ILLINOIS POLLUTION CONTROL BOARD
March 16, 1971

NORFOLK AND WESTERN RAILWAY COMPANY	)	
	)	
v.	)	PCB 70-41
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Dissenting Opinion (By Mr. Kissel):

I have read the opinion of the Board drafted by Mr. Currie, and while I agree with the factual statements regarding the operation of the petitioner, I must disagree with the result reached. I would grant the variance to the petitioner, conditioned on the performance of certain acts.

The petitioner operates a plant in Decatur, Illinois, which has four boilers. The boilers are used to heat various facilities of the petitioner, and are for all intents and purposes inoperative during the summer months. The boilers consume an average of 2,218,000 pounds of coal with an average sulphur content of 3.6% and an average ash content of 10% with a heating value of 10,700 B.T.U. per pound. There is a mechanical collector above the combustion chamber with an efficiency of approximately 60%.

The petitioner admits to a problem in the firing of the coal units. The claim is that the petitioner was notified by the Environmental Protection Agency (EPA) of the problem in October of 1970. Apparently at that time, the EPA advised the petitioner that the petitioner's boilers were being operated in violation of Rule 3-3.112 of the Rules and Regulations Governing the Control of Air Pollution. After this notification the petitioner engaged the services of a consultant who advised that the petitioner had three alternatives from which to choose:

1) Convert the present boiler units from coal firing to oil at a cost of $103,137;

2) Install a fly ash system to permit operation of the boilers on coal at a cost of $150,000; and

3) Install a system of packaged automatic oil fired boilers in lieu of the present heating plant at a cost between $350,000 and $400,000.

In a letter sent to the Pollution Control Board after the hearing the petitioner elected to proceed with alternative number three and install the package oil fired boilers. The time to install these boilers would be approximately one year.

The opinion by Mr. Currie first dealt with the issue of the sufficiency of the petition for variance. While I agree that the petition did not contain each and every fact necessary to be a proper one under the Rules of the Pollution Control Board, I must agree with Mr. Currie that this should not be a fatal defect where the proof in the hearing is adequate to support the grant, or denial, as the case may be, of the variance. In my opinion, there was sufficient proof presented at the hearing for the Board to make a decision on the merits of the case.

What did the petitioner prove? First, he proved the operation of his boilers is in violation of the existing rules and regulations governing air pollution. The amount of coal used, plus the high ash content would have to show a violation of Rule 3-3.112 of the Rules and Regulations Governing Air Pollution which provide that not more than 0.6 pounds of particulates shall be emitted per million of B.T.U. input. In addition, the petitioner admitted in its Letter of Intent filed with the EPA that it emits 630 tons of particulate matter each year. Second, the record demonstrated the total effect of the operation of the plant on the community. The Mayor of Decatur testified in favor of the granting of the variance. There were letters introduced into the record indicating that persons in the surrounding area were affected by the soot and ashes being emitted from this plant. The community was allowed to speak and it did. The Mayor was in favor of granting the variance and other citizens were not.

In determining whether a variance should be granted, or denied, this Board must consider the effect of the pollution source on the community. This would include a balancing between the benefits which the industry gives to the community versus the detriments which are imposed on the community as a result of the pollution. We have stated many times that this is not an equal balance and that the Board will require that the benefits to the community will substantially outweigh the harm inflicted upon the community. In this case, although the pollution does cause some problem to the local residents, the benefits which the petitioner gives to the local community and the state as a whole substantially outweigh the harm caused, particularly in light of the short time in the future during which the pollution would continue. The petitioner is a significant employer in the area and the operation of the Decatur plant is key to the entire operation of the railroad. The petitioner made it quite clear that if it could not operate the boilers it would be required to close its operations simply because the petitioner's employees would not be able to healthfully do their job without adequate heat. If

the Decatur operation were to close, this would mean that much of the petitioner's operations state-wide, and even nationally, would have to be closed. This is certainly "an arbitrary or unreasonable hardship" contemplated by the Environmental Protection Act.

While I would grant the variance to the petitioner, I would impose the following conditions:

1) Performance bond -- Since the petitioner is asking for time within which to correct the violation of the regulations, I would require the petitioner to post a performance bond, in a form agreeable to the EPA, in the amount of $250,000. The amount of the bond is related in magnitude to the contemplated capital cost of the improvements to be installed by the petitioner.

2) Time for performance -- The petitioner stated that it would be unable to complete the installation of the new boilers in less than one year; yet the EPA in its recommendation says that the time required by the petitioner is "excessive" and further that the petitioner should be in compliance by the 1971-72 heating season. We think that a year is too long, since the petitioner has delayed long enough in implementing its program to comply with the air pollution regulations and laws of this state. I would recommend that the petitioner be in compliance by October 31, 1971.

3) Reporting -- I would agree with the EPA that the petitioner should report to that agency as to the progress of its compliance program. This reporting should be on a monthly basis.

4) Penalty -- Although the petitioner did file a Letter of Intent with the former Air Pollution Control Board, it did not file a program with the State which program would have brought the petitioner into compliance with the particulate regulations. The petitioner is delinquent by three years in filing this program. If the petitioner had followed the law three years ago, this case would have never arisen. Because of the dilatory tactics used by the petitioner in this case, I would require as a condition to the granting of the variance that the petitioner pay a penalty in the amount of $10,000 for the violation of the regulations during the past three years. The imposition of this penalty would have been made regardless whether the EPA had recommended it or not, therefore, I would not construe the EPA's request for a penalty to be imposed as the filing of an enforcement case against the petitioner. The decision to require the payment of a penalty, under circumstances almost identical to those of this case was made by the Board in the Marquette Cement case, PCB 70-23, decided January 6, 1971. That case is a direct precedent for this one.

I, Regina E. Ryan, Clerk of the Pollution Control Board, certify that Mr. Kissel and Mr. Dumelle submitted the above dissenting opinion this 15th day of December, 1971.