ILLINOIS POLLUTION CONTROL BOARD
August 20, 1987

CHICAGO, CENTRAL AND PACIFIC RAILROAD,	)	
Petitioner,	)	
v.	)	PCB 87-30
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

DANIEL T. YOEST [KUNZ, YOEST, FRITZA AND ASSOC., INC.] APPEARED ON BEHALF OF PETITIONER; AND

CHARLES V. MIKALIAN APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on the petition for variance filed by the Chicago Central and Pacific Railroad (CCP) on March 9, 1987 as amended April 27, 1987. CCP seeks a three year variance from two of the Board's special waste hauling regulations: 35 Ill. Adm. Code 809.401 which requires that vehicles display non-removable identification numbers and markings and 35 Ill. Adm. Code 809.202 and 809.203 which requires vehicle owners to submit signed permit applications to the Agency, including various information (such as license plate number, make, model, year description and identification number) for each vehicle to be used to transport special waste. CCP does not propose to come into compliance with these existing rules during the term of the variance, but instead intends to develop a regulatory proposal change to make the rules more "railroad-compatible". On May 26, 1987, the Illinois Environmental Protection Agency (Agency) filed a Recommendation that variance be denied on the bases that CCP had failed to prove existence of an arbitrary or unreasonable hardship and had failed to file an acceptable compliance plan; CCP filed a response thereto on June 12, 1987.

Hearing was held on July 1, 1987, at which some members of the public were in attendance. Testimony on CCP's behalf was presented by Kevin King, ramp manager of CCP's Cicero facility, and testimony on the Agency's behalf was presented by Harry Chappel, manager of the Compliance Section of the Agency's Division of Land Pollution Control. The only post-hearing brief

submitted was that filed by the Agency on July 31 in which the Agency maintained its position that variance should be denied.

The Chicago, Central and Pacific Railroad operates approximately 786 miles of Class III and IV railroad trackage between Chicago, IL. to Omaha, NE. and Sioux City, IA.. This rail carrier employs approximately 800 people and has Illinois operations extending from Chicago, IL. to East Dubuque, IL.. It's primary business is to haul shippers' commodities as both common and contract carrier in and through the State of Illinois.

CCP does not presently transport special waste, a service which it would like to provide for customers. CCP presently has three Illinois trailer ramp facilities which could dispatch or receive special waste loads. These are located in Cicero, Rockford and Freeport. On January 5, 1987, CCP filed an application for a special waste hauler permit, along with a request for waiver of the permit requirements for railroad trailers. On January 22, 1987, the Agency denied the application advising CCP that it should petition the Board for a variance.

CCP asserts that the transportation of hazardous waste would be performed in packages such as 55 gallon drums, 85 gallon overpacks or other appropriate DOT authorized containers approved for the safe transportation of hazardous materials. Normal quantities loaded would be approximately 60 drums for a single-stacked load or 120 drums for a double-stacked load per trailer. No loading would be anticipated beyond the safe axle load limits or highway safety limits prevalent in the State of Illinois.

The anticipated operation would be for shippers to access "free-running" empty 40 to 48 foot railroad trailers at the railroad ramps in Illinois. These trailers would then be checked out of the railroad ramp and driven to the generator's loading location. Once loaded and blocked and braced, they would be again driven back to the railroad ramp where they would be loaded on a railroad flatcar and transported via rail out of state for proper disposal, treatment, incineration or recycling.

CCP asserts that the existing requirements for identification and placarding of trailers imposes a unique burden on rail carriers. CCP asserts that, in contrast to regional motor carriers, which may own and operate a limited fleet of trucks, CCP utilizes the services of a multitude of trailers which it does not own or lease (as that term is commonly understood). Rather, as CCP explained in its petition, the rail industry operates its trailer fleets under a pooling arrangement in which over 500 owners allow their trailers to randomly run across the country. These are utilized for loading at the same location where they were previously unloaded. The owner earns a daily per diem from the carrier harboring the trailer on his line

either as an "empty" or a "load". The Agency, by way of interrogatories, requested CCP to provide various information concerning the economics of its operation. CCP explains that:

> "its typical charges for "ordinary" cargo are between $0.75¢ to $1.00 per highway mile while charges for transportation of special waste range would range between $1.75 to $2.50 per highway mile. CCP "would be able to net (sic) between $1.00 to $1.50 per highway mile. Out of this difference (CCP) would have to discount or give an incentive to the shipper to acquire the business, handle additional manifest paper work, assist the shipper in the proper blocking and bracing methods, mechanically inspect the trailers before being dispatched and upon return to the railyard, provide pickup and delivery service, obtain and administer the suggested placarding procedures and various other quality assurance programs to properly manage the risk while the trailers are in his possession."

CCP does not consider it economically feasible to reserve some trailers exclusively for special waste hauling. Less than 1% of the trailers which come into its control sit unloaded and idle, as the per diem charge is collectable by the owner whether the trailer is idle or not: the industry average charge is approximately $15.00 per day for a standard 45 ft. closed van trailer. Moreover, to shuttle an empty trailer devoted to special waste hauling between CCP's three ramp facilities could cost between $100 to $250 (one way) depending on the length of haul to or from the ramp location.

CCP has initially asserted that the free-running nature of the estimated 174,123 trailers currently in use in the industry makes them impossible to permit on an individual basis, as any one trailer may not show up in the same location twice. Although this record is somewhat unclear, it would appear that CCP may have somewhat modified its position between the time of the filing of CCP's petitions and the date of hearing as a result of discussions with the Agency. At hearing, the parties stipulated that CCP's variance request was narrowed to two matters: a request to placard the trailer with removable or strippable insignia rather than the "removable only by destruction" placard required by Section 809.401, and a request that CCP be deemed an "authorized representative" of the owners of all trailers, for purposes of Section 809.203, so that only CCP's signature would be required on permit applications.

At hearing, the primary focus was the nature of the agreement between CCP and trailer owners. Any trailers which would be utilized by CCP for the origination of special waste loads would be governed by the standard "Trailer/Container

Interchange Agreement" (Pet. Ex. 1) executed between CCP and other rail companies; while trailers not governed by such agreements exit and enter CCP's yards, CCP provides only a "bridging service" from one carrier to another (R. 27-28). The Board cannot relate with specificity the entirety of the terms of this agreement, as it incorporates documents which were not entered into this record: a transportation service (Intermodal) agreement which appears to be another standard agreement executed between rail carriers, and the TOFC/COFC (sic) Container and Trailer Interchange Rules published by the Mechanical Division of the Association of American Railroads. On its face, the interchange agreement basically allocates the liability for such things as loss, damage or repair between CCP and the trailer owner as the trailer changes hands.

It appears to be CCP's position that compliance with the non-removable placarding requirement would require that each special waste bearing trailer have the appropriate identifying marks painted on by use of a stencil. CCP's Mr. King estimated that some 40% of the trailers that CCP might use are painted (R.28). CCP's position appears to be that damage to the paint which would likely be caused when CCP removed the stencilled special waste insignia would be its responsibility under the interchange agreement. Mr. King also testified that use of paint-removing solvents would require more employee time and closer supervision to minimize health and accident risks than would use of more easily removable adhesive strips or placards. Mr. King noted that self-adhesive placards are currently used to comply with U.S. Department of Transportation regulations for the placarding of dangerous and hazardous materials.

While the Agency does not dispute the fact that adhesive placards may be easier to remove, it dismisses CCP's assertions that to supply extra supervisors to prevent accidents during solvent use is unreasonably burdensome. The Agency is greatly concerned about the potential misuse of removable placards. It states in paragraph 15 of its Recommendation that:

> The Petitioner's proposal to use removable placards rather than non-removable insignia poses serious problems. After a load is received, the placard can easily be removed, leaving no indication that the trailer contains special waste. As citizens and law enforcement officials are often tipped off to the presence of special waste by the required marking and decal on a trailer, the use of an easily removable insignia grants the transporter far greater freedom to improperly dispose of its waste. In addition, a hauler could use the placard, then freely transfer it to another unlicensed hauler, whereas the non-removable decal cannot be transferred once affixed to a vehicle.

> This threat of transferability will create confusion and uncertainty among generators and waste disposal site operators, who by law may deliver waste to or receive waste from only licensed haulers. The possibility even arises that a hauler's employees could borrow the removable placard for their own use and then replace it before its absence is discovered. Were a non-removable decal to be improperly used, it could not be detached from the unauthorized vehicle for reuse. Its absence would be noted and the improper use thereby detected. Finally, to allow the rail industry to use removable rather than non-removable insignia will result in all haulers requesting their use. This will serve to spread the problems discussed above throughout the entire special waste hauling industry.

Concerning the issue of the signature of owner requirement, the owner certification currently required by the Agency reads as follows: "I, the undersigned, certify that the information contained herein is true and complete and that the removal, transporting and disposal, storage or treatment of special waste will comply with all requirements to Title 35, Section 809.202."

CCP points to paragraph 5 of the interchange agreement, which provides that:

> "Railroad, while in possession of interchanged containers, releases and agrees to defend and hold harmless the Owner against and from any and all loss, damage, liability, cost, or expenses suffered or incurred by the Owner arising out of or connected with injuries to or death of any persons arising out of the Railroad's use, operation, maintenance, or possession of such containers."

It is CCP's position that since CCP as operating railroad signs the permit certification, since CCP would be controlling the trailer's loading and its designation as carrier for a particular waste load, and since CCP would indemnify the owner for damages as provided in paragraph 5 of the indemnification agreement, that the owner's signature in unnecessary. At the very least, CCP argues, CCP should be deemed the owner's authorized representative for purposes of signature.

This issue was addressed at hearing by the Agency's Mr. Chappel, as well as being more fully addressed by the Agency's post-hearing brief. Mr. Chappel explained that, while Part 809 does not define the term "authorized representative", that the Agency interprets the term consistent with its usage in other (unspecified) environmental regulations. This requires the

owner, in writing, to designate an individual to sign permit documents in its behalf, such individual to be 1) for a corporation, a person at the vice-president level, 2) for a partnership, one of the partners, and 3) for a municipality, one of the local officials (R. 46-47).

The Agency also argues that the Interchange Agreement, as applied to proposed special waste hauling, is insufficient to support the position urged by CCP. The Agency notes that the Interchange Agreement nowhere mentions that the vehicles might be used to haul either hazardous or non-hazardous waste. Additionally, the paragraph 5 indemnification is by its terms limited to "injuries to or death of any persons"; it does not speak to damages to property. The Agency asserts that to waive signature of the owner, thereby failing to require an "informed consent" to special waste hauling, could have detrimental effects on both the owner and the environment.

At hearing, the Agency posited the occurence of an accident in which a train derails, releasing chemical wastes into a creek with resulting damage to downstream property (R. 33-34). The Agency suggests that the trailer owner might then be subject to "potentially ruinous superfund type liability for the property damage. The Agency notes that the Illinois Environmental Protection Act (Act) holds the owner of a "facility" liable for costs incurred by the State in responding to a release or threatened release of a hazardous substance from that "facility". [Ill. Rev. Stat. Par. 1986 Supp., ch. 111 1/2, par. 1022.2(f)] The definition of "facility" is exceptionally broad and would possibly include a trailer. [Ill. Rev. Stat. 1986 Supp.,ch. 111 1/2, par. 1022.2(b)(1)].

On the other hand, the Agency argues, the state's efforts to recover clean-up costs could be hampered in the above situation, if owners are not specifically informed of their exposure to liability. The Agency notes, by way of example, that Section 22.2(j)(1)(c) of the Act contains a "third-party" defense to the cost-recovery liability discussed above. [Ill. Rev. Stat. 1986 Supp. ch. 111 1/2 par. 1022.2(J)(1)(c)]. If the owner of the vehicle is not informed of the vehicle use in special waste hauling, this defense becomes more plausible.

The Agency further disputes CCP's contention that the requirement to register a large fleet of trailers is an unusual burden upon the railroad industry. It states that large trucking companies register their entire fleet every year, remarking that the same fee is charged for registration of any number of vehicles; the Agency observes that the Pacific Intermountain Express Co. registers over 20,000 vehicles annually. The Agency further believes that little administrative burden would be imposed by requiring owner's signatures on permit applications,

given the fact that CCP and the owners enter into signed Interchange Agreements. The Agency suggests that:

> Both documents would easily fit within the same 6 1/2 x 11 envelope. If the owner is willing to have its trailers used for special waste hauling, signature of the permit would quickly occur and no delay in the processing of the permit or the Agreement would arise. In such case, no hardship at all would occur.

The Board finds that CCP has failed to prove that denial of variance would impose an arbitrary or unreasonable hardship, and variance will be denied. The primary deficiency in this case is CCP's failure to produce an adequate compliance plan. Variances are normally granted to allow a source time to come into compliance with rules as written. It is true that in some instances persons have filed petitions for variance simultaneously with petitions for rule change, the petition for rule change being the "compliance plan" in the variance proceeding. The Board has, on some occasions, granted variance relief of this type.

In this case CCP has not filed a petition for rule change, but has stated only that it intends to do so. The Board has previously held that mere intention to file a petition for site specific rule change is an insufficient compliance plan. See, e.g. Schrock v. IEPA, PCB 86-205, March 5, 1987 and cases cited therein on p. 8.

Moreover, the facts which have been presented in this specific case would not support grant of variance, even if CCP had filed a petition for rule change seeking relief substantially similar to that sought in this variance. CCP has not adequately responded to the Agency's concerns regarding use of removable placards. While it is not inconceivable that CCP could develop a factual record to, for example, demonstrate that a specific "inventory control"/employee supervision system to prevent misuse of placards would serve to accomplish the same ends as the permanent placard rule. Not only has CCP failed to do so here, CCP has failed to demonstrate why it would be necessary to remove a permanent placard once a special waste load has been removed from a trailer, since it is possible that any given trailer would again be loaded with special waste, given all trailers' general pattern of random movement.

Of even greater concern, however, is the record developed here concerning trailer owner's consent to and liability for hauling of special waste in their trailers. CCP has again failed to respond to Agency concerns in this regard, concerns which are shared by the board. The Board agrees that its existing Part 809 special waste hauling regulations did not specifically address

rail carriage of special waste in trailers, and the Opinion adopting those regulations did not reflect that the rail industry had introduced any concerns it may have had into the record of the regulatory proceeding. See, In The Matter of: Special Waste Hauling Regulations, R76-19, Opinion and Order of March 15, 1979. However, it is equally clear to the Board that the existing Interchange Agreement did not specifically address such carriage either, either in terms of consent to such carriage or allocation of liability for environmental accidents. While it is possible that the AAR Rules, which are incorporated into the Interchange Agreement but which were not provided to the Board, provide for this, the Board tends to be doubtful that they do on the basis of this record. Given the potential magnitude of the environmental risks and liability issues here involved, as well as the plain language of the documents presented to the Board, arguments here presented that CCP should be deemed to be an authorized representative of other rail carriers for these purposes are unpersuasive.*

CCP should not construe denial of this variance as precluding it from initiating a petition for rule change if it continues to believe that relief for rail carriers is necessary; the Act specifically contemplates regulatory adjustment where requirements are demonstrated to have unintended and disproportionate effects on one industry as opposed to another. In so stating, however, the Board in no way intends to imply that regulatory relief would be automatically granted without an adequate supporting record.

In the event that CCP determines to institute future proceedings concerning this subject matter, CCP would be advised to address the concerns expressed in this Opinion. Additionally, it would be prudent to address the issue of whether CCP qualifies for any of the exemptions contained in Section 809.211, and especially 809.211(g), as well as the inter-relationship between Part 809 and the Board's RCRA regulations codified at 35 Ill. Adm. Code Part 700 et seq.

Again, for all of the foregoing reasons, variance from 35 Ill. Adm. Code 809.203 and 809.401 is hereby denied.

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

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* While existing Parts 807 and 809 do not define "authorized representative", a definition which would codify the Agency's interpretation is pending in the Board's R84-17, Docket D proceeding.

ORDER

The Chicago Central and Pacific Railroad (CCP) is denied variance from 35 Ill. Adm. Code 809.203 and 609.401.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1965 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 concurs.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 30th day of August, 1967, by a vote of 6 0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board