ILLINOIS POLLUTION CONTROL BOARD
September 6, 1972

RICHARDSON CO.	)	
	)	
	)	
v.	)	##72-41,72-144
	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Mr. Douglas T. Moring, Assistant Attorney General, for Environmental Protection Agency

Mr. Alan Abrams, for the Richardson Co.

Opinion of the Board (by Mr. Currie):

Richardson applied to us for a variance to permit continued operation of its phenolic laminate plant in DeKalb until December, 1972 while completing an emission control program approved by our predecessor the Air Pollution Control Board. We granted the variance only until September 9 because of doubts as to whether the company should have accelerated the purchase of the last incineration equipment, required by the program, expressly inviting further proceedings in which if our doubts were answered the variance could be extended to December. Richardson Co. v. EPA, #72-41 (May 3, 1972). The Agency had in the meantime filed a complaint against the company alleging particulate violation (# 72-144), the company filed a request for extension of the variance, the two matters were consolidated, and a hearing was held.

The original compliance program contemplated installation of afterburners to reduce solvent and other emissions from phenolic laminate treaters. The first unit was installed but proved defective (see Stipulation, p. 4). The initial variance petition contemplated the rebuilding of the defective unit by July 1972, which has since been accomplished (id., p. 7), and the ordering of the remaining equipment in time for completion by the end of 1972 "if granted sufficient time." We indicated that this seemed to imply that Richardson was delaying in curing its pollution problems until it obtained a variance and made clear that this would be no excuse. We asked for an explanation of why the equipment was not ordered earlier.

The record does indicate that Richardson was motivated at least in part by the desire to get approval of continued operation before making the necessary commitments to clean up (R. 30). To the extent that such was the case, it does

not represent diligent action to abate pollution as rapidly as is practicable as the law requires. We appreciate the company's reluctance to spend substantial sums only to discover later that it must shut down its plant and make the expenditures in vain. But such a prospect misconceives what actually happens when variances are denied. The instances in which this Board has ordered going businesses closed for polluting are few indeed; the almost invariable practice, in the absence of a most considerable nuisance or health hazard or utter disregard of the law, is to leave the petitioner open to money penalties commensurate with the seriousness of the delay but to permit continued operation. See, e.g., Marquette Cement Mfg. Co. v. EPA, #70-23 (Jan. 6, 1971). We emphasize once more that we expect those who petition for variances approving deferred compliance to proceed posthaste, as many have done, see, e.g., A.E. Staley Mfg. Co. v. EPA, #71-174 (Sept. 30, 1971), to achieve compliance as soon as possible while their petition for variance is being considered.

We find, however, that in the present case the delay was to a significant extent mitigated by the company's legitimate concern that the bugs should be taken out of the first incinerator before substantial sums were committed for the purchase of more of the same equipment (R. 39-42). The timetable Richardson was following, moreover, was such as to achieve compliance, despite the delay, within the period approved by the predecessor Board. (See Exs. 7, 11). Finally, the remaining equipment was promptly ordered upon entry of our earlier order (R. 42). Under these facts we think no great purpose would be served by requiring the payment of a penalty for this relatively brief delay or by leaving the company open to a further prosecution on that account. The variance will therefore be extended to December 1972, the earliest date on which the program can now be completed (R. 51-52).

The Agency's complaint is based upon a different matter. Agency evidence brought out, and the company conceded, that the incinerators as presently designed will control emissions only from the curing ovens and not from other sources such as dip trays and recirculation tanks, from which the evidence is clear certain gaseous contaminants are emitted. (R. 18-19, 42-43, Ex. 28). The Agency asks us to require control of these sources as well. The company responds that from preliminary sniffing at vents on the roof it believes these emissions will not independently cause any odor problem but declares itself willing and able to connect these sources to the incinerators if a problem should be found to exist in the future (R. 42-43). Ascertaining whether or not there will be such a problem is complicated by the fact that the more obvious oven emissions have not yet all been brought under control.

The principal difficulty with the Agency's case is that the only violation charged is under the process weight table of Rule 3-3.111 of the old air regulations, which expressly applies only to particulate emissions. The evidence is that the only particulate emissions from the plant come from the curing ovens (Ex. 28), which are covered by the company's existing program. Emissions from the dip trays and re-circulating tanks, so far as the evidence shows, are entirely of gaseous solvents (id.) and therefore not covered by the rule in question. There was no allegation of statutory air pollution, and indeed no adequate proof that existing odors were caused even in part by these sources rather than by the ovens themselves (R. 21). But the basic principle that governs here is that the Agency may not allege one violation and prove another, for to do so deprives the respondent of the notice indispensable to a meaningful opportunity to defend. See EPA v. McHugh, Healy & Keeny Construction Co. & City of Chicago, (# 71-291)(May 17, 1972). We therefore find the EPA has failed to prove any violation it has alleged.

The evidence does establish, however, that there are possibly significant odor sources within the plant that are not being controlled by the present program, even though the original compliance program (See Ex. 3) did indicate an intention to deal with emissions from the "coating head and oven combination." We think it appropriate, therefore, to make it a condition of the variance that the intent of the original program be carried out insofar as is necessary to prevent an odor nuisance. If such a nuisance continues to exist as a result of other sources after the ovens are fully controlled, the company will be required to connect those sources expeditiously to the afterburners and to take any other steps necessary to eliminate the problem. Cf. Greenlee Foundries v. EPA, #70-33 (March 17, 1971).

ORDER

1. The complaint in #72-144 is hereby dismissed for want of proof of the violation alleged.

2. The variance granted to Richardson Co. (#72-41) May 3, 1972 is hereby extended to December 31, 1972, subject to all conditions of the order of May 3, 1972 and to the following additional condition:

3. In the event that an odor problem continues to exist after completion of the installation of afterburners on the curing ovens, Richardson shall expeditiously take such steps as are necessary and practicable to abate such problem, including the ducting of emissions from the dip trays and recirculating tanks to the afterburners.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion this 6th day of September, 1972, by a vote of 4-0.

Christan L Moffett