ILLINOIS POLLUTION CONTROL BOARD
July 27, 1989

CONTAINER CORPORATION OF AMERICA (CAROL STREAM PLANT),	)	
Petitioner,	)	
v.	)	PCB 87-183
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ROY M. HARSCH AND DANIEL F. O'CONNELL, OF GARDNER, CARTON AND DOUGLAS, APPEARED ON BEHALF OF PETITIONER; AND

JOSEPH R. PODLEWSKI, JR., OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board upon a request for variance filed by Container Corporation of America ("CCA"), on November 30, 1987, as amended on January 20, 1988, as secondly amended on February 23, 1988 and as thirdly amended on May 1, 1989. In its third amended petition, CCA is requesting a variance from the Board's regulations governing emissions from flexographic and rotogravure printing operations under 35 Ill. Adm. Code 215.401-215.407 and 215.245 until December 31, 1990.

PROCEDURAL HISTORY

CCA's original petition requested a variance until December 31, 1989 to allow CCA to pursue a site-specific rule and in the alternative until December 31, 1992 to allow CCA to install control systems, should the Board deny CCA's petition for a site-specific rule.

In response to a December 3, 1987 Board Order, CCA filed an amended petition on January 20, 1988. This amended petition advised the Board that CCA had filed a petition for site-specific relief from Section 215.245 as a primary compliance method, with installation of control equipment as an alternative compliance method. However, CCA did not address the challenge to the validity of Section 215.245 raised in its original petition, which the Board had required CCA to brief in its December 3, 1987 Order. By an Order of January 21, 1988, the Board noted CCA's

failure to address the issues raised in challenging the validity of Section 215.245 and again ordered CCA to brief those issues.

In response to the Board's January 21, 1988 Order, the Agency and CCA filed their respective pre-hearing briefs and CCA filed its second amended petition on February 23, 1988. CCA's second amended petition asserted, among other contentions, that the Board's Subpart P rules were invalid because they were not properly adopted. (2d Amended Pet. at 8).

On June 2, 1988, the Board issued an Interim Order in regard to the issues discussed in CCA's pre-hearing brief. In that Order the Board found that challenges to the validity of the regulations as applied are limited "within the variance proceeding to matters concerning uncertainty of meaning of the regulations." (Container Corp. of America v. IEPA, PCB 87-183, June 2, 1988 at 3). The Board also found that "such burden of proof as may exist in the instant matter resides with Petitioner." (Id.). Finally, the Board found that the standard to be met by the petitioner for this variance proceeding was arbitrary or unreasonable hardship as specifically provided for in Section 35 of the Environmental Protection Act ("Act") and not technical feasibility or economic reasonableness as maintained by CCA. The Board then directed the Hearing Officer to proceed to hearing.

On June 21, 1988, the Agency filed a recommendation that the Board deny CCA's petition for variance. Hearings on this matter were held on December 14, 1988 and April 14, 1989; no members of the public attended either hearing. CCA filed a third amended petition on May 1, 1989, "to conform to its proof at hearing." (3rd Amended Pet. at. 1). By order of May 11, 1989, the Board construed CCA's third amended petition as intended solely to clarify the exact nature of the relief sought, rather than to commence variance proceedings anew.

CCA filed a post-hearing brief on May 12, 1989. The Agency filed a post-hearing brief on May 26, 1989 and CCA filed a reply brief on June 5, 1989.

BACKGROUND

Until September 1986, CCA was a wholly owned subsidiary of Mobil Corporation. On September 30, 1986, JSC/MS Holdings, Inc. completed acquisition of CCA.* Upon acquisition, JSC/MS merged

* On September 30, 1986, JSC/MS Holdings, Inc. was a newly formed company; the common stock at that point was owned 50% by Jefferson Smurfit Corporation and 50% by the Morgan Stanley Leveraged Equity Fund, L.P. and their investors. (Resp. Ex. 3 at 1).

with and into CCA, with CCA surviving the merger. (Resp. Ex. 3 at 1).

CCA's Carol Stream Plant, in DuPage County, manufactures folding cartons. Plant operations include the use of two rotogravure presses, which are the subject of this variance proceeding. Press No. 9 has no control equipment for volatile organic materials ("VOM"). The tons of VOM used in Press No. 9 in 1986, 1987 and 1988 were approximately 471, 186 and 170 respectively. (3rd Amended Pet. at 3, Agency Response Brief at 14, CCA Post-Hearing Brief at 4).

The tons of VOM Press No. 10 used in 1986, 1987 and 1988 were 235, 145 and 360 respectively. (Agency Response Brief at 14, CCA Post-Hearing Brief at 4). Press No. 10 is equipped with a VOM incinerator system which has an efficiency rate of approximately 55%. (R. at 52).

Since CCA emits less than 1,000 tons of VOM yearly, it was exempt from the Board's emission limitations for rotogravure printing operations until November 9, 1987. (35 Ill. Adm. Code 215.401,402). When the Board amended its regulations governing VOM emissions from rotogravure and flexographic printing operations, the amount of VOM emissions triggering the exemption from the requirements of Section 215.401 for sources in ozone non-attainment areas decreased from 1,000 TPY to 100 TPY. (In re: Proposed Amendments to 35 Ill. Adm. Code 215: Flexographic and Rotogravure Printing, R85-21, Docket B; 35 Ill. Adm. Code 215.245). Affected facilities were required to be in compliance by December 31, 1987. Since CCA filed its original variance petition within twenty days of the effective date of Section 215.245, the effect of that rule as it applies to CCA is stayed pending the disposition of this variance proceeding. (Ill. Rev. Stat. ch. 111-1/2, par. 1038(b)(1987); 35 Ill. Adm. Code 104.102).

DISCUSSION

Hardship

In its third amended petition, CCA states that it will bring its plant into compliance by installing add-on control equipment. (3rd Amend Pet. at 5). However, CCA asks the Board to grant it twelve months, until December 31, 1989 to "bring the plant to a profit-making basis so that it can qualify for capital funds needed for the control equipment." (Id.) At that time CCA states that it "will commit to either install the controls, reduce solvent usage on presses 9 and 10 below 100 tons per year or cease operation of the presses by December 31, 1990." (Id.) CCA states that in the event that it determines the plant is generating sufficient revenues, it will upgrade and install control equipment on a schedule allowing compliance by December

31, 1990. (Id. at 6). CCA further asserts that its Carol Stream plant is currently running at an operating loss and that it "would be economically unreasonable to require the installation of control equipment ... at a plant which already has a substantial operating loss." (Id. at 10).

In recommending that CCA's variance not be granted, the Agency states, inter alia, that CCA has not established the requisite hardship associated with the immediate installation of RACT controls. (Agency Response Brief, at 5,22). Specifically, the Agency states that the issue in this case is not whether compliance with the Board's regulations is economically unreasonable as asserted by CCA, but whether compliance will cause an unreasonable or arbitrary hardship for CCA. (Id. at 22). In support of this position, the Agency cites the Board's previous language in its June 2, 1988 Order in this proceeding.

The Board agrees with the Agency, and indeed has stated in its June 2, 1988 Order, that arbitrary or unreasonable hardship, not economic unreasonableness, is the requisite standard in variance proceedings. The issue then is whether the profitability of CCA's Carol Stream plant, independent from the parent corporation, is the sole consideration in determining an arbitrary or unreasonable hardship.

Essentially, CCA argues that since its Carol Stream plant has not been profitable in recent years it should be given until December 31, 1989 to "return to a more profitable basis." (CCA Post-Hearing Brief at 1). CCA supports its position that any hardship considerations should focus on the plant's profitability, as opposed to the corporation's, by arguing that the plant is independent from the corporation, financially, structurally and operationally. (Id. at 15, R. at 114).

In response, the Agency argues that hardship considerations are not determined solely by the economic impact compliance would have on the plant but on the economic impact compliance would have on CCA as a corporation. (Agency Response Brief at 23, citing Alton Packaging Corp. v. IEPA, PCB 83-49 (February 25, 1988), appeal docketed, No. 5-88-0322 (5th Dist.)) Citing testimony by CCA witnesses made at hearing, the Agency further argues that CCA has the financial capability to bring the plant into compliance, regardless of the plant's individual profitability. (Agency Response Brief at 25, R. at 163).

The Board is persuaded in this instance that considerations of arbitrary or unreasonable hardship of compliance include hardship on the corporation, not solely on the individual plant. After all, it is Container Corporation of America that is seeking this variance for its Carol Stream Plant. The Board holds that a variance cannot be granted simply to allow time to determine the

profitability of an individual plant before making any committment whatsoever to a compliance plan.

The Board is also persuaded that CCA has the financial capability to bring this plant into compliance. As stated in CCA's Annual Report for 1986*, "further substantial sums [for pollution control] may be required in the future, although, in the opinion of management of CCA, such expenditures will not have a material effect on its financial condition." (Resp. Ex. 3 at 10; R. at 157). The Board is further persuaded by the Agency's argument that "[t]his is not a case where funding for pollution control equipment simply cannot be obtained." (Agency Response Brief at 27). As asserted by the Agency, it is clear from CCA's financial data, CCA's own admission and from testimony by CCA's Controller that funds for CCA's pollution control equipment are eminently available. (Id., citing Resp. Ex. at 3-8, Resp. Ex. 9 at par. 27 and R. at 170-172).

The Board agrees with the Agency that the fact that the Board has granted variances from Section 215.245 and/or 35 Ill. Adm. Code Part 215, Subpart P since December 31, 1987 is irrelevant to CCA's variance request in this case. (Agency Response Brief at 29). Each of the variances cited by CCA were decided on the individual merits in each case. In no case has the Board granted time to determine the profitability of a plant prior to the selection of a compliance plan, as requested by CCA in this instance.

The Board believes that any hardship on CCA is to a large degree self-imposed. Since CCA filed its original petition on November 30, 1987, little progress has been made toward identifying or committing to a definite compliance plan.

Compliance Plan

CCA states in its third amended petition that it proposes to bring its plant into compliance by installing control equipment. In the same paragraph, CCA also requests that the Board grant CCA until December 31, 1989 to determine profitability of the plant, at which time it will "either install the controls, reduce solvent usage on presses 9 and 10 below 100 tons per year or cease operation of the presses by December 31, 1990." (3d Amended Pet. at 5). Again, in CCA's post-hearing brief, CCA states that it will install control equipment "[i]f the Plant is generating sufficient revenues" on December 31, 1989. (CCA Post-Hearing Brief at 11).

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* The most recent Annual Report prior to CCA's filing a variance petition on November 30, 1987.

The Board finds that this is not a definite compliance schedule that will bring CCA into unquestioned compliance, as asserted by CCA. Although this variance petition was filed in November, 1987, CCA has still not committed to a definite compliance plan. CCA's conditioning commencement of a compliance schedule upon the plant's profitability alone disqualifies CCA for lack of a definite compliance plan. CCA's further vacillation over which compliance method it may choose if the plant is profitable, sheds more doubt upon the definiteness of compliance within a reasonable period of time. CCA's inclusion of a possible installation schedule to commence after a profitability determination is speculative; as it is premised on several conditions precedent, it does not provide any more definiteness. Additionally, the pollution control technology in this area is well known and readily available. In sum, CCA has failed to commit to a specific compliance plan.

Environmental Impact

CCA contends that VOM emissions from its Carol Stream plant have no identifiable adverse environmental impact.* CCA argues that the plant's environmental impact is negligible because of the limited operations at the plant as well as the incinerator on Press No. 10. (CCA Post-Hearing Brief at 6).

In response, the Agency states that:

> [a]s a major hydrocarbon source located in an ozone non-attainment area, CCA contributes, to an unquantified degree, to the 'frequent pervasive and substantial' violations of the ozone ambient air quality standards detected in Northern Illinois over the past several years.

(Agency Response Brief at 28, citing Ekco Glaco Corporation v. IEPA, PCB 87-41 (December 17, 1987) appeal docketed, No. 88-803 (1st Dist.). In support of its position, the Agency points out that "over the three year period 1985-1987, CCA averaged 490 tons of VOM emissions to the atmosphere yearly." (Id.).

The Board finds unacceptable CCA's contention that the environmental impact emissions from the Carol Stream plant are negligible. The VOM emissions from CCA's plant, as indicated in the record, are indeed significant.

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* CCA's estimated contribution to ozone emissions in the Chicago area as less than 0.1% is unsubstantiated in the record, except as information obtained from CCA's Corporate Counsel in Clayton, Missouri. (R. at 166, 3d Amended Pet. at 7).

Consistency With Federal Law

CCA maintains that the Board may grant the requested variance consistent with the Clean Air Act and federal regulations. CCA contends that the variance would not be a delayed compliance order as defined in 40 CFR 65.01(e). CCA further argues that if the granting of the variance would require a revision to the Illinois State Implementation Plant (SIP), the variance would be approvable as a SIP revision because VOM emissions from the Carol Stream plant would not interfere with the attainment or maintenance of ambient air quality standards. Finally, CCA alleges that the Clean Air Act does not require imposition of Subpart P (Sections 215.401 through 215.407) controls on the Carol Stream plant because those controls do not constitute Reasonably Available Control Technology (RACT) for that plant.

In response, the Agency first notes that Section 215.245 has not yet been approved by the United States Environmental Protection Agency (Agency) as part of the Illinois SIP. Thus, the Agency does not believe that the requested variance would need to be submitted as a SIP revision unless Section 215.245 is approved by USEPA before the expiration of the variance, if granted. However, the Agency states that it has reviewed the variance petition, the applicable air quality standards, the most recent Illinois air quality report, and other information. Based upon that review, the Agency maintains that the variance, if granted, would not be approvable as a SIP revision. (See e.g. 53 Fed. Reg. 45104 (November 8, 1988)). Because the requested variance would not be consistent with federal law, the Agency contends that the Board cannot grant the variance.

Since CCA has failed to commit to a specific compliance plan, any hardship suffered by CCA is self-imposed and therefore not arbitrary or unreasonable, and the environmental impact during the requested variance is not minimal. Therefore, the Board will not grant the variance, and thus need not decide whether the variance would be consistent with federal law. The Board notes, however, that CCA's contention that Subpart P controls are not RACT for its Carol Stream plant is not germane to the issue of consistency of the requested variance with federal law. Indeed, as the Board has previously held, that claim is not relevant in a variance proceeding, where the standard is arbitrary or unreasonable hardship, not economic reasonableness. (Container Corp. of America v. IEPA, PCB 87-183, June 2, 1988.)

CONCLUSION

The Board finds that CCA has not presented adequate proof that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship upon CCA. Based on the

record, particularly CCA's own admissions, it is evident that CCA has the funds available to bring its plant into compliance with the Board's regulations. Additionally, the environmental impact of CCA's VOM emissions as major ozone precursors in the Chicago area and CCA's significant lack of a definite compliance plan further militate against the grant of a variance in this matter.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Petitions for Variance filed on November 30, 1987, January 20, 1988, February 23, 1988 and May 1, 1989 by Container Corporation of America for its Carol Stream Plant, for variance from 35 Ill. Adm. Code 215.401-215.407 and 35 Ill. Adm. Code 215.245 are hereby denied.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 1/2 par. 1041, provides for appeal of Final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

J. Marlin and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of July, 1989, by a vote of 6-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board