IN RE BURLINGTON NORTHERN RAILROAD

CAA Appeal No. 93-3

FINAL DECISION AND ORDER

Decided February 15, 1994

Syllabus

U.S. EPA Office of Enforcement has appealed an Initial Decision in an enforcement action brought under Section 113(d) of the Clean Air Act. The Initial Decision assessed a $25,000 penalty, the statutory maximum, for a single violation of the Montana State Implementation Plan. The violation concerned the open burning of creosote-treated railroad ties. The Office of Enforcement objects to the presiding officer's calculation of economic benefit because it credited the cost of open burning of the ties against the costs that would have been incurred had the ties been lawfully disposed of. Recalculation of the economic benefit component of the penalty would not affect the amount of the penalty assessed since the statutory cap is controlling in any event.

Held: The Initial Decision is modified to eliminate language providing for a credit for the costs of open burning. The Board does not believe that this case is an appropriate vehicle for resolving the issue of whether such a credit is permissible. Since the outcome of this proceeding is unaffected by this issue, the language can be modified without deciding the issue. Because of the Office of Enforcement's concerns about the precedential effect of the original language, such a modification is appropriate.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

U.S. EPA Office of Enforcement (OE) has appealed the Initial Decision of the presiding officer, Chief Administrative Law Judge Gerald Harwood, in this Clean Air Act enforcement action. This appeal is pursuant to 40 C.F.R. § 22.30(a) and was timely filed on December 16, 1993.[1]

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[1] Respondent, Burlington Northern Railroad Company, filed a notice of cross-appeal on December 30, 1993, which was dismissed as untimely. Order Dismissing Cross-Appeal (January 5, 1994).

I. *BACKGROUND*

The enforcement action giving rise to this appeal was brought by U.S. EPA Region VIII against Burlington Northern Railroad Company (BNRR) under Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d). In its complaint, the Region sought a penalty of $65,530 for alleged violations of the Montana State Implementation Plan, arising from the open burning of creosote-treated railroad ties. A hearing on the alleged violations was held in Helena, Montana, on June 15-16, 1993, and an Initial Decision issued on November 24, 1993. In his Initial Decision, Judge Harwood found Respondent liable for the violations but reduced the penalty assessed to $25,000.

In arriving at this penalty amount, Judge Harwood calculated that the "preliminary deterrence amount" would be $25,384 and that no upward adjustments would be appropriate. Initial Decision at 25-26. However, based on his determination that there was only one violation lasting one day,[2] he reduced this amount to the statutory maximum of $25,000 per violation per day as provided in § 113(d)(1), 42 U.S.C. § 7413(d)(1). *Id.*

As part of his calculation of the preliminary deterrence amount, Judge Harwood calculated what he felt was the economic benefit to BNRR of its noncompliance. He stated as follows:

> The EPA computed $2,212, as the economic benefit realized by BNR from the violation. This is based on an estimated cost of $11.08, a tie to haul the ties to an industrial furnace for incineration. The study from which this cost was derived also estimated a cost of $2.60, per tie for open-burning, or a total of $520 for the 200 logs. The economic benefit would appear to be the difference between the costs. Consequently, this component of the penalty is reduced to $1,692.

Id. at 23-24 (footnotes omitted). This calculation of economic benefit is the sole issue raised by EPA on appeal.

More specifically, the Office of Enforcement argues that Judge Harwood should not have subtracted the $520 from the $2,212 in

[2] The Region had argued that since BNRR burned ten separate piles of railroad ties, there were ten separate violations. Judge Harwood found that under the circumstances presented here, the burning of the ten piles constituted only a single violation. Initial Decision at 22-23. The Region did not appeal this determination.

calculating the economic benefit because no credit should be given for illegal expenditures (here, the illegal open burning of the ties). Brief in Support of the Environmental Protection Agency's Notice of Appeal of Initial Decision (OE Brief) at 5-8. OE thus argues that the economic benefit component of the penalty should be recalculated as $2,212. BNRR opposes this recalculation. BNRR Brief in Opposition to EPA's Notice of Appeal of Initial Decision (BNRR Brief) at 2. Both parties acknowledge that resolution of this appeal can have no effect on the amount of the penalty since the statutory maximum will be controlling in any event. OE Brief at 1 n.1; BNRR Brief at 1 n.1.

II. *DISCUSSION*

The initial question logically presented by this appeal is why OE would want to appeal an Initial Decision if the appeal can have no effect on the outcome of the proceeding, *i.e.*, the amount of the penalty assessed. OE explains that it has filed this appeal "because the ALJ's interpretation of the statute has ramifications in every case in which an economic benefit of noncompliance is assessed." OE Brief at 1 n.1. OE further asserts that the ALJ's holding, if upheld, could force EPA to change its current policy and methodology for calculating the economic benefit component of penalties. *Id.* at 1. OE's apparent concern is that if the Initial Decision had not been appealed, it would become a final order of this Board under 40 C.F.R. § 22.27(c), assuming the Board did not elect, sua sponte, to review the decision.[3] As a final order of the Board, the Initial Decision might be cited as Board precedent in future cases.

It is not necessary, however, to address this concern directly or to delve into the exact precedential effect of an unappealed initial decision. It is sufficient to note here that the decision has been appealed and neither party has questioned whether Judge Harwood's rationale respecting open burning costs is appealable under 40 C.F.R. § 22.30(a) ("[a]ny party may appeal an adverse ruling or order of the Presiding Officer * * *."). Rather, our concern is that the Board does not want to be drawn routinely into parsing the language of an initial decision

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[3] 40 C.F.R. § 22.27(c) provides:

> (c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision.

assessing a penalty when neither party has appealed the amount of the penalty assessment. As explained below, we think that the burdens engendered by such an exercise can be avoided in this instance without prejudice to either party, but while also eliminating the concerns that apparently prompted OE's appeal.

Turning to the substance of the appeal, OE argues that Judge Harwood did not fully consider EPA penalty guidelines (including the *BEN User's Manual*[4] and *BEN User's Guide*) and did not provide specific reasons for not assessing the penalty recommended in the complaint. OE Brief at 3.[5] BNRR replies that Judge Harwood adequately explained his penalty determination and properly exercised his discretion in calculating the penalty. BNRR Brief at 2-3. BNRR further states that the guidelines relied upon by EPA have not been adopted as regulations and therefore do not have the force of law, and that neither the *BEN User's Manual* nor the *BEN User's Guide* were mentioned at the hearing or in any of the pleadings or briefs filed by EPA. *Id.* at 4.

A review of the Initial Decision shows no indication that Judge Harwood intended to depart from the EPA's Clean Air Act Stationary Source Civil Penalty Policy (Policy), dated October 25, 1991. While he indicated that he was only required to consider the Policy, not follow it, the methodology he applied clearly purported to follow the Policy. *See* Initial Decision at 22-26. More specifically, his discussion of the economic benefit component explains how he adjusted EPA's computation but does not indicate that he was intending to depart from the Policy itself. (The Policy contains *no* discussion of the "credit" issue involved in this appeal although it does reference the *BEN User's Manual* as establishing the methodology for calculating economic benefit.) Therefore, we conclude that Judge Harwood was intending to apply the Policy when he calculated economic benefit.

OE contends that Judge Harwood misapplied the Policy and associated guidance. BNRR does not discuss the proper interpretation of the Policy except by noting that the EPA guidelines should not be given the force of law and have been widely criticized. BNRR Brief at 4.

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[4] "BEN" is the name of the computer model EPA's enforcement officials use for calculating the economic benefit in enforcement actions.

[5] Under 40 C.F.R. § 22.27(b), a presiding officer "must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."

We do not believe that this appeal presents a particularly good vehicle for resolving the issue of whether credit should be given for illegal expenditures in calculating the economic benefit component of a penalty. The posture of this case does not lend itself to having the issue fully briefed on both sides. Although BNRR filed a brief in opposition, it had no monetary stake in the outcome of the appeal and thus only a limited incentive to research and address the issue. We believe it would be more appropriate to decide this issue when it is presented in a truly adversarial context.

That said, we are still sensitive to the OE's underlying concern about the potentially precedential nature of Judge Harwood's Initial Decision. Therefore, we are modifying the Initial Decision to eliminate the language providing for a credit for the costs of open burning, as follows.

The paragraph beginning at the bottom of page 23 and carrying over to the top of page 24 is revised to read:

> The EPA computed $2,212 as the economic benefit realized by BNR from the violation. This is based on an estimated cost of $11.08 a tie to haul the ties to an industrial furnace for incineration. [58/] The study from which this cost was derived also estimated a cost of $2.60 per tie for open-burning, or a total of $520 for the 200 logs. [59/] It is not necessary to decide whether EPA should have credited the $520 against the $2,212 or properly declined to do so since, as will be seen, the size of the penalty will ultimately be determined by the statutory maximum and the penalty will thus be the same in any event.

In addition, the last full sentence in the text on page 25 and the sentence following it are revised to read:

> If the same procedure is followed here, the penalty for the size of the violator would be reduced to reflect the adjustments previously discussed. However, this adjusted figure, when added to the amount calculated for economic benefit, importance to the regulatory scheme, and length of time would result in a penalty in excess of the $25,000 maximum, and thus the preliminary deterrence amount is assessed at $25,000.

Since the changes to the Initial Decision do not affect the amount of the penalty assessed, a $25,000 penalty is still appropriate.

III. *CONCLUSION*

Pursuant to the Section 113(d) of the Clean Air Act, 42 U.S.C. 7413(d), a civil penalty of $25,000 is assessed against Burlington Northern Railroad Co. The full amount of the penalty shall be paid within sixty (60) days of the date of service of this decision. Payment shall be made in full by forwarding a cashier's check or a certified check in the full amount payable to the Treasurer, United States of America, at the following address:

> EPA - Region VIII
> Regional Hearing Clerk
> P.O. Box 360859M
> Pittsburgh, PA 15251

So ordered.