BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF KAISER ALUMINUM & CHEMICAL CORPORATION and BURLINGTON NORTHERN, INC., Appellants, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 1017, 1023, 1028 and 1033 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These consolidated matters, appeals of two civil penalties ($250.00) assessed against Appellants for allegedly causing or allowing excessive emissions of an air contaminant came on for formal hearing before the Pollution Control Hearings Board (W. A. Gissberg, presiding, Art Brown and Chris Smith) in Lacey, Washington, on August 24, 1976 and continued on August 26, 1976.

Appellant Kaiser Aluminum & Chemical Corporation was represented by Edward M. Lane; Gerald A. Troy appeared for Appellant Burlington

Northern, Inc.; Respondent Puget Sound Air Pollution Control Agency was represented by its attorney, Keith D. McGoffin.

Having heard the testimony, having examined the exhibits, having reviewed the brief of Appellant Burlington Northern, Inc., having considered and denied the exceptions filed by Appellant Kaiser, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

On April 1, 1976, two of Respondent's inspectors, on routine patrol at the loading facilities of the Kaiser Aluminum & Chemical Corporation Tacoma plant, observed alumina leaking from the gate of a railroad car. The car, a Burlington Northern hopper car, BN456-249, had just been loaded with approximately 100 tons of alumina and was stationary on the tracks.

The excessive emission for which Appellants were cited was the descending column of alumina from the hopper car to the railroad tracks beneath, a distance of approximately 14 inches. The leakage continued for at least seven continuous minutes and the opacity of the column or plume as observed by the inspector from a distance of 50-75 feet, was 100 percent. The opacity of the haze, if any, created by the column of leaking alumina was not ascertained nor were the dimensions of the released alumina (either as it descended or as it accumulated) determined.

Notice of Civil Penalty No. 2794 in the amount of $250.00 was issued to Kaiser Aluminum & Chemical Corporation and Burlington Northern, Inc. on April 1, 1976, for violation of Section 9.03(b)

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of Respondent's Regulation 1.[1] Appellants Kaiser and Burlington Northern timely appealed to the Pollution Control Hearings Board on May 7, (PCHB No. 1017) and May 20, 1976, (PCHB No. 1023) respectively.

II

On April 29, 1976, Respondent's inspectors observed alumina leaking from a Burlington Northern hopper car (BN456-246) located on the shoulder of the Port of Tacoma's 11th Street track adjacent to Pier Four and between Port of Tacoma Road and Blair Waterway in Tacoma, a location approximately one-half mile from the Kaiser load-out facility.

The opacity of the haze generated by the leaking alumina was observed on this occasion by the inspectors and determined to be 60 percent as it hovered near the base of the hopper car.

Notice of Civil Penalty No. 2821 was issued to Appellants on May 11, 1976, assessing the sum of $250.00 for violation of Section 9.03(b) of Regulation 1. Appellants timely appealed.

III

Alumina, though not a toxic substance, is an abrasive compound with the texture and density of fine sand. One hundred to one hundred and ten cars, each with a capacity of approximately 100 tons, are loaded with alumina at the Kaiser facility each week.

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1. Section 9.03 EMISSION OF AIR CONTAMINANT: VISUAL STANDARD . . . (b) . . . (1) Darker in shade than that designated as No. 1 (20% density) on the Ringelmann Chart, as published by the United States Bureau of Mines; or (2) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in Subsection 9.03(b)(1); . . . .

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Kaiser's load-out facility is located on Pier Seven in the Tacoma tideflats, approximately 1-1/2 miles from its Tacoma plant. Alumina is imported from Australia in ships that are unloaded into one of two concrete storage "domes" which have a capacity of 50,000-100,000 tons. From the domes, alumina is moved through a closed system of chutes and conveyors into waiting railroad cars.

Prior to loading, the car numbers are checked by Kaiser, the gates of the hoppers are closed and on each gate a seal is affixed which is not to be broken until delivery.

One operator located 15 feet above the ground loads an average of four cars an hour. When a string of 10 to 12 cars has been loaded, the operator descends to maneuver the loaded cars out and bring empty cars in utilizing a car tugger system. The operator is concerned at this time only with the coupling of the system to the end car and makes no inspection of the line of loaded cars.

IV

The railroad cars loaded at the facility include both Kaiser-owned and Burlington Northern-owned cars. Title to both leaking cars and responsibility for their maintenance remained in Burlington Northern throughout the period at issue in these matters. Control of the hopper cars, however, had passed from Burlington Northern through the City of Tacoma's Municipal Belt Line to the Port of Tacoma and ultimately to Kaiser at the load-out facility. Upon leaving the facility, control of the cars passed through the identical parties in reverse order before returning to Burlington Northern.

At no time was a Burlington Northern employee involved in the

loading or transport of the alumina.

V

The gates on the hopper cars at issue were Fabko gates, in use by Burlington Northern since 1970 and considered in the industry as a superior product. Out of 800 Burlington Northern hopper cars which carry alumina, only the instant two have ever been reported for leakage due to defects.

BN456-249, cited for leakage on April 1, 1976, was last inspected by Burlington Northern on its repair track on December 24, 1975; BN456-246, involved in the April 29 incident, was last inspected on February 16, 1976. These were visual inspections made when the cars were empty.

Following each incident of leakage, the defective car was forwarded to Burlington Northern for repair where it was determined that BN456-249 required an adjustment to the linkage of one gate and BN456-246 needed to have the seal on one gate replaced.

These defects would not have been visible to Kaiser during its check of the cars prior to loading, would not be readily visible even to Burlington Northern's repairmen during a routine inspection, and could have occurred at any time during loading or transit prior to observation of the leakages.

VI

Respondent, pursuant to RCW 43.21B.260, has filed with this Board a certified copy of its Regulation 1 containing Respondent's regulations and amendments thereto.

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VII

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

Section 1.07, General Definitions, of Respondent's Regulation 1 provides in relevant part:

> . . .
> (b) "Air contaminant" means dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof.
> . . .
> (e) "Ambient air" means that portion of the atmosphere, external to buildings, to which the general public has access.
> . . .
> (j) "Emission" means a release into the outdoor atmosphere of air contaminants.
> . . .
> (w) "Particulate matter" means any material, except water in an uncombined form, <u>that is or has been airborne</u> and exists as a liquid or a solid at standard conditions. (Emphasis added.)

The Board concludes that in its descent from beneath the hopper car to the tracks, the leaking alumina was not airborne "particulate matter" and therefore not an emission of an "air contaminant" as proscribed by Section 9.03(b) of Respondent's Regulation 1.

Thus, with regard to the incident of April 1, 1976, where the only observation was of the descending column, no violation or civil penalty can be sustained as against either Appellant.

II

The haze, observed by the inspectors as emanating from the

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accumulated alumina during the second leakage incident on April 29, 1976, was formed by airborne particulate matter and was therefore subject to the opacity test of Section 9.03(b) of Respondent's Regulation I. In this instance, a technical violation of the opacity standard did occur. The Board must further determine, however, whether Kaiser or Burlington Northern or both violated the requirement.

III

Appellant asserts that the omission of the word "knowingly" from Section 9.03(b) of Regulation I is an unlawful extension of the statutory standards set forth in RCW 70.94.040.[2] However, the statutory provision is not a "standard" in itself which can be violated, but is an enforcement provision of the Act "or of any ordinance, resolution, rule or regulation" which does set a standard.

There are five enforcement provisions of the Clean Air Act which are found in RCW 70.94.040, 70.94.425, 70.94.430, 70.94.431 and 70.94.435. A scienter element, i.e., "knowingly," is present in RCW 70.94.040.[3] This statutory provision was enacted in 1957.[4] A decade later, in 1967, further and different enforcement provisions

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2. RCW 70.94.040 provides:

"Except where specified in a variance permit, as provided in RCW 70.94.181, it shall be unlawful for any person knowingly to cause air pollution or knowingly permit it to be caused in violation of this chapter, or of any ordinance, resolution, rule or regulation validly promulgated hereunder."

3. Ibid.

4. Laws of 1957, ch. 232. The provision was amended in 1967 substituting "70.94.181" for "70.94.180." Laws of 1967, ch. 238, § 3.

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were added to the Clean Air Act which included restraining orders and injunctions (RCW 70.94.425),[5] assurances (RCW 70.94.435),[6] and certain criminal penalties (RCW 70.94.430).[7] In 1969 a civil penalty section

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5. "Notwithstanding the existence or use of any other remedy, whenever any person has engaged in, or is about to engage in, any acts or practices which constitute or will constitute a violation of any provision of this chapter, or any rule, regulation or order issued thereunder, the governing body or board or the state board, after notice to such person and an opportunity to comply, may petition the superior court of the county wherein the violation is alleged to be occurring or to have occurred for a restraining order or a temporary or permanent injunction or another appropriate order." Laws of 1967, ch. 238, § 60.

6. Laws of 1967, ch. 238, § 62.

7. "Any person who violates any of the provisions of this 1967 amendatory act, or any ordinance, resolution, rule or regulation in force pursuant thereto, other than section 33 of this 1967 amendatory act, shall be guilty of a gross misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment for a term of not more than one year or by both fine and imprisonment for each separate violation. Each day upon which such violation occurs shall constitute a separate violation.

"Any person who wilfully violates section 33 of this 1967 amendatory act shall be guilty of a gross misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment for a term of not more than one year or by both fine and imprisonment." Laws of 1967, ch. 238, § 61.

The provision was subsequently amended in 1973 to read as follows:

"<u>Any person who violates</u> any of the provisions of this chapter, or any ordinance, resolution, rule or regulation in force pursuant thereto, other than RCW 70.94.205, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than two hundred fifty dollars, or by imprisonment for not more than ninety days, or by both fine and imprisonment for each separate violation. Each day upon which such violation occurs shall constitute a separate violation.

"<u>Any person who wilfully violates</u> any of the provisions of this chapter or any ordinance, resolution, rule or regulation in force pursuant thereto shall be guilty of a gross misdemeanor. Each day upon which such wilful violation occurs shall constitute a separate offense. Upon conviction the offender shall be punished by a fine of

was added to the enforcement provisions of the Act.[8] It is important to note the absence of any language such as "wilfully" both in the first paragraph of RCW 70.94.430 (dealing with misdemeanors) and the first paragraph of RCW 70.94.431 (dealing with civil penalties). In viewing RCW 70.94.040, 70.94.430 and 70.94.431, the omission of the "wilful" requirement can leave little doubt of a clear legislative intention to dispense with the scienter requirement for certain violations which include civil penalties. This interpretation is also consistent with the increasing legislative concern for clean air since 1957 as evidenced

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not less than one hundred dollars for each offense.

"Any person who wilfully violates RCW 70.94.205 or any other provision of this act shall be guilty of a gross misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment for a term of not more than one year or by both fine and imprisonment." (emphasis added.) Laws of 1973, 1st Ex. Sess., ch. 176, § 1.

8. Laws of 1969, 1st Ex. Sess., ch. 168, § 53. The first paragraph provides:

"In addition to or as an alternate to any other penalty provided by law, any person who violates any of the provisions of chapter 70.94 RCW or any of the rules and regulations of the state board or the board shall incur a penalty in the form of a fine in an amount not to exceed two hundred fifty dollars per day for each violation. Each such violation shall be a separate and distinct offense, and in case of a continuing violation, each day's continuance shall be a separate and distinct violation."

The foregoing provision was amended in 1973 to read as follows:

"In addition to or as an alternate to any other penalty provided by law, any person who violates any of the provisions of chapter 70.94 RCW or any of the rules and regulations of the department or the board shall incur a penalty in the form of a fine in an amount not to exceed two hundred fifty dollars per day for each violation. Each such violation shall be a separate and distinct offense, and in case of a continuing violation, each day's continuance shall be a separate and distinct violation."

by the successive provisions added to the Clean Air Act, chapter 70.94 RCW.

Unlike certain outdoor burnings (RCW 70.94.775), there is no specific statutory provision making it unlawful to cause or allow air contaminant emissions. However, the agency's responsibility and authority for controlling air contaminants and thereby air pollution is pervasive in RCW 70.94. Section 9.03 of Respondent's Regulation 1 promulgated pursuant thereto does render it unlawful for any person to "cause or allow" emissions. Scienter need not be present nor must a lack of reasonable care be established.

The imposition of strict liability under this regulation designed to secure and maintain levels of air quality protective of human health is consistent with the development of the law which imposes strict liability in public welfare offenses.[9]

IV

The Board, on the evidence before it, cannot identify a specific isolated instrumentality or event which caused the emission to occur. The Board must therefore rely on reasonable inferences and rebuttable presumptions in determining causation in this instance.

Kaiser Aluminum & Chemical Corporation which owned the alumina and was responsible for both its loading into the car and its transport to the Tacoma plant is presumed to have "caused" or "allowed" the emission. Appellant Kaiser, had opportunity to rebut such a

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9. See 46 A.L.R.3d 758. Cobin v. Pollution Control Board, 16 Ill. App.3d 958, 307 N.E.2d 191 (1974); Bath, Inc. v. Pollution Control Board, 10 Ill. App.3d 507, 294 N.E.2d 778 (1973).

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presumption by proving to the Board that an unforseeable third party or intervening cause had in fact been responsible for the emission as the circumstances of a particular case may exculpate an alleged violation.[10] While Appellant Kaiser did speculate that any one of a number of third parties or conditions may have in fact caused the emission, its burden of rebutting the presumption in this regard was not met.

Burlington Northern might also have been presumed to have "caused" or "allowed" the emission. Burlington Northern was the owner of the car from which the alumina leaked and was responsible for the maintenance of the car. However, Burlington Northern did not have control of the car at the time of the violation, its inspection procedures were reasonable as to type and frequency, the improper operation of the gate on its car was the result of an unanticipated defect, and Burlington Northern had no actual nor constructive notice of such a defect prior to the violation.

Therefore, given these facts, no inference of causation can be made as to Burlington Northern and no civil penalty based on strict liability can be imposed.[11]

V

Despite the technical violation of Section 9.03(b) of Respondent's Regulation 1 by the Appellant Kaiser, the circumstances attending the violation are such that the civil penalty should be suspended.

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10. See, e.g., U.S. v. White Fuel, 6 ERC 1794, 1797.

11. See, e.g., Walters v. Hampton, 14 Wn.App. 548, 556 (1975).

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While the fact that the emission was minimal cannot excuse it, where wilfulness is not established, the impact of the emission should affect the penalty assessed. In this instance, the obscuration of the inspectors' view was one which occurred while they were on their hands and knees.

In addition, while the provisions of Section 9.16 of Respondent's Regulation I[12] are not applicable to the instant circumstances, the rationale for its promulgation is applicable.

The defects in the cars in these matters were unavoidable and unforseeable as to both Appellants. As is specifically provided in Section 9.16(2), to have required a "report including the known causes and the preventive measures to be taken to minimize or eliminate a re-occurrence" would have been an agency response preferable to the imposition of the maximum civil penalty.

VI

Any Finding of Fact which should be deemed a Conclusion of Law

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12. REPORTING OF START-UPS, SHUTDOWNS, UNAVOIDABLE FAILURES, UPSETS OR BREAKDOWNS.

Emissions exceeding any of the limits established by this Regulation as a direct result of start-ups, periodic shutdown, or unavoidable and unforeseeable failure or breakdown, or unavoidable and unforeseeable upset or breakdown of process equipment or control apparatus, shall not be deemed in violation provided the following requirements are met:

(1) The owner or operator of such process or equipment shall immediately notify the Agency of such occurrence, together with the pertinent facts relating thereto regarding nature of problem as well as time, date, duration and anticipated influence on emissions from the source.

(2) The owner or operator shall, upon the request of the Control Officer, submit a full report including the known causes and the preventive measures to be taken to minimize or eliminate a re-occurrence.

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is hereby adopted as such.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The Notice of Civil Penalty No. 2794 issued to Kaiser Aluminum & Chemical Corp. and Burlington Northern, Inc. is vacated. The Notice of Civil Penalty No. 2821 as issued to Burlington Northern, Inc. is vacated. Notice of Civil Penalty No. 2821 issued to Kaiser Aluminum & Chemical Corp. is sustained and suspended.

DATED this 1st day of December, 1976.

POLLUTION CONTROL HEARINGS BOARD

Art Brown

ART BROWN, Chairman

W. A. Gissberg

W. A. GISSBERG, Member

Chris Smith

CHRIS SMITH, Member

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