" entry into the computer.

12. The computer generates an inspection certificate when the inspection is complete.

13. Inspectors for the AIM program conduct both overt and covert audits of licensed facilities to ensure compliance with the law.

(testimony Compton, Rickenbacker).

14. An overt audit is announced, and includes an EPA inspector visiting a site and assuring compliance in terms of, among other things, signs, gauges, and ID numbers (testimony Rickenbacker, Dysle)

15. A covert, or undercover, audit, on the other hand, is not announced, and involves the removal of a major pollution component from the test auto. The inspector then visits a licensed facility and presents the tampered auto for inspection. (testimony Rickenbacker)

16. Prior to a covert audit, each major pollution component which is removed is entered into the Agency's "Undercover Vehicle Tampering Log", before the auto leaves the OEPA office. (testimony Rickenbacker) (App'lee Ex. 6).

17. On October 17, 1992, Mr. David Dysle, an Automobile Emissions Inspector for the OEPA, conducted a covert audit of Sutton Service Center. (Tr. 123)

18. Mark Rickenbacker, Supervisor of the AIM program for the Greater Cleveland area, testified that he removed the evaporative canister, a component whose purpose is to control air emissions of vehicles, from the vehicle to be used for the inspection. He documented this removal in the tampering logbook and secured the canister in a locker at the office.

19. Mr. Rickenbacker also testified that he documented the removal and replacement of the canister with photographs. (App'lee Ex. 7-12, Tr. 68).

20. Subsequent to the removal of the canister, Mr. Rickenbacker had David Dysle, an Auto Emission Inspector with the OEPA, drive the tampered vehicle to Sutton's Service Center for a covert inspection (Testimony, Rickenbacker)

21. Mr. Dysle testified that he presented the tampered vehicle for inspection on October 17, 1991. (Tr. 123)

22. Prior to presentation, Mr. Dysle also conducted a pre-audit inspection of the vehicle, making sure that the evaporative canister was, in fact, missing. (testimony Dysle Tr. 124)

23. Despite this removal, the vehicle received a passing certificate from the Center. (App'lee 13).

24. Immediately after the audit, Mr. Dysle completed a Covert Audit Report documenting the inspection and failure to find the missing control piece. (App'lee 15)

25. On October 24, 1991, Mr. Rickenbacker notified Mr. Sutton that his station had failed the audit. (App'lee 14)

26. While a copy of the inspection certificate was not attached to the notice, the Agency Facility Inspection Report was attached, and it communicated the necessary information regarding the reason for the failure. (App'lee 14)

27. On January 16, 1992, the Director issued Notice and Findings of Violations and Orders to Sutton's Service Center, documenting the failed inspection, and ordering Mr. Sutton to pay a civil penalty for the violation. (C.R. 2, also Notice of Appeal)

28. Mr. Sutton testified on his own behalf regarding the training he required of his AIM inspectors.

29. He requires that all inspectors successfully complete a training course approved by the OEPA. (Tr.168)

30. In addition to this training, Mr. Sutton has developed and adopted a form to be used in conjunction with the computer program, to assure adequate inspections (App'nt A).

31. Item 3A on the checklist of the form requires the inspector to verify the presence of the evaporative canister on the vehicle being inspected.

32. It was standard operating procedure at Sutton Service Center that the inspector use the form for every inspection. (Testimony, Sutton)

33. Michael Zaenglein, a certified AIM inspector, conducted the inspection in question. He testified that he both visually and physically verifies the presence of each part before he indicates its presence on the form, before he enters a "P" into the computer.

34. He further testified that he never deviates from this procedure. (Tr. 179)

35. The checklist is then stapled to the computer generated certificate and filed for up to 6 months at the Service center.

36. In this particular case, however, Mr. Sutton was unable to find his copy of the inspection certificate.

37. Mr. Zaenglein testified that, while he could not specifically recollect inspecting this particular vehicle on this particular day, he would not have passed the vehicle unless the canister was present, a fact he would have verified by touching the canister. (Tr. 195)

CONCLUSIONS OF LAW

1. While there was plain disagreement between the witnesses regarding the presence of the evaporative canister in the vehicle presented to Sutton Service Center as part of a covert audit on October 17, 1992, the record produced at

hearing indicates that the Director had a valid factual foundation for taking the action he did, in the form of a Notice of Violation. The record does not indicate that the Agency's determination was inaccurate or inappropriate in this instance. Furthermore, nothing in the record indicated that the Director's utilization and reliance upon the tampering log, the photographs, and the covert audit inspection report was either unlawful or unreasonable.

2. In deciding this de novo appeal, the Board must determine whether or not the action of the Director which is in question in the appeal was lawful and reasonable; that is, not in accord with reason or that it has no factual foundation. Where the evidence at a de novo hearing supports the Director's action, the Board must affirm the action of the Director. The Board will not substitute its judgment for that of the Director. An action of the Director is unlawful if it is not in accordance with law. An action is unreasonable if it is not in accordance with reason or without any factual foundation. [Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61 (1977)]

3. In a de novo proceeding such as the one presently before the Board, the burden of proceeding is placed upon the Appellants. It is their burden to demonstrate to the Board that the action of the Director which is the subject of the appeal is unlawful or unreasonable. [Jackson County]

4. Where the evidence before the Board demonstrates that the action taken by the Director is reasonable and lawful, the Board must affirm the action of the Director. The Board may not substitute its judgment for that of the Director. [Citizens Committee to Preserve Lake Logan v. Williams, Supra]

5. The action of the Director in the present case then is based on a valid factual foundation and therefore reasonable and lawful and should be affirmed.

FINAL ORDER

The action of the Director being reasonable and lawful is hereby affirmed by the Board.

The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

Entered in the Journal
of the Board this 3rd
day of August, 1993.

THE ENVIRONMENTAL BOARD OF REVIEW

Juliana F. Bull
Juliana F. Bull, Chairwoman

Jerry Hammond
Jerry Hammond, Member

COPIES SENT TO:

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