

ILLINOIS POLLUTION CONTROL BOARD
August 4, 1988

AMEROCK CORPORATION,)	
)	
Petitioner,)	
)	
v.)	PCB 87-131
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board on an appeal of a Hearing Officer's ruling concerning discovery matters filed by Amerock Corporation (Amerock) on July 14, 1988. The Agency filed a Response on July 21, 1988.

At issue is ruling of the Hearing Officer which was filed with the Board on July 1, 1988. The ruling was made pursuant to the Board's Order of May 19, 1988. That Order directed the parties to file briefs concerning whether Amerock should respond to Agency interogatories and a request for documents that dealt with the financial status of Amerock and which had been filed on March 2, 1988. After considering the briefs, the Hearing Officer was to rule on the outstanding discovery controversy.

Essentially, the Hearing Officer's Order states that Amerock need not submit the economic information requested by the Agency if Amerock files by July 1, 1988:

 An Affidavit, signed by [Amerock's] Chief Executive Officer, acknowledging that [Amerock] understands that [Amerock's] refusal to submit any financial data concerning its income and earnings precludes [Amerock] from any contention now or at a later date that [Amerock] may suffer arbitrary and unreasonable or economic hardship in meeting the cost of whatever compliance plan may be approved and required to be implemented by the Board to reduce or eliminate [Amerock's] discharges into Kent Creek.

In the alternative, the Hearing Officer allowed Amerock to submit economic information pursuant to any agreement Amerock makes with the Agency. On material for which no agreement is reached, the Hearing Officer would rule on the contested aspects after further briefing.

Finally, the Hearing Officer extended the time for the filing of the Agency's post hearing Response brief.

In its brief on this issue to the Hearing Officer and in this instant appeal, Amerock takes the position that the Agency's discovery request is irrelevant since Amerock is not utilizing "economic hardship" as a basis for variance relief. (June 6th Amerock Brief, p. 4; Amerock Appeal, p. 3). In addition, Amerock states that it would cost \$100,000 to generate the requested information. (Id., p. 6).

Amerock claims that it can "afford" the implementation of its chosen compliance plan. (June 6th Amerock Brief, p. 4; Amerock Appeal, p. 5). Amerock claims that the affidavit requirement as worded in the Hearing Officer's Order, is inappropriate and would require Amerock to withdraw its petition.

The Agency responds by stating that its interrogatories and request for documents "may be viewed as reasonably calculated to lead to the discovery of relevant evidence even if Petitioner [Amerock] were to state unequivocally that it would suffer no economic hardship if required to comply with regulations at issue." (Agency Response, p. 2). However, the Agency does not take the position that the Hearing Officer's ruling should be overruled to require Amerock to respond to the Agency's discovery request. Instead, in its Response, the Agency states that its "concern here is primarily to ensure the record as it now stands, whether or not further evidence is ever introduced is not distorted." (Agency Response, p. 2).

At hearing, the Agency substantially explained its position with regard to why it believed the information it has requested is necessary.

I would note to the Board that there is a particular issue in this variance proceeding, that of hardship...We would summarily state that the Agency does not feel there's been sufficient information put into the record, either in the regulatory proceeding or thus far in the variance proceeding as to the financial status or condition of the company.

This, we believe, is necessary so that the Board can determine whether or not there is, in the context of the variance case, an unreasonable or arbitrary hardship and as well in the context of the site specific case, whether or not the implementation of the controls would be economically unreasonable. So, while the issues are similar as the Board is well aware, they are different in nature. That is, we believe

that it is incumbent upon Petitioner to show hardship in this case and they simply haven't.

Now that leads me to the next point that we need to cover and that is the pending matter of the Agency's request for production of documents and first set of interrogatories, which was filed on March 2, 1988. A response has been made by nature of objections and requests for protective order from Petitioner, that response having been dated, or at least filed before the Board, on the 24th of March. Here again, I would simply and briefly state that what the Agency was attempting to do was essentially force the company to provide this economic information because we feel it is necessary.

(R. 8-10)

Aside from these statements at hearing, the Agency has not made any other assertions as to the need for the requested material. Specifically, the Agency has not stated how the discovery request could lead to the discovery of admissible evidence. Apparently, the Agency believes that the requested material is directly relevant to the case.

It is clear from Amerock's filings that it is not taking the position that it will suffer "economic hardship" if denied a variance. In its June 6, 1988 brief to the Hearing Officer, Amerock explains its position.

In its variance petition, Amerock contends that denial of variance would impose an arbitrary or unreasonable hardship. In support of its position, Amerock has provided considerable data demonstrating that the environmental impact of its stormwater discharges on North Kent Creek is minimal. As respects the hardship issue, Amerock is not contending that denial of variance will impose an economic hardship. Instead, Amerock is contending that the denial of variance would impose an arbitrary or unreasonable hardship because the cost of immediate compliance is wholly disproportional to the environmental impact of Amerock's activities such that the variance relief should be granted.

(June 6th Amerock Brief, p. 2-3)

Section 103.161 of the Board's procedural rules addresses

discovery. Section 103.161(a) states:

Regarding any matter not privileged, the Hearing Officer shall order discovery upon the written request of any party when parties cannot agree on the legitimate scope of discovery. It is not a ground for objection that the testimony will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence or is relevant to the subject matter involved in the pending action.

Subsection (b) also states that:

The Hearing Officer may at any time on his own initiative or on motion of any party or witness make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party obtaining such materials consistent with the provisions of Sections 7 and 7.1 of the Act.

Because Amerock is not alleging economic hardship as part of the arbitrary or unreasonable hardship that it would allegedly suffer if denied a variance, the information requested by the Agency which seeks to determine the financial integrity of Amerock is simply not relevant to this proceeding. Also, the Agency has not adequately shown how this information could lead to relevant evidence. Consequently, the Hearing Officer was correct in not requiring Amerock to provide the Agency with the requested information.

Although the Hearing Officer required that Amerock's Chief Executive Officer file an affidavit stating that Amerock waives claim of economic hardship, the Board views statement of counsel to be sufficient in binding Amerock to its position that "economic hardship" is not an issue in this matter. Consequently, the Board will not require an affidavit as described in the Hearing Officer's Order.

In summary, the Board finds that pursuant to Amerock's representations, "economic hardship" is not an issue in this proceeding as Amerock seeks to prove that it would suffer an arbitrary or unreasonable hardship on other grounds. While cost for compliance still is relevant, the ability of Amerock to afford compliance is settled. Amerock has never asserted that it lacks the economic capability to immediately comply with Board regulations. The Board notes that a variance petitioner may select any compliance alternative as it wishes, provided that the

alternative does in fact achieve compliance.

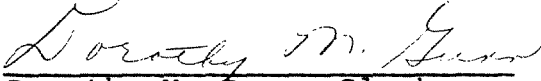
On another matter, Section 35 of the Illinois Environmental Protection Act (Act), is the controlling statutory authority for the Board's variance determination. Section 35(a) of the Act provides that the Board may grant variances "upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." Section 33(c) applies to enforcement actions. While factors such as those found in 33(c) may sometimes aid the Board in a variance determination, the Board is not required by law to consider such factors as it makes its "arbitrary or unreasonable hardship" finding.

Because of the time elapsed for the disposition of this appeal, the Board must set new dates for the post-hearing briefing schedule. The Agency's Response Brief shall be submitted to the Board and Amerock no later than August 25, 1988. Amerock's Reply Brief shall be submitted to the Board and the Agency no later than September 8, 1988.

For simplicity in directing the parties, the Board's Order today supersedes the Hearing Officer's July 1, 1988 ruling.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 4th day of August, 1988, by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board