ILLINOIS POLLUTION CONTROL BOARD
June 27, 1972

YOUTH FOR ENVIRONMENTAL SALVATION	)	
	)	
v.	)	#71-254
	)	
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD	)	

MR. JOSEPH V. KARAGANIS, ON BEHALF OF YOUTH FOR ENVIRONMENTAL SALVATION
MR. DEAN M. TRAFELET, ON BEHALF OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD
MR. HAROLD H. WINER, ON BEHALF OF VILLAGE OF DEERFIELD

OPINION OF THE BOARD (BY MR. CURRIE):

This is a citizen complaint filed by Youth for Environmental Salvation (YES), charging the Milwaukee Road with violations of the regulations (APCB Rules and Regulations Governing the Control of **Air Pollution, Ch. 6**, Rules 6-6.2 and 6-6.5) respecting visible emissions from diesel locomotives. After prehearing conferences and a full day of hearing, the parties entered into a stipulation resolving all significant factual disputes. The railroad concedes that seven different locomotives on five distinct days emitted contaminants of more than the 30% opacity permitted by the regulation, and no contention is made that the emissions were within the sole exception, which is for "individual smoke puffs during acceleration". The railroad's defense is that it did everything it could be expected to do in an effort to reduce emissions. We are thus presented with two questions: the extent to which such a defense is recognized by the statute, and whether, if there is such a defense, the railroad has established it in this case.

First, it should be made clear that liability for pollution or for violation of the regulations does not depend upon affirmative proof of negligence. The statute simply makes it illegal to "cause or allow" pollution or to exceed standards set by the regulations. (Environmental Protection Act, §§ 9(a), 12(a).) As we held in an earlier decision respecting an accidental oil spill, the statute imposes an affirmative duty to keep offending quantities of contaminants out of the environment (Environmental Protection v. Valley Line, Inc., # 71-289, January 6, 1971). The present regulation, under the same sections of the statute, has the same effect. The statute recognizes that to require proof of negligence would greatly impede the enforcement process and fail to achieve the goals of the pollution control program. People who control such materials as cyanide, for example, simply must keep them where they will do no harm.

Recognizing that responsibility under the Environmental Protection Act is not generally based upon negligence, however, does not mean there can never be a defense based upon the unavoidability of an emission that exceeds prescribed limits. The statute provides that in determining what order to enter for a proved violation, the Board must consider the technological and economic practicability of compliance (§33 (c) (4)) and places the burden on the respondent to show, in light of technology and economics as contrasted with the harm done, that compliance would impose an arbitrary or unreasonable hardship (§31 (c)0. In framing regulations we are required to consider what can practicably by achieved (§27), and we have done so. See generally our opinions in ##R70-8, R71-14 and R71-23 (Effluent Standards, Water Quality Standards and Emission Standards). In individual cases, as indicated above, we are directed to entertain legitimate claims of impracticability, in recognition that general rules that are generally attainable may create undue hardships in particular circumstances. We are empowered to grant variances in such cases upon appropriate conditions. While many of the variances we have granted have involved simply an extension of time in which to achieve compliance, e.g., Illinois Power Co. v. EPA, #71-193 (November 11, 1971), cases are conceivable in which unusual conditions require an essentially permanent relaxation of a standard. The argument in the present case differs from both the above cases: It is that a standard that can now be met most of the time must necessarily be exceeded on occasion due to uncontrollable factors.

Our regulations, in several respects, recognize the legitimacy, within limits, of this kind of hardship claim. Both our emission standards for air contaminants from stationary sources (PCB Regs., Ch. 2, Rules 203, 204) and our effluent standards for water contaminants (PCB Regs., Ch. 3, Rules 201, 401) allow averaging of discharges in certain cases on the basis of normal fluctuations in the performance of control equipment even when properly operated an maintained. Related also are our provisions, in the above regulations, regarding breakdowns of control equipment (Ch. 2, Rule 105; Ch. 3, Rule 601). The water regulation requires anticipatory precautions to be taken to minimize the adverse effects of breakdowns; the air regulation goes so far as to permit continued operation despite the standards if a prior showing of need has been made. In the case of visible emissions from stationary sources, we have allowed a limited excursion beyond the standard for eight minutes in an hour, not more than three times daily, in reliance on testimony as to a variety of expectable and unavoidable circumstances (including startups and soot blowing) that make occasional excesses necessary (PCB Regs., Ch. 2, Rule 202; See opinion in #R71-23, Emission Standards, April 13, 1972). The policy behind such an exemption is that, once it has been determined that the harm done by such emissions is not so great as to justify shutting down the activity, there is nothing to be gained by penalizing people who have done all they can to minimize pollution. We see no reason why such proof could not be made in mitigation of a violation of a regulation absolute on its face, under the statutory provisions respecting arbitrary or unreasonable hardship and technical or economic feasibility.

We stress that the statute itself makes quite plain that the burden of proving an inability to comply is upon the respondent; if no such proof is made, responsibility is established on the basis of emissions exceeding the standard. Nor does our decision mean that the desirability of a regulation may be relitigated in every case; the strict statutory language requiring a showing of arbitrary or unreasonable hardship, coupled with explicity legislative history, negates any such conclusion. See the discussion in Environmental Protection Agency v. Lindgren Foundry Co., #70-1, (September 25, 1971). Moreover, the question of impracticability of compliance depends upon a balancing of the harm a violation causes against the costs of compliance. Thus, measures whose cost may be excessive to prevent minor visual annoyances may be entirely appropriate to avoid an extensive fish kill. If the risk is great enough and the threatened values sufficiently large, such measures might conceivably include an interdiction of the offending activity, at least in that location, depending upon the value of the activity and the availability of alternatives. Further, the degree of relief afforded on the basis of such proof may depend upon the circumstances. It may be appropriate in some cases to refrain from imposing money penalties for purposes of deterrence or punishment, while requiring the respondent to pay for aquatic life damaged (Environmental Protection Act, Section 42), or to clean up an accidental oil spill, on the ground that doing so is a legitimate cost of doing business.

Having examined the general principles governing defenses such as that made in this case, we turn to the undisputed facts. The railroad tells us that one smoky incident occurred because a locomotive, apparently in good condition when it began its journey, threw a rod enroute; that a second was attributable to cottonwood seeds clogging an air filter; and that the rest probably arose from wheel slippage that altered engine load conditions due to a track condition beyond the engineer's control (R. 97-98, 136-141, Ex. 10). We do not find this evidence sufficient to prove that the emissions could not practicably have been prevented. The railroad conceded that in the case of the thrown rod it had failed to conduct a regular 14-day inspection that might have revealed a water leak making such an accident likely. There is no evidence that some type of simple screening could not be devised at low cost to keep such gross items as cottonwood seeds from fouling the filters. There is no proof that the track conditions resulting in wheel slippage could not have practicably been corrected. The burden is on the railroad to prove these things; it has failed to do so.

We are asked by the complainant to impose a penalty of $500 for each day of offense. The railroad objects that this recommendation violates a procedural agreement as to timely notice of an earlier $200-per-day request was to be changed. We have no evidence as to the duration, volume or effect of the emissions in this case, and on the basis of our own experience with the type of emission here involved, we believe a penalty of $50 per incident is sufficient, for a total of $350. A smoky diesel locomotive is unpleasant but not devastating, and the

railroad's defense, while falling short of complete exculpation, does show no gross dereliction was responsible.

ORDER

1. The Chicago, Milwaukee, St. Paul & Pacific Railroad (Milwaukee Road) shall cease and desist from emissions in excess of those permitted by Chapter 6 of the Rules and Regulations Governing the Control of Air Pollution.

2. The Milwaukee Road shall, within 35 days after receipt of this order, pay to the State of Illinois the sum of $350.00 as a penalty for the violations found in the Board's opinion. Payment shall be made by check to the Environmental Protection Agency, Fiscal Services Division, 2200 Churchill Drive, Springfield, Illinois 62706.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion this 27th day of June, 1972, by a vote of 5-0. Christan L. Moffett