ILLINOIS POLLUTION CONTROL BOARD
March 24, 1983

CONTINENTAL GRAIN COMPANY, A Delaware corporation, Petitioner,	)	
v.	)	PCB 80-71
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

ROY M. HARSCH, MARTIN, CRAIG, CHESTER & SONNENSCHEIN, APPEARED ON BEHALF OF THE ENVIRONMENTAL PROTECTION AGENCY;

WILLIAM J. BARZANO, JR., ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE CONTINENTAL GRAIN COMPANY.

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

This matter comes before the Board upon an April 10, 1980 appeal of the Illinois Environmental Protection Agency's (Agency's) March 6, 1980 denial of Continental Grain Company's operating permit application. Hearing was held on February 22, 1983, at which both parties but no members of the public appeared. The only witnesses who appeared testified on behalf of Continental. The Agency relies upon the permit record filed in this matter.

The facts are undisputed. Continental owns and operates a grain elevator in Hennepin for which it requested an operating permit from the Agency on December 17, 1979. The Agency denied that permit application on March 6, 1980 on the basis that Rule 203(d)(8)(B)(iv)(c)(1) of Chapter 2: Air Pollution, might be violated.* Its reasoning was that the cited rule requires Continental to install pollution control equipment which is capable of providing particulate removal efficiency of not less than 90%.

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* The Board notes that both parties refer to Rule 203(d)(9) throughout the record. However, the proper rule is Rule 203(d)(8) and the Board views this simply as a mutual mistake. That the citation is incorrect is much less a comment upon the attorney's diligence than it is on the cumbersome structure of the present rule.

Continental, however, argues that it is exempt from the application of that rule pursuant to Rule 203(d)(8)(D) as an existing grain handling operation, and that the Agency's interpretation that Continental is a modified grain handling operation under Rule 203(d)(8)(F) which would require such removal is incorrect.

The applicability of Rule 203(d)(8)(F) turns on whether there has been an increase in annual grain through-put (AGT) of more than "30% of the annual grain through-put on which the operation's original construction and/or operating permit was granted."

Continental submitted information to the Agency which demonstrated that the AGT on which the original permit was based was not representative of normal conditions. The original AGT was indicated to be 5.0 million bushels per year, but Continental now contends that it should have been indicated as 8.58 million bushels per year. If that higher number were to be accepted, the December 17, 1979 application would not demonstrate any increase in the AGT, Continental would be exempt from the control equipment requirements of Rule 203(d)(8)(B)(iv)(c)(1), and the permit should have issued.

Pursuant to Rule 201, AGT is to be determined by adding grain receipts and shipments for the three previous fiscal years and dividing the total by 6, "unless otherwise shown by the owner or operator." The AGT indicated on the original permit was apparently derived through the averaging procedure. However, Continental now contends that it should have made the alternative showing. The Agency, on the other hand, essentially contends that Continental is bound by its 5.0 million bushel figure.

Richard Kobetz, a former Continental employee who now does some consulting work for them, testified that the 5 million figure "was based on the fiscal years '72, '73 and '74, during which time the elevator had undergone a boycott of truck traffic, because the truck dump platform that they had was too short" (R. 17). Based upon the AGT data shown in Continental Exhibit No. 2, which shows AGT figures for 1967-1979, he estimated that about 8.5 million bushels per year more accurately reflects the long term AGT (R. 21). He further testified that the original figures "were even further tainted...because of abnormally low grain production and soybean production" in at least one or two of the years used to develop the original AGT (R. 27-28).

Elmer Dransfelt, a retired Continental employer, reiterated the reasons for depressed shipments and receipts in the early seventies, but also pointed out that the construction of the J&L Steel Mill increased Continental's draw area (R. 58-61). The reason is that some truckers will reduce their grain hauling fee to the area when they would otherwise be making an empty run to pick up steel (R. 60). He also testified that a tug service which started in the middle seventies has allowed Continental to handle more grain (R. 71).

Those are the facts, and based on those facts the Board must determine whether Continental is bound by the AGT figure on the original permit or whether it can at this late date make an alternative showing, and if it can, whether these facts are sufficient to establish the higher AGT figure.

Rule 201 clearly allows the use of either of two alternative procedures for determining the AGT. The method chosen by Continental was in accordance with that rule, and the Agency granted the permit on the basis of a 5.0 million bushel AGT. Certainly the AGT figure could have had a significant impact on the Agency's permitting decision since the amount of particulates discharged bears a significant relationship to the AGT. Thus, the Board does not have any way of knowing whether the Agency would have granted the original permit if the 8 million figure were used, and if it would not have, Continental could not now be requesting its renewal. This reasoning is consistent with the language of Rule 203(d)(8)(F) which relates the increase in AGT, for purposes of determining whether the facility has been modified, to the figure upon which the original permit was based. To allow that number to be changed after the permit has expired makes little sense.

However, even if the Board were to hold that such a modification could be made, it could not find that Continental's alternative showing was sufficient. Mr. Kobetz based his AGT analysis in part on data which was not even available at the time of the original permit. Continental applied for the original permit on May 3, 1976 and yet Continental's Ex. No. 2 includes data through March 31, 1979. Clearly, data after 1976 must be disregarded in determining the AGT. Further, if that data is disregarded, it is difficult to justify the "estimate of what AGT might have been" as presented in the graph in that exhibit.

The evidence presented for using an alternative figure are not convincing in other respects as well. It is not particularly unusual that there are good crop years and poor crop years and yet Continental apperently discounts only bad crop years. The years of 1972-1974 (which include the "bad year" of 1974 and which are the years the original AGT was based upon) averaged 182.3 million bushels of corn and 20.5 million bushels of soybeans in the plant's draw area (the area from which it obtains shipments of grain). These compare to 1968-1976 averages of 193.0 million and 18.3 million bushels, respectively. The total corn and soybeans, therefore, averaged 202.8 million bushels during 1972-1974 and 211.3 during 1968-1976, a difference of less than 5%.

The effect of the "boycott" is unquantified, and probably unquantifiable in that the record suggests that the "boycott" was not so much an organized protest which shut down operations as it was a decrease in the number of truckers who were willing to wait the length of time which was necessary for unloading due to the short scale (R. 56-58). This view is further supported by the graph of the AGT's which shows a general decline in the

AGT until a longer scale was built followed by a dramatic increase thereafter.

The increase in scale size, perhaps aided by the construction of J&L Steel, appears to be the cause for increased AGT's in the mid to late seventies. However, these sorts of changes are precisely the reason for including the 30% limitation on exempt status under Rule 203(d)(8)(F).

The exemption for existing grain-handling operations from the control requirements of Rule 203(d)(8)(D) is to retain the status quo with respect to those operations which are controlling their emissions as effectively as possible with their existing equipment and which the Agency has no reason to believe are contributing to a pollution violation. This avoids the added expense of retrofitting the control equipment where that added cost appears unjustified in light of the environmental impact. However, if the equipment is modified in such a way as to reduce the cost of retrofitting, the balance of cost versus environmental impact shifts. A similar shift takes place when the AGT increases in that the environmental impact becomes greater. That is the reason for the 30% limitation of Rule 203(d)(8)(F).

When Continental enlarged its scale, the Agency apparently made the determination that such modification was not the sort of modification which reduced the cost of retrofitting. However, the evidence supports the view that such modification has led to an increase in the AGT of considerably greater than 30% and, therefore, has clearly increased the environmental impact.

Continental presented some evidence that the modification was made simply to keep customers that it had been losing (R. 65), but Mr. Dransfeldt admitted that they would not turn away new customers (R. 66), and regardless of intent, Continental's AGT for each year since the scale was enlarged has been at least 35% greater than any year prior to that time. (See Cont. Ex. 2).

The Board finds that Continental's increase in AGT resulted from a business decision to increase the amount of grain it was handling and that the increase was greater than 30%. Therefore, Continental no longer qualifies for the Rule 203(d)(8)(D) exemption and its permit application was properly denied.

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

ORDER

The Board affirms the Illinois Environmental Protection Agency's March 6, 1980 denial of an operating permit for Continental Grain Company's grain handling facility in Hennepin.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Opinion and Order was adopted on the 24th day of March, 1983 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board