

ILLINOIS POLLUTION CONTROL BOARD
May 12, 1977

DEL MONTE CORPORATION,)
)
) Petitioner,)
)
)
) v.) PCB 76-239
)
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) ENVIRONMENTAL PROTECTION AGENCY,)
)
) Respondent.)

ATTORNEY THOMAS J. IMMEL, BURDITT & CALKINS, APPEARED ON BEHALF OF PETITIONER;
ATTORNEY WILLIAM A. ERDMAN, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by Mr. Goodman):

On September 27, 1976, the Del Monte Corporation (Del Monte) filed its Petition appealing the denial of an operating permit by the Illinois Environmental Protection Agency (Agency) for Del Monte's facility known as Plant #115 in Rochelle, Illinois. Hearing was held in this matter on January 26, 1977.

Del Monte owns and operates a complex of facilities at Rochelle, Illinois, one of which is Plant #115 (Plant). The Plant is a can manufacturing facility whose operation includes the application of a liquid film of enamel to flat sheets of tin plate which are subsequently conveyed through baking ovens. The Plant utilizes five different types of enamels, with a maximum of two enamels being used at any one time due to the availability of two ovens. The Rochelle Rose Company, engaged in the commercial production of roses, is directly adjacent to the Del Monte Plant.

Del Monte alleges that the Agency has arbitrarily and capriciously denied Del Monte's operating permit application by its permit denial letter of August 27, 1976. In its denial letter the Agency stated that it had verified citizen complaints on file indicating that the equipment under consideration caused an odor nuisance beyond the Plant boundary of Del Monte, thus invoking Rule 205(f) of the Board's Air Pollution Rules and Regulations. Rule 205(f) limits

the emission of organic material to no more than 8 pounds per hour from any emission source if an odor nuisance exists. It is clear from the evidence that Del Monte cannot meet the 8 pounds per hour limit of 205(f) (R.38, Attachments 2-A through 6-A of Petitioner's Exhibit 1). There is no allegation that Del Monte uses photochemically reactive material. The issue is, therefore, whether the Agency could have reasonably determined that an odor nuisance existed at the Del Monte facility.

In determining the question of whether the Agency was correct in denying the operating permit application of Del Monte, the Board shall consider only the evidence before the Agency at the time the decision was made. Del Monte contends that, without an adjudication that a nuisance does indeed exist, the Agency may not invoke the limitations of Rule 205(f) as the basis for denial of a permit application. The Board does not agree. Under Section 39 of the Act it is the duty of the Agency to issue a permit upon proof that such issuance will not cause a violation of the Act or the Regulations. If the Agency can reasonably find from the facts before it that a particular Rule applies to the Petitioner, it must deny the permit application if the applicant cannot prove compliance with that Regulation. If the applicability of every Regulation to an individual source were to be adjudicated, total paralysis of the intent of the Act and the permit requirements would result.

Del Monte further alleges that, if indeed a nuisance does result from its emissions, it would be what is legally termed a "private" nuisance, over which the Agency and the Pollution Control Board have no jurisdiction. The Board is charged with the regulation and abatement of pollution in the State of Illinois. If the Board utilizes a legal term of art in its Regulations, this use does not invoke the legal connotations ascribed to such a term by the case law of the State of Illinois. The word "nuisance" in Rule 205(f) means what an ordinary person considers it to mean, and nothing more.

Before discussing whether the Agency properly determined that an odor nuisance existed, the Board notes that much of the record herein concerned a contention by Rochelle Rose that emissions from Del Monte caused considerable physical damage to its product. A September, 1975 letter from the Illinois Natural History Survey indicated that rose cane specimens submitted by Rochelle Rose were infected by fungi and were weakened. However, a subsequent investigation by the Illinois Department of Agriculture coupled with a hydrocarbon monitoring project conducted by the Agency in the City of Rochelle resulted in the conclusion that Del Monte could not be identified as the major contributor to the plant damage sustained by Rochelle Rose.

As to the alleged odor nuisance which formed the basis of the Agency's denial, on June 23, 1975 a report was submitted concerning the complaint of Rochelle Rose against Del Monte with regard to odors and damage to the rose crop from Del Monte's emissions. This report recommended that a warning letter be issued indicating the noncompliance status of the equipment in Del Monte's facility (Agency Record 356). In November, 1975, fifteen employees of the Rochelle Rose Company signed a complaint concerning the alleged odor (Agency Record 254).

Del Monte has been using modified solvents and enamels since May 1, 1976 (Agency Record 12). On May 17, 1976, the Agency calculated that the new solvents had caused a reduction in potential odor emissions by a factor of 9. This calculation was based upon the solvent composition of the old paints and their pound per hour usage compared to the new paints which replaced them (Agency Record 48). On July 16, 1976, another report by the Agency indicated only two of the old coatings were being used in 1976 and that the solvents for them had been changed. The report then purports to compare those two coatings, completely ignoring the quantities used, and reaches the conclusion, that the 1976 solvent may be more odorous than the 1974 solvents. The first report used known usages and merely substituted the new paints for the old paints. The second report ignores most of this data and merely compares the odorous properties of the solvents of two of the new coatings, totally disregarding amounts. The Agency contends that the second report is a "correction" of the first report. The Board cannot accept this "correction". The first report was done in an orderly manner using data requested from Del Monte by the Agency. There is no reason to believe that the results of the report of May 17, 1976 are not correct, and certainly the sketchy report of July 16, 1976 does absolutely nothing to refute the former report.

On August 3, 1976 the Agency interviewed the Rochelle Rose employee complainants. Although these complainants are referred to by the Agency as citizens, the more narrow classification of Rochelle Rose employees is appropriate. The record contains summaries of the interviews with the Rochelle Rose employees. A total of 27 people were interviewed, 24 of which stated that they were bothered by the emissions. The complainants generally stated that, while at work, they became sick, nauseated and sustained headaches from breathing the odors and emissions from the Del Monte Company. None had ever registered a prior complaint, although some said they had been suffering for many years. All insisted that they had been affected by the emissions in the last three months, apparently attempting to prove that the new type solvents did not correct the alleged problem, and most insisted that they had not been approached by the owners of Rochelle Rose to give any testimony.

During a prior citizens survey conducted January 14, 1976, the Agency interviewed nine citizens in residences located east of the Plant, the nearest home being about two city blocks away. The wind is predominantly west to east toward these residences. The report concluded that two of the nine acknowledged the presence of odors from Del Monte. The only odor identified, however, turned out to be the odor emitted during the canning of sweet corn in the summer. None of the nine citizens interviewed indicated any problems with odors from Del Monte. The Agency contends that none of the Rochelle Rose employees interviewed were influenced by their position with Rochelle Rose or by the owners of Rochelle Rose. On the other hand, it is the opinion of the Agency that all of the citizens who testified that they were not affected by Del Monte's emissions were either friends of Del Monte employees, or intimidated in some manner by Del Monte (Agency Record 156). The only complaints the Agency has ever recorded against Del Monte's emissions are the ones noted from the employees and the owners of Rochelle Rose Company.

The Board finds that the information supplied to the Agency from the employees of Rochelle Rose Company and the citizens in the area, surrounding the Del Monte facility should have resulted in further investigation of the alleged problem. Certainly the weight to be accorded the sudden deluge of complaints from workers in an industrial area, all of whom were employees of a single company which had admittedly been on bad terms with Del Monte, must be tempered by the fact that the Agency was unable to elicit a complaint from anyone else in the surrounding area. In addition, the fact that no complaints had ever been lodged against Del Monte except those by Rochelle Rose Company employees should have led the Agency to further investigate the situation in a somewhat more scientific manner. Based upon the record before us, the Board cannot find that Del Monte's emissions do not constitute an odor nuisance. The Board does find, however, that the information contained in the Agency record could not have reasonably led the Agency to the conclusion that Del Monte's emissions constituted an odor nuisance under Rule 205(f) of the Regulations. Since the Agency could not have reasonably found that an odor nuisance existed, it follows that Del Monte was in compliance with Rule 205(f) in that it had converted to non-photochemically reactive solvents in its process. Accordingly, the decision of the Agency denying Del Monte's permit application is hereby reversed.

One final secondary issue remains to be resolved. Del Monte has requested that the permit application, the record on appeal filed by the Environmental Protection Agency, and the Exhibits produced at the hearing be treated confidentially by the Pollution Control Board in accordance with Rule 107(e), Chapter 1, Procedural Rules of the Illinois Pollution Control Board (Procedural Rules) and Section 7.1 of the Environmental Protection Act (Act). Although only certain parts

of the material requested warrant such confidentially due to reference to proprietary information, the Board can find no prejudice to anyone if the request is granted. The Board shall therefore order the Petition herein, the record on appeal filed by the Environmental Protection Agency, and the Exhibits produced at the hearing to be marked "Not Subject to Disclosure" and held by the Clerk of the Board under Rule 107(c) of the Board's Procedural Rules.

This Opinion constitutes the findings of facts and conclusions of law of the Board in this matter.

ORDER

It is the Order of the Pollution Control Board that the Illinois Environmental Protection Agency's action of August 27, 1976, denying Del Monte Corporation's operating permit application, is reversed and that the Illinois Environmental Protection Agency issue a permit pursuant to said application.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 12th day of May, 1977 by a vote of 5-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board