

ILLINOIS POLLUTION CONTROL BOARD
June 16, 1988

SIMKINS INDUSTRIES, INC.)
)
 Petitioner,)
)
 v.) PCB 87-181
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

MESSRS. THOMAS M. GILLER AND ANDREW H. PERELLIS OF GESSLER, FLYNN, LASWELL, FLEISCHMANN, HUGHES & SOCOL, LTD., APPEARED ON BEHALF OF PETITIONER;

MR. JOSEPH R. PODLEWSKI, JR., APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board upon a request for variance filed on November 25, 1987 by Simkins Industries, Inc. ("Simkins"). Simkins requests variance from 35 Ill. Adm. Code 215.245 until May 31, 1989.

35 Ill. Adm. Code 215.245 was promulgated pursuant to the Board's final order in R85-21, Docket B (In the Matter of: Proposed Amendments to 35 Ill. Adm. Code 215: Flexographic and Rotogravure Printing, October 29, 1987). It provides in pertinent part that Flexographic and Rotogravure Printing operations which are located in non-attainment counties and which have aggregate uncontrolled emissions of volatile organic material ("VOM") greater than 100 tons per year comply with rules regarding Flexographic and Rotogravure Printing, as specified at 35 Ill. Adm. Code 215 Subpart P, by December 31, 1987. Prior to adoption of Section 215.245 Simkins was exempt from the requirements of Subpart P. Because Simkins filed the instant variance petition within twenty days of the effective date of Section 215.245, application of the rule is stayed as to Simkins pending a decision on the variance petition pursuant to Ill. Rev. Stat. ch. 111-1/2 par. 1038(b).

On February 1, 1988 the Illinois Environmental Protection Agency ("Agency") filed a recommendation that the requested relief be granted to March 31, 1989 subject to certain conditions. Hearing was held on March 16, 1988 and continued to

March 31, 1988¹ On the latter date a Stipulation of Facts (Joint Exhibit 1) was submitted by the parties. Briefs were filed by Simkins and the Agency on May 16, 1988 and May 19, 1988, respectively; Simkins filed a response brief on May 31, 1988.

Based on the record before it, the Board finds that Simkins would incur an arbitrary or unreasonable hardship, not justified by the environmental impact, if the requested relief were to be denied. Accordingly, the variance will be granted, subject to conditions.

BACKGROUND

Simkins is a closely-held Connecticut corporation with its Illinois facility located at 5701 West Ogden, Cicero, Cook County, Illinois. The Cicero facility has approximately 200 full-time employees and operates both rotogravure and lithographic printing presses. The lithographic operation produces no VOM emissions, and is not of concern in the instant matter.

Simkins' rotogravure printing operation consists of a single Champlain press which prints on paperboard. The end-products are folding cartons for consumer applications, including, but not limited to, pharmaceuticals, packaging, hardware, toys, and food packaging. Simkins characterizes its rotogravure printing as highly specialized, with individual production runs lasting two to three days, each with unique specifications and different ink formulations. The rotogravure press normally operates sixteen hours a day, five days a week.

Simkins discharges VOM to the atmosphere as a consequence of its rotogravure printing operation. The emissions are derived primarily from solvents contained in printing inks. Simkins calculates its annual VOM emissions rate to be approximately 350 tons per year based on ink purchases from the period July 1, 1985 through June 30, 1986 as corrected (R. at 44); Simkins contends that ink usage has not changed substantially since that time. An independent estimate of VOM emissions for the calendar year 1987 is 322 tons per year (R. at 43; Joint Ex. 1 at par. 9). All VOM emissions are currently uncontrolled and vented directly to the atmosphere (Id. at 8).

¹ The Transcripts of the two hearings have separately numbered pages. All citations to the transcripts herein (i.e., R. at ___) are to the transcript of March 31, 1988.

COMPLIANCE PLAN

At the time of hearing this matter Simkins had not yet made a selection among two compliance options considered to be viable by both Simkins and the Agency. These are substitution of VOM-inks with water-based inks and installation of VOM control equipment (R. at 43). Simkins asserts that both options are presently under study by Simkins' consultants, and that the information necessary to make an informed decision should be available shortly (R. at 54). Accordingly, Simkins stipulates that it will make a specific choice among the options on or before May 31, 1988² (Joint Ex. 1 at par. 26, 29(B)).

Simkins has been investigating the use of water-based inks, including conducting printing trials, for a period of approximately two to three years (Petition at par. 11; R. at 78-9). Simkins contends that complete conversion to water-based inks "may take more than a year" from the time the decision is made to comply via water-based inks, with the actual time dependent "on the frequency of repeat product orders" (R. at 49, 69).

Preliminary analysis by Simkins' consultants indicates that the most economical of the add-on control options is oxidation via either thermal or catalytic incineration (R. at 50). Simkins estimates that the time required to achieve operation of an incineration system is 54 weeks (R. at 53), although under cross-examination Simkins' consultant indicated that this time period "might be shortened a little bit" (R. at 63).

HARDSHIP AND ENVIRONMENTAL IMPACT

Simkins contends that it cannot come into immediate compliance via either the water-based ink or the add-on control options. Because ink usage on the Champlain press cannot be readily switched between water-based and VOM-based inks (R. at 81), it is necessary to identify a full spectrum of water-based inks in order to accomplish the switch from VOM-based inks; additionally, modifications must be made to the press itself (R. at 96).

² The Board notes that the May 31, 1988 date is now past. Although the record is silent as to whether Simkins has made its selection of compliance plans as proffered, the Board will accept that the selection has been made in the absence of evidence to the contrary.

Similarly, add-on control equipment requires design and construction time. Simkins also contends that the immediate necessity to incur an estimated \$400,000 to \$700,000 (R. at 57-8) in capital expenditures would impose an unreasonable financial hardship upon a facility which incurred an operating loss of nearly \$700,000 in the fiscal year ending September 30, 1987 (R. at 84; Joint Ex. 1 at par. 18).

The Agency, for its part, notes:

Immediate compliance with the substantive requirements of Section 215, Subpart P is simply not feasible. Water-based or low-VOM content inks which are both compatible with Simkins' rotogravure press and satisfy customer requirements have not yet been developed. With respect to VOM control equipment, the IEPA has stated as a matter of record in the rulemaking proceeding which led to adoption of Section 215.245 that "expeditious installation" of control equipment at affected facilities would take one year from the date that regulation was enacted. The Agency does not expect Simkins to be able to do in two months (November and December of 1987) what it reasonably expects will take one year.

The Agency agrees with Simkins that compliance with the VOM emission limitations of Section 215.401 will create an unreasonable hardship. Because existing water-based inks are not satisfactory and Simkins cannot realistically install and operate control equipment by December 31, 1987, its only compliance alternative is to shut down its rotogravure printing operations. A shut down of the rotogravure press would very likely result in a shut down of the entire plant, causing a temporary loss of 200 jobs and \$25 million in sales.

Agency Recommendation at par. 22-23.

Contrasting with hardship is the issue of environmental impact. The ozone monitor nearest to Simkins' facility is located at 1850 S. 51st Street in Cicero; no ozone excursions were recorded at this monitor during 1986, but two were recorded during 1987 (Joint Ex. 1 at par. 21). Nevertheless, given the large number of VOM sources in the Chicago area and the multiple exceedences of the ozone standard throughout the Chicago area during 1987, it is difficult to quantify Simkins' contribution to this environmental problem. However, Simkins' compliance program, if successful, will significantly reduce the amount of VOM emitted by its facility.

The parties contend that the requested relief can be granted consistent with the federal Clean Air Act (42 U.S.C.A. par. 7401 et seq., 1983), and that the variance should be approvable as part of the Illinois State Implementation Plan (Joint Ex. 1 at par. 24).

CONTESTED ISSUES

There remain two³ issues in dispute between the parties, both dealing with conditions of the requested variance. These are: (1) Simkins requests variance until May 31, 1989, whereas the Agency recommends variance until March 31, 1989; (2) Simkins requests that the Certification of Acceptance not be required, contrary to the Agency's recommendation.

On the matter of the termination date of the variance Simkins argues that it requires the additional two months based upon testimony from its witnesses thereto (R. at 44-54, 57, 71). Conversely, the Agency believes that Simkins can achieve compliance within the shorter timeframe, and, moreover, that it is desirable for Simkins to achieve compliance prior to onset of the 1989 ozone season (R. at 38).

While the Board agrees with the Agency that it is desirable that Simkins achieve compliance by the onset of the 1989 ozone season, the Board also finds merit in Simkins' contention that the Agency has not demonstrated that it is possible for Simkins to come into compliance in a shorter timeframe than that testified to by Simkins. Under these circumstances, the Board believes that the proper resolution is to terminate the variance consistent with the attested to compliance schedule.

On the matter of the Certification of Acceptance, Simkins contends, among other matters, that the Board has stricken similar conditions in other cases (citing Waste Management, Inc. v. IEPA, PCB 85-45 et al, 60 PCB 173 at 196-7; Illinois Power Co. v. IEPA, PCB 83-53, 55 PCB 13). Simkins badly mischaracterizes the Board action in the two cited cases; both deal with conditions within permits, and have little to do with the instant matter of variance. Contrary to Simkins apparent belief, the

³ A third issue of dispute unresolved at the time of hearing was resolved in the briefs. Namely, Simkins requests the insertion of the phrase "on an annual basis" within the proposed condition which limits, during the term of the variance, increase in annual emissions to no more than 20% above 1987 emission levels; the Agency agrees to this modification (Agency Brief at 15).

Certificate of Acceptance has been and continues to be a standard element in the conditions associated with grant of variance.

The Board believes that the Agency well capsulizes the necessity of inclusion of a Certification of Acceptance as a condition of grant of variance:

It is well settled law that a variance granted by the Board is not binding upon a variance petitioner until petitioner accepts the variance upon the terms imposed (Citizens Utilities Co. v. PCB, 9 Ill. App 3d 158, 289 N.E.2d 642 (1972); Flintkote Co. v. PCB, 53 Ill. App 3d 665, 368 N.E.2d 984 (1977)). Therefore, contrary to Simkins assertions, the Certification of Acceptance is not a mere restatement of its legal obligations should a variance be granted. Without the execution of the Certification of Acceptance, no legal obligations exist. It is only with the execution of the Certification of Acceptance and the resultant acceptance of the variance terms that legal obligations are created and the variance becomes binding.

Agency Brief at 16-17.

The Board would further note that it has experienced cases where, due to failure of a successful petitioner to identify that it had accepted the variance via submission of a Certification of Acceptance or other vehicle, substantial doubt arose as to whether a granted variance was in force. This condition has led to added litigation at the expense of petitioners, the Agency, and the Board. To rectify this circumstance, the Board has within recent times required as standard procedure that a successful petitioner not only submit the Certification of Acceptance, but that the submission be within a time certain. Failure to timely submit the Certification of Acceptance renders the grant of variance void.

CONCLUSION

The Board finds that Simkins would suffer an arbitrary or unreasonable hardship not justified by the environmental impact if denied the requested relief. Accordingly, the relief will be granted with conditions consistent with this Opinion.

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

ORDER

Petitioner, Simkins Industries, Inc., is hereby granted variance from 35 Ill. Adm. Code 215.245 for its facility located at 5701 W. Ogden Avenue, Cicero, Illinois, subject to the following conditions:

- 1) Variance expires on May 31, 1989, or when compliance with 35 Ill. Adm. Code 215.245 is achieved, whichever occurs first.
- 2) During the term of this variance, Petitioner shall submit quarterly written reports to the Agency detailing all progress made in achieving compliance with 35 Ill. Adm. Code 215, Subpart P at its plant located at 5701 West Ogden Avenue, Cicero. The first quarterly report shall be due thirty (30) days from the date of this Order. The quarterly reports shall include monthly VOM emission data from the Champlain rotogravure press. The first quarterly report shall also include copies of material data sheets showing the composition (in terms of percentage of solid, solvent, and water) of all inks used during the rotogravure printing process. The reports shall be submitted to the Agency at the following addresses:
 - (a) Manager, Permit Section
Division of Air Pollution Control
Illinois Environmental Protection Agency
1340 N. Ninth Street
Springfield, Illinois 62702
 - (b) Manager, Field Operations Section
Division of Air Pollution Control
Illinois Environmental Protection Agency
1701 S. First Avenue, Suite 600
Maywood, Illinois 60153
- 3) By May 31, 1988, Petitioner shall decide whether the installation of VOM control equipment will be necessary to achieve compliance with 35 Ill. Adm. Code 215, Subpart P. Notice of this decision shall be provided to the Agency in the next scheduled quarterly report.
- 4) No later than ninety (90) days prior to the initiation of construction of a VOM control system, Petitioner shall submit an application for a construction permit for that system in accordance with 35 Ill. Adm. Code 201.152. Construction shall not begin until a construction permit is issued. Operation of the emission control system is not allowed until an operating permit is issued by the Agency, pursuant to 35 Ill. Adm. Code 201.143.

- 5) Petitioner shall give thirty (30) days notice prior to the expected date of any stack test to the Agency's regional office and Emission Source Specialist at the address provided in Condition 2(b). The Agency's Emission Source Specialist shall be further notified within a minimum of five (5) working days of the exact date, time, and place of the these tests, to enable Agency to witness these tests.
- 6) During the period of this variance VOM emissions from rotogravure printing operations shall not increase more than 20%, on an annual basis, above 1987 levels.
- 7) Within 45 days of the date of this Order, Petitioner shall execute and forward to Joseph R. Podlewski, Jr., Enforcement Attorney, Illinois Environmental Protection Agency, 1701 S. First Avenue, Suite 600, Maywood, Illinois 60153, a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. The 45-day period shall be held in abeyance during any period that this matter is being appealed. Failure to execute and forward the Certificate within 45 days renders this variance void and of no force and effect as a shield against enforcement of rules from which variance was granted. The form of said Certification shall be as follows:

CERTIFICATION

I (We), _____, hereby accept and agree to be bound by all terms and conditions of the Order of the Pollution Control Board in PCB 87-181, June 16, 1988.

Petitioner

Authorized Agent

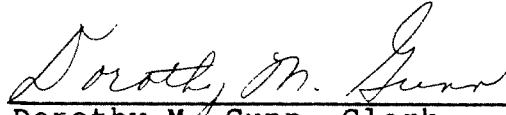
Title

Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 ch. 111¹/₂ 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.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 16th day of June, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board