

IN THE COURT OF COMMON PLEAS, JEFFERSON COUNTY, OHIO

STATE OF OHIO, ex rel.,	:	
ANTHONY J. CELEBREZZE, JR.	:	
ATTORNEY GENERAL OF OHIO	:	CASE NO. 90-CIV-67
Plaintiff	:	JUDGMENT JOURNAL ENTRY
	:	<u>FINAL APPEALABLE ORDER</u>
VS	:	January 24, 1991
STEEL PROCESSING SERVICES, INC.	:	STATEMENTS OF FACT
Defendant	:	FINDINGS OF LAW
	:	OPINION
	:	DECISION

. . . . .

This matter came on for trial on October 24 and October 25, 1990. The Court, having reviewed the evidence adduced, and having reviewed the pleadings, memoranda of law, arguments of counsel, and evidence introduced at the trial finds as follows:

Defendant, Steel Processing Services, Inc., (Defendant) is a corporation duly organized under the laws of the State of Alabama and is licensed to transact business in the State of Ohio.

Defendant engages in the business of salvaging railroad tank cars at four permanent terminals and at various temporary locations throughout the South and the Midwest. The company claims that these temporary salvage sites do not constitute a primary source of revenue.

On or about September 6, 1988, Defendant started its railroad tank car salvage operations on a railroad side yard located on State Route #164 between Amsterdam and Bergholz, in Jefferson County, Ohio.

This railroad side yard at which Defendant conducted its salvage operation was located less than a quarter mile from

Edison Middle School and less than half a mile from Gregg Elementary School.

Prior to initiating its tank car salvage operations in Jefferson County, Ohio, Defendant did not contact the Ohio EPA or its designated representative, the North Ohio Valley Air Authority (NOVAA) about its operations, and did not apply to the Ohio EPA or NOVAA for an air pollution control installation or operation permit.

In initiating and conducting its operations at the Jefferson County site, Defendant improved and utilized a dirt access road extending from State Route #164 to the salvage site.

Plaintiff contended that Defendant's utilization of acetylene torches in cutting apart tank cars at the Jefferson County site resulted in the ignition and/or burning of fiberglass and the emission of smoke and odor into the air.

From September 1988, until approximately January 13, 1989 SPS conducted steel salvaging operations at the site.

SPS entered into agreements with the Ohio-Rail Corporation, a short line railroad which leases trackage between Minerva and Hopedale, Ohio, to provide SPS with access to the tracks and the associated real estate. The real estate in question is owned by the Ohio Department of Transportation.

Prior to utilizing the site, SPS improved the unpaved access road to the Bergholz site by placing bottom ash and crushed

limestone on the roadway. The access road was in existence and had been utilized in its unimproved state prior to (and after) SPS operations at the Bergholz site.

SPS activities at the Bergholz site consisted of salvaging steel from pre-cleaned railroad tank cars purchased from ACF Industries. Dismantling operations were performed by workers using cutting torches to cut and dismantle the outer shell of each tank car. After removing the outer sheet, fiberglass insulation was removed from around the inner tank, lowered to the ground and piled on the site. The inner tank of each tank car was then dismantled with the use of cutting torches. Scrap steel was removed from the site by rail.

The testimony further revealed that during the period of SPS operations at the Bergholz site, the temporary storage piles of fiberglass were either wet or frozen and there were no observed emissions of fiberglass particles. The only instance of observed emissions from the site were from the improved roadway and were created by the tires of the vehicle driven by Ohio Environmental Protection Agency (Ohio EPA) employee, Thomas Hadden in January, 1989, upon leaving the site at the intersection of the unpaved road and State Route #164. During the entire period of SPS operations at the Bergholz site, conditions at the site were described as either muddy or frozen.

The air contaminants which were observed from SPS's operations were smoke which originated from the use of the

cutting torches in the SPS salvaging operation.

The Bergholz site was operated without any complaint or incident from early September 1988 until January 11, 1989.

On January 11, 1989, the North Ohio Valley Air Authority (NOVAA) received an unknown number of anonymous complaints regarding the SPS Bergholz site. These complaints, and the resulting site inspections by NOVAA and the Jefferson County Health Department, received a substantial amount of media attention in the Steubenville/Jefferson County area.

Further, Plaintiff contended that in the process of cutting and removing the steel from the tank cars at the Jefferson County site, Defendant would expose fiberglass insulation which would be torn from the tank cars and dumped and piled on the ground.

While conducting its salvage operations, Defendant did not take any control measures to prevent the emission into the air of smoke and odor from the tank car cutting operations. Additionally, Defendant did not take any control measures to prevent the emission into the air of fiberglass particles and fibers from the fiberglass removed from the tank cars and dumped and piled on the ground.

A primary purpose of requiring air pollution control permits is to place pollution control officials on notice as to the kinds and amounts of air contaminants being generated at a facility and to insure that appropriate pollution control devices are in place.

In response to the anonymous complaints, NOVAA and representatives from the Ohio EPA visited the Bergholz site on January 11, 1989. In response to requests from both NOVAA and the Ohio EPA, SPS suspended operations at the Bergholz site. Under the direction of the Ohio EPA, SPS cleaned the site and removed and properly disposed of all of the fiberglass material.

During the time period in which SPS operated the Bergholz site, SPS did not have permits from the Ohio EPA to install or operate an air contaminate source (s). SPS testified that it was first informed of the necessity to obtain permits for it's operations after being informed of the need to obtain permits.

Further, in late January of 1989, in response to complaints and requests from the Jefferson County Health Department and the Ohio EPA, Representatives of the Ohio Department of Health investigated allegations of rash illnesses in the two local schools in Jefferson County during the time period in whic SPS was operating. The investigation and subsequent evaluation demonstrated that there was no statistically significant increase in complaints by students during 1988-1989 which would support any indication that SPS's operations adversely affected the health or welfare of any school children. Air samples taken before the school was cleaned revealed a level of fiberglass particles with less than normal background levels.

Because Defendant, Steel Processing Services did not notify the Ohio EPA or NOVAA of its operations, and did not apply for and obtain the appropriate permits, NOVAA and the Ohio EPA had no knowledge of Defendant's operations until January 11, 1989, when the said complaints and allegations of health concerns were registered with the Jefferson County Board of Health (JCBH) and NOVAA.

As a result of the complaints regarding the salvage operations, NOVAA, Ohio EPA and JCBH conducted repeated and time-consuming inspections of Defendant's salvage site and the nearby schools from January 11 through January 25, 1989. The Jefferson County Board of Health ordered Edison Middle School and Gregg Elementary School closed for cleaning from January 18 through January 26, 1989. The closing and the cleaning of the schools would not have taken place had the SPS applied for permits.

Pursuant to the Ohio EPA and NOVAA's orders, the Defendant ceased operations January 12, 1989. Between January 13 and January 25, 1989 Defendant removed the fiberglass, and subsequently vacated the site on or around February 1, 1989.

The State of Ohio utilized the United States Environmental Protection Agency Air Civil Penalty Policy to calculate a civil penalty it believes is commensurate with Defendant's violations.

The Air Civil Penalty Policy takes into account a number of factors in the calculation of civil penalties, including the

economic benefit of non-compliance with the law, the gravity of the violations, and any mitigating or augmenting circumstances.

Further, the State was unable to calculate the economic benefit portion of its civil penalty calculation. Because Defendant failed to apply for permits and clearly identify the kinds of air contaminant sources it operated, the State is unable to retroactively determine what kinds of air pollution control measures should have been taken, nor the costs of such measures.

The Plaintiff further contended that the gravity of the civil penalty calculation takes into account the actual or threatened harm arising from a Defendant's actions, the importance of the violated regulations to the overall regulatory scheme, and the size of the Defendant. Based on the United States EPA Civil Penalty Policy, the gravity component of the State's civil penalty calculation is \$39,000.00 according to the Plaintiff. \$30,000.00 of this amount is derived from the importance of permitting regulations to the air pollution control regulatory scheme, again this is the Plaintiff's testimony.

Further, Plaintiff testified that the mitigating or augmenting factors taken into account by the Civil Penalty Policy include the willfulness or negligence of the Defendant. The Defendant's history of non-compliance, the Defendant's inability to pay a civil penalty, the Defendant's cooperation, if any, and any other unique factors. Based on the United States EPA Civil Penalty Policy, the state testified it augmented the \$39,000.00

gravity component by \$39,050.00 due to the Defendant's history of non-compliance, its willful violations, the disruption of the community caused by Defendant's violations, and the costs incurred in responding to Defendant's violations.

In May, June and July, 1988, Ohio EPA's Northwest District Office inspected another SPS salvaging operation in Ohio City, Ohio in response to complaints received by that office. On July 18, 1988, Ohio EPA wrote SPS and informed SPS that "personnel from the Northwest District Office observed this operation June 2, 22, and July 14, 1988. The cutting torches which were being used caused a significant amount of smoke and odor to be emitted to the surrounding neighborhood...the Ohio EPA will not approve this operation or issue any type of operating permits until sufficient information (as discussed in your phone conversation with Gerry Rich on July 13) is obtained and reviewed by this office. The appropriate action and procedures can then be carried out."

Ohio EPA's investigation of SPS's salvage operations in Ohio City, Ohio did not involve issues respecting fugitive air emissions from (1) the use of unpaved roadways; or (2) the handling of fiberglass. Rather, Ohio EPA's investigation involved the open burning of salvage materials and smoke which was generated from cutting torches. Ohio EPA argues that this earlier investigation placed SPS on "notice" as to its requirements for permits to install and operate "sources" of



of air pollution. SPS argues that the nature of the complaints at Ohio City were factually dissimilar, and that no clear instructions were given by Ohio EPA regarding the need for permits for various salvaging operations.

The move of SPS's operations from Ohio City to Spencerville was facilitated by Vaughn Mottinger, Mayor of Ohio City according to the testimony.

After sending the July 18, 1988 letter representatives of the Ohio EPA visited SPS's operations in Spencerville, but took no enforcement action as it related to SPS operations, nor did the Ohio EPA request that SPS submit permit applications for its operations.

Testimony from Steve Hayes, Executive Vice-President, SPS established that the SPS salvage operation in Bergholz was not the result of a transfer of operations from either the Ohio City or Spencerville locations and did not involve the same tank cars. Rather, the Bergholz operation involved the salvaging of a separate group of tank cars. The tank cars were not moved from Ohio City to Spencerville to Bergholz.

There are numerous unpaved parking lots and roadway in Jefferson County which do not have permits to install or permits to operate air contaminate sources.

SPS has operated temporary salvage sites in several states without being required to apply for or obtain permits from state or federal environmental agencies according to Defendant's testimony.

Further, the Court finds upon the testimony and circumstances of this case that:

1. Defendant's railroad tank car cutting and salvage operations at the Jefferson County site constituted an "air contaminant source" within the meaning of O.A.C. Rules 3745-31-01 (D), 3745-35-01 (B)(1), and 3745-15-01 (W).
2. The dirt access road improved and utilized by the Defendant at the salvage site constituted an "air contaminant source" within the meaning of O.A.C. Rules 3745-31-01 (D), 3745-35-01 (B)(1) and 3745-15-01 (W).
3. Defendant's tank car cutting and salvaging operation may have constituted a "fugitive dust source" within the meaning of O.A.C. Rule 3745-17-01 (B)(7).
4. By establishing its tank car salvage operations and access road in Jefferson County, Defendant caused, permitted, or allowed the installation of at least two new sources of air contaminants without first obtaining permits to install for such sources from the OPEA, thus violating OAC Rule 3745-31-02 (A) and Ohio Revised Code Section 3704.05 (H).
5. Further, Defendant took no measures to control the emission of smoke and fiberglass fibers or particles from the cutting and salvage operations thus violating O.A.C. Rule 3745-17-08 (B) and Ohio Revised Code Sections 3704.05 (A) and (H).

The emissions which were demonstrated to have occurred at the SPS site appear to have been de minimis in amount and effect.

The Court does not find that the Company was recalcitrant or uncooperative.

Further, it was testified to that salvage operations of this kind have not been required to obtain permits from the Ohio EPA before conducting business according to the Defendant, and this fact may be considered in establishing the severity of the violation and the amount of the penalty for such a violation.

The Court has reviewed the considerations and calculations employed by the Ohio EPA, including the use of the United States EPA "Clean Air Act Stationary Source Civil Penalty Policy." These materials provide useful information to the Court respecting the amount of any penalty to be imposed; ultimately, however it is the function of this Court to impose a penalty under Section 3704.06 of the Ohio Revised Code. Taking into account all the circumstances which aggravate or mitigate the severity of the violation, the Court finds and orders that the Defendant, Steel Processing, Inc. is adjudged in violation of Chapter 3704 of the Ohio Revised Code and the regulations adopted thereunder; therefore, orders the Defendant to pay a civil penalty in the amount of Twenty-Five Thousand Dollars (\$25,000.00). And the Defendant is ordered to pay the Court costs.

Further, the Defendant, having failed to comply with the Ohio Revised Code section 3704 and regulations promulgated thereunder is ordered and enjoined from conducting any operation in the State of Ohio except such operations as are properly permitted by the Ohio EPA; injunctive relief prayed for is granted and ordered with the understanding that the Defendant has ceased it's operations herein complained of.

  
HONORABLE DOMINICK E. OLIVITO



Attorney General  
Lee Fisher

M E M O R A N D U M

TO: EES Attorneys  
FROM: Chris Korleski *CK/KOH*  
DATE: January 29, 1991  
RE: State v. Steel Processing Services, Inc.,

---

Attached please find Judge Olivito's recent opinion. The opinion contains language which may be helpful regarding ~~air~~ pollution permit violations and the assessment of civil penalties. I note, however, that the opinion is likely to be appealed. Thanks.

1765E/4  
kmh