

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

DIAMOND TOWN TIRE)	
PROS & AUTO CARE, LLC)	
and NUCAR MIDDLETOWN, LLC,)	
)	
Appellant,)	
)	
v.)	EAB Appeal No. 2021-04
)	
DELAWARE DEPARTMENT)	
OF NATURAL RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	
)	
Appellee.)	

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing served on all parties in interest, and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on February 22, 2022, via remote Web conferencing.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Frances Riddle, Michael Horsey, Randall Horne, Guy Marcozzi and Robert Mulrooney. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Charles Brown, III, Esquire represented Appellant Diamond Town Tire, LLC and Nucar Middletown, LLC (“Diamond”). Deputy Attorney General Kayli H. Spialter represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

On June 18, 2021, Diamond appealed Secretary's Order No. 2021-WH-0015 ("Secretary's Order") issued by DNREC. The Secretary's Order found Appellants to be in violation of Chapter 60 of Title 7 of the Delaware Code and the Regulations Governing Solid Waste ("DRGSW") 7 Del. Admin. C. § 1301, related to the storage of scrap tires at 5221 Summit Bridge Road, Middletown, DE 19709.

BACKGROUND FACTS

Mr. James Barnes, doing business as Diamond Town Tire Pros & Auto Care LLC on property owned by NUCAR Middletown, LLC, sells new passenger vehicle tires. During its operation of the site, Diamond generates scrap tires. On May 17, 2019, DNREC representatives conducted a scrap tire compliance inspection at Diamond's facility and claims it observed approximately 250 scrap tires located on the ground. Diamond was issued Notice of Violation 19-SW-11 on June 3, 2019 for failure to comply with DRGSW § 12.0. DNREC conducted follow-up inspections on August 5, 2019 and December 7, 2020 and claims it observed over 100 scrap tires on the property both times. Diamond also submitted a Scrap Tire Facility Annual Report in 2019. Additionally, on December 7, 2020, Diamond provided a receipt for disposal of 194 scrap tires. Based on these observations, DNREC issued the Secretary's Order.

PRELIMINARY MATTERS BEFORE THE BOARD

A. DNREC's Motion For Summary Judgment

DNREC argues that the failure of Diamond to timely identify documents it intended to introduce as evidence at the hearing coupled with “only the most cursory identification of witnesses” should preclude Diamond from being permitted to present any documents or other evidence at the hearing.

B. Diamond’s Response to DNREC’s Motion For Summary Judgment

Diamond counters that it has timely identified three possible witnesses: James Barnes (the owner and operator of Diamond); Al McCloskey (a former DNREC employee with experience overseeing scrap tire facilities); and a representative from Grove Point Haulers (the company that Diamond employed to remove used tires). Diamond disputes that it is a “scrap tire facility” subject to the regulatory scheme that governs the maintenance of scrap tires and that Diamond intends to present evidence that DNREC made little, if any, effort to determine what tires in its tire pile were “scrap tires” as opposed to reusable tires that third parties could recycle and reuse.

After deliberate and careful review of Parties’ respective arguments and evidence, the Board, by a vote of 6 to 0, denies the Secretary’s Motion for Summary Judgment. The Board concludes as a matter of law that there exist genuine issues of material fact as to the nature of the tires in Diamond’s tire pile. As such the Board concludes that there is no basis to deny Diamond the opportunity to present argument on the correctness of the Secretary’s Order based upon analysis of the record and other evidence through a witness who was properly identified at the pre-hearing conference or the Chronology which DNREC made part of the record.

POSITIONS OF THE PARTIES

DNREC contends that the evidence of record supports the Secretary’s decision that the Diamond facility constitutes a scrap tire facility. DRGSW § 3.0 defines “scrap tire facility” as “an

accumulation of 100 or more scrap tires wherein each scrap tire weighs 25 pounds or less; or 100 or more scrap passenger tire equivalents; or any combination thereof that, upon conversion, results in 100 or more passenger tire equivalents, in the same general vicinity that is not enclosed by a building, including, but not limited to, open fields, woodlots, pavement, dumpsters or rolloffs, trailers, and fenced areas.” Once a site is qualified as a facility, it must comply with the requirements of DRGSW § 12.0 based on the size of the facility.

Diamond asserts that it is clear from the record evidence that DNREC failed to distinguish between a used tire capable of being recycled and reused and a scrap tire as defined in the regulations. Diamond contends that DNREC did nothing more than attempt to determine the number of tires in the pile without regard to their condition. Diamond asserts that DNREC has taken the legally erroneous position that there is no difference between a used tire that remains “practical for vehicular use” and a “scrap tire.”

SUMMARY OF THE EVIDENCE

In its case-in-chief, appellant Diamond presented evidence of one witness: Mr. James Barnes.

(A) Mr. Barnes testified that:

- (1) He is the owner of Diamond, LLC which began operation in 2015 and has been involved in the family tire industry for “probably about 40 years.” Tr. at p. 24.¹
- (2) Diamond is focused on oil changes and general auto maintenance, tire repair and replacement with with tire sales “complementing” the core services. Tr. at p. 25.

¹ The abbreviation “Tr.” is used throughout this Order to refer to the transcript of the Board’s hearing on February 22, 2022.

- (3) The wear indicator is a raised area within the tread depth of all tires that is “at the 2/32nd mark” and indicates that a tire is nearing the end of its tread life. Diamond does not sell used tires. Tr. at 26.
- (4) When Diamond removes tires from a vehicle it puts them in one area of their property and waits for their tire hauler to schedule a visit to remove them. Tr. at p. 26.
- (5) A typical tire that is replaced by Diamond is holding air and viable to run on the highway and often tires that could be repaired are not because the customer prefers to replace it with a new tire. Tread does not wear out uniformly due to any number of factors, including but not limited to, alignment, towing wear, rotation and air pressure. Tr. at p. 28.
- (6) Diamond’s tire hauler, Grove Point Haulers, takes all tires and Diamond receives a reduced cost because there are used tires along with scrap tires in the tire pile that are capable of reuse. Grove Point bills Diamond monthly and it varies how often Grove Point visits Diamond’s facility. Tr. at p. 29.
- (7) The receipt that indicated that Grove Point had picked up approximately 190 tires represents several pickups as Grove Point bills monthly and there are “tires on the tire pile that would be considered used tires, serviceable used tires, meaning a tire depth of 2/32nds of an inch tread.” Tr. at p. 30.
- (8) Diamond filed the 2019 scrap tire facility report in response to a call from DNREC that said that Diamond needed to file the report. Diamond conducted no investigation at that time to determine whether it should be considered a scrap tire facility and did not look at the regulations. Tr. at p. 31.

- (9) The Middletown Fire Department told him “that there is nothing they would do with” the “plan” that DNREC insisted Diamond take to the fire department. Tr. at p. 33 .
- (B) On cross-examination, Mr. Barnes testified that:
- (1) He operated a facility known as General Tire “from about 1982 to about 2019” which was the subject of at least one notice of violation issued by DNREC. Tr. at p. 35.
 - (2) Diamond does no record keeping when tires are removed from a vehicle. Tr. at p. 40.
 - (3) He had some discussions with DNREC representatives after Diamond received a notice of violation in 2019. Tr. at p. 39.
- (C) Upon questioning from the Board Mr. Barnes testified that:
- (1) Diamond sold approximately 1,288 tires in the calendar year that was the subject of the annual report but that tire sales are “sporadic and seasonal” and the bulk of their business is repair. Tr. at p. 41.
 - (2) Tire removal depends on Grove Point’s schedule and Diamond does not keep a count of the number of tires in the pile at any given time. Tr. at p. 42.
- (D) In their case-in-chief, appellee DNREC presented evidence of Tara Grazier. Ms. Grazier testified that:
- (1) She is employed at DNREC presently as a Planner but she also does scrap tire facility inspections and processes solid and hazardous waste permits and has been doing scrap tire facility inspections since 2016. Tr. at p. 47.

- (2) DNREC typically evaluates businesses that they suspect generate scrap tires such as auto body shops, tire shops and car dealerships. Inspections involve observation of areas where scrap tires are stored and inquiry regarding the nature of the business. Tr. at p. 48.
- (3) She conducted a May 17, 2019 inspection at the Diamond facility and Cam Barnes, who identified himself as the facility Manager, showed her to what he called the scrap tire pile. She did not look to see if any of the tires in the pile were in a usable condition especially since Mr. Barnes had referred to the pile as a “scrap tire pile.” Tr. at p. 50.
- (4) Generally people who are selling used tires “keep them inside, indoors, something of that nature.” Tr. at p. 51.
- (5) The people that remove scrap tires from a facility “are required to get a solid waste transportation permit from DNREC and Grove Point had such a permit.” Tr. at p. 52.
- (6) During the May 17, 2019 inspection of Diamond she counted up to 100 tires in the pile and then approximated because “the way the tires were stacked, you can’t see every individual tire.” Tr. at p. 53.
- (7) As a result of the May 17, 2019 inspection of Diamond she wrote a notice of violation which required Diamond to comply with regulatory mandates but that Diamond did not comply and there was “no communication at all.” Tr. at p. 54.

- (8) A follow up inspection conducted in December 2020 found “approximately 150 scrap tires still on-site” and thereafter she drafted the Secretary’s Order that is the subject of this appeal. Tr. at p. 57.
 - (9) That it is normally her responsibility to determine whether a particular tire is a scrap tire or a used tire but it was not necessary at the Diamond facility because the operators had “already identified them as waste.” Tr. at p. 58.
- (E) On cross-examination, Ms. Grazier testified that:
- (1) When she inspects a facility she assumes that the employee that directs her to the tire pile knows what is meant by the term “scrap tire.” Tr. at p. 61.
 - (2) That if a facility intends to resell a used tire it is not “thrown in” with their scrap tires” and that they are usually barrel stacked and separated by size. Tr. at p. 61.
- (F) Upon questioning from the Board Ms. Graizer testified that:
- (1) DNREC does not regulate used tires and in her experience doing inspections if an entity is selling used tires the used tires are not mixed in with the scrap tires. Tr. at p. 61.
 - (2) The solid date transporter is required to submit an annual report which identifies how many tons of tires they took out of state or through the state or in the state, and where the waste destination facilities are. Tr. at p. 69.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prior to the February 22, 2022 hearing and in accordance with the Board’s Regulations, DNREC provided the Board the Chronology consisting of the record before the Secretary with

respect to Secretary's Order No. 2021-WH-0015. In deciding this appeal, in addition to considering the Chronology, the Board considered the written submissions of the Parties, the testimony of all witnesses and the oral argument from the Parties. Following the presentation of evidence and closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 Del. C. § 6008(a) to deliberate and receive legal advice.

After deliberation and careful review of Parties' respective arguments and evidence, the Board, for the reasons that follow, (1) by a vote of 6 to 0, affirmed the Secretary's decision. The Board agrees with DNREC's conclusion that Diamond's tire pile constitutes a scrap tire facility as that term is used in the regulations. Before further explaining the Board's rationale the Board would like to make it clear that it was uneasy with the presumptuous and seemingly casual way in which DNREC made its calculations regarding the number of scrap tires in the pile at the time of its inspections. In light of the fact that the number of "scrap" tires in a pile is determinative of whether the pile will be judged a scrap tire facility the Board encourages DNREC to explore alternative methods for making that crucial finding. Nonetheless the Board is unable to conclude as a matter of fact that "the Secretary's decision is not supported by the evidence on the record before the Board." 7 Del. C. § 6008(b).

The Board also finds that Diamond could have revised its business model so as to better physically separate scrap tires from used tires. The Board believes that better record keeping practices and physical separation of the scrap tires and used tires on the part of Diamond could have established the missing evidence to support its theory of the case.

IT IS SO ORDERED, this 25th day of March, 2022.

/s/Dean Holden

Dean Holden, Chairperson

The following four Board members concur in this decision:

Date: March 25, 2022

/s/Robert Mulrooney

Robert Mulrooney
Board Member

Date: March 25, 2022

/s/ Michael Horsey

Michael Horsey
Board Member

Date: March 25, 2022

/s/ Frances Riddle

Frances Riddle
Board Member

Date: March 25, 2022

/s/ Randall Horne

Randall Horne
Board Member

Date: March 25, 2022

/s/ Guy Marcozzi

Guy Marcozzi
Board Member