ILLINOIS POLLUTION CONTROL BOARD
October 24, 1972

INTERNATIONAL HARVESTER CO. (Wisconsin Steel Division)	)	
v.	)	# 72-321
ENVIRONMENTAL PROTECTION AGENCY	)	

Mr. Jeffrey Brown, for International Harvester Co.

Mr. Joseph Karaganis and Miss Percy Angelo, for the Environmental Protection Agency

Opinion and Order of the Board (by Mr. Currie):

International Harvester operates an old battery of 67 coke ovens at its Wisconsin Steel plant in Chicago. (R. 21, 30). Between each pair of ovens, in which coal is heated without air to drive off volatile matter, are combustion chambers in which gas is burned to provide heat for the coking process (R. 30). Our new air pollution regulations, adopted in April of this year (#R 71-23, April 13, 1972, 4 PCB 191), impose strict requirements for the control of emissions from the coke ovens themselves, the most dramatic of which (dealing with emissions while the ovens are open for charging and pushing) require the installation of control equipment by December 1973 and December 1974, PCB Regs., Ch. 2, Rule 203(d)(6). These regulations are not the subject of the present petition. Wisconsin Steel's immediate problem derives from the fact that smoke and gases from the coke ovens seep through cracks in the oven walls into the combustion chambers during the charging operation, resulting in visible emissions from the combustion chamber stack (R. 34-35, 72) that exceed the general standard for emissions from combustion sources (R. 39, 157-58, 162). The company promises to submit by May 1, 1973 a program for eliminating these violations, after receipt of a comprehensive study that is to explore alternative means of achieving compliance. On presentation of the program Wisconsin Steel intends to seek a further variance to allow continued operation until the program is completed.

A pre-hearing conference was held September 6 to delineate the issues. When the hearing itself began September 11, the Agency, which in flat violation of our procedural rules, had still not filed its recommendation or any other response to the petition, for the first time suggested that the scope of the proceeding be expanded to include issues as to emissions from the coke ovens themselves. The Hearing Officer correctly ruled that to raise what in effect would be an unrelated countercomplaint on the date of the hearing would result in prejudicial and unfair surprise to the petitioner requiring further time to prepare a response and unjustifiably delaying decision on the original petition (R. 14-19). The request was denied without prejudice to the filing of whatever complaints the Agency may wish to file, upon proper notice and opportunity to defend, respecting the coke ovens or any other aspect of Wisconsin Steel's plant. If Wisconsin Steel or anyone else is violating or threatening to violate the coke-oven regulations, it is the explicit obligation of the Agency or Attorney General to file a complaint; but that is no reason to hold up decision on this unrelated petition on which the company is entitled to an answer.

Notwithstanding the Hearing Officer's ruling, the bulk of the State's case on the first day of hearing consisted of inquiries upon cross-examination as to the company's intention to comply with the regulations on control of emissions from the coke ovens themselves. Such questions were irrelevant and time-consuming and should have been excluded.

Following the first day of hearing, the Hearing Officer ordered the State to file its response to the petition by September 25 (R. 110), which allowed a further two weeks to do what should have been done many weeks before. The second hearing was held October 2, and still there was no response from the State (R. 114). An attorney on the Agency's own staff then tendered a recommendation which, she said, had been prepared by the Agency and sent on September 18 to the Attorney General for filing (R. 115). The Assistant Attorney General replied that he had not filed it because it discussed emissions from the coke ovens themselves, which the Hearing Officer had ruled were not in the case (R. 121-22). When the Agency's own attorney attempted to respond, she was told by the Assistant Attorney General that she had no right to speak because "The role of attorney is handled by the Illinois Attorney General's office " (R. 123). The Hearing Officer thereupon refused to allow the Agency's attorney to be heard (R. 142).

As we have repeatedly said, something must be done about recommendations. The Agency's draft recommendation

was contrary to the order excluding the coke ovens from the case; the Attorney General's office violated the order by failing to file anything at all. In an ordinary adversary proceeding such an elementary failure to inform one's adversary of one's position should result in a judgment by default, but that would in a case like this punish the innocent public; the enforcement agencies may no more grant variances by default than they may by agreement. Our only recourse is to decide cases without the recommendations the General Assembly thought essential, and the public is the worse for it.

As for the question who speaks for the Agency, we adhere to EPA v. Lindgren Foundry Co., # 70-1, 1 PCB 11 (Sept. 25, 1970), in which we made clear that it is no concern of ours whom the Agency designates to speak for it; that is the job of the Agency's own Director. We cannot help doubting that the Director explicitly or implicitly authorized an Assistant Attorney General to speak for him in a dispute between the Agency and the Attorney General's Office, and therefore we think the Agency should have been allowed to speak in its own behalf.

On the merits, the variance request was for what is now about six months in which to complete a study of alternatives for bringing the combustion chamber stacks into compliance, with the expectation of a further variance to carry out the program. The Agency's principal response was to attempt to show that control equipment for reducing particulate emissions from these stacks was probably available (R. 168-80). But Wisconsin Steel has agreed to find a way to meet the standard. Proof that control technology is available does not mean we will not allow a reasonable time in which to install it, or to determine the best method for achieving the standard. Our numerous decisions refusing indefinite variances for want of satisfactory control programs (e.g., Chicago-Dubuque Foundry Co. v. EPA, #71-130, 2 PCB 65 (June 28, 1971); York Center Community Cooperative, #72-5, 3 PCB 485 (Jan. 17, 1972)), do not establish an inflexible rule against allowing an extension of time to develop a program.[1] If the evidence shows that to require an immediate commitment to a particular means of achieving compliance, without adequate study, might result in unreasonable hardship through the waste of resources, the statute requires us to grant a variance. The need for further study must be demonstrated; the timetable for submitting such a program must be reasonable and

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1. We have recognized that good faith study of alternatives can be a mitigating factor in determining sanctions for delay in compliance. See EPA v. City of Silvis, #71-157, 5 PCB___ (Aug. 22, 1972).

reasonably certain; there must be adequate justification for not having made the study earlier; all other criteria for granting a variance must be met. But in an appropriate case we can and must grant a variance to develop a program.

In the present case there is a firm commitment to meeting the standard by one or another means; a broad spectrum of possible remedies is under consideration, ranging from repair of the leaky ovens to the use of stack control technology to replacement of the entire battery with a more fully enclosed pipeline system (see petition); a choice is promised within a rather short time on the basis of a comprehensive study now in progress; there is an admitted paucity of experience with either precipitators or afterburners, the two control techniques suggested by the Agency, on installations such as this one (R. 168-80); considerable expenditures are involved (a million dollars for controls according to EPA, R. 180). Given the adoption of our new regulations as a starting point in time, there is much persuasiveness in the argument that the company should be permitted to complete its study before making a choice of this magnitude among the many alternatives that are under consideration. We do not accept the Agency witness's suggestion that two months can be cut from the schedule by not waiting for the final report (R. 184); the company's testimony was persuasive that a full inspection of the brickwork is needed to permit a determination of the extent of needed repairs and thus the practicability of that approach (R. 247-48).

Yet Wisconsin Steel has not proved all it needs to prove in order to demonstrate that it is entitled to the requested extension. First, we do not know from which regulations the company wishes relief; we suspect the only one is that pertaining to visible emissions (Rule 202(b)), but nothing in the petition or the record tells us so. We cannot grant a variance except from specific provisions specifically invoked. Anything else might cause us to grant more than is required by the hardship and result in unnecessary pollution. Second, there is no adequate evidence to establish that the company was justified in not making this study, and commencing action to correct this problem, some years ago. There is only the testimony that the problem was viewed as a minor part of the overall coke manufacturing problem and ignored because the coke ovens themselves were not until our new regulations required to be controlled (R. 93, 101). If the argument is that the emissions from the combustion stack were likewise exempted from prior regulations, so that the adoption of the new rules required immediate compliance without allowing a reasonable time for construction, the justification for not acting sooner is persuasive, as we have held in the asbestos cases.

E.g., Johns-Manville Corp. v. EPA, #72-272, 5 PCB ___ (Sept. 26, 1972). But that position has not been established, and as we have often held one cannot qualify for a variance simply by delaying compliance with the law; if the old rules forbade the present stack emissions, we cannot let Wisconsin Steel's failure to meet them be its own justification. Decatur Sanitary District v. EPA, #71-37, 1 PCB 359 (March 22, 1972).

To the extent that the above deficiencies can be cured by a new brief without further evidence, we could upon waiver of the right to a decision within 90 days hold the case for receipt of such briefs. But the petitioner's case falls short in additional ways that cannot so easily be corrected. Our procedural rules state quite clearly that a petitioner must allege, and therefore prove, the nature and quantity of his emissions and their effect on the environment, PCB Regs., Ch. 1, Rule 401(a)(1), (2). There was no such pleading here, and no such proof. It is the petitioner's statutory obligation to prove that the hardship of compliance would be arbitrary or unreasonable (Environmental Protection Act, §§ 35, 37). This standard requires us to balance the costs against the benefits of compliance; an expense that might be excessive to prevent a little pollution might be entirely in order to prevent a lot. Even the shutdown of a battery of coke ovens[2] pending compliance by other means might not be inappropriate if the plant were causing human deaths; consider the case of a nuclear power plant with its radiation controls out of order. We have no reason to suspect any such consequences here, but we cannot make factual findings without support in the record, and the statute places the burden squarely upon the petitioner. In Norfolk and Western Ry. v. EPA, #70-41, 1 PCB 281 (March 3, 1971), a persuasive case was made of the need to continue operating coal-fired boilers in a locomotive maintenance shop during the construction of control equipment, yet a variance was denied for failure to demonstrate that the effect on the community would be tolerable:

> We recognize the importance of railway operations to the general welfare and economy of the region. We also appreciate the importance of the heating plant which serves the shops of petitioner at the hub of its regional operations. But section 37 of the Environmental Protection Act makes plain that the petitioner must prove that the pollution caused by its continued

2. (R. 39-40). We note that the company has not refuted the Agency's evidence that because a blast furnace has been shut down, Wisconsin Steel does not need coke from this battery and can operate at a much slower coking rate with much lower emissions (R. 186-92).

violation is not so great as to justify the hardship that immediate compliance would produce. We cannot determine whether or not the costs of compliance significantly outweigh the benefits, as the statute requires, see Environmental Protection Agency v. Lindgren Foundry Co., #PCB 70-1 (decided Sept. 25, 1970), unless we have some idea of what the benefits are. For all we know on the present record, the railroad's shops may be an unbearable nuisance and a health hazard. The petitioner has clearly failed to meet its burden of proof.

The present case is governed by Norfolk & Western. If this disposition seems unduly technical in light of what we as individuals know or suspect about the effects of coke-manufacturing emissions and the neighborhood in which the plant is located, one should consider the dangers of permitting this Board or any other quasi-judicial tribunal to make important decisions on the basis of what we know or suspect and what has not been placed in the record by those who really know and subject to rebuttal by those to whom the outcome of the case may make a significant difference. The statute is as clear as it can be that our decisions must be based strictly on the record, and that fact has been brought home to us quite firmly by the reviewing courts. North Shore Sanitary District v. Pollution Control Board, 277 N.E. 2d 754 (Ill. App. 2d Dist. 1972). The present record fails to establish that the costs of immediate compliance greatly outweigh the benefits, the petitioner has not shown the hardship would be unreasonable or arbitrary, and it has not made its case for a variance.

Because the 90 days in which we must decide the case expires this week, in the absence of a timely waiver allowing adequate time for further hearing and decision the variance must stand as denied without prejudice. Should such a waiver be filed, we shall schedule a further hearing in which the deficiencies of the present record may be corrected.

It is so ordered.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion & Order of the Board this _____ day of _____, 1972, by a vote of _____.

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