ILLINOIS POLLUTION CONTROL BOARD
March 28, 1977

ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 74-455
UNITED STATES TOBACCO COMPANY, a New Jersey corporation, Respondent.	)	

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

This matter comes before the Board on the Complaint filed by the Environmental Protection Agency on December 4, 1974, charging that U. S. Tobacco Company owned and operated three coal-fired boilers from May 1, 1973 until December 4, 1974 without the requisite operating permits in violation of Rule 103(b)(2) of Chapter 2: Air Pollution Control Regulations and in further violation of Section 9(b) of the Environmental Protection Act.

At the hearing held on November 5, 1975, Mr. Ottoman D. Roeder, Vice-President of manufacturing for U. S. Tobacco, admitted that the boilers were operated during the relevant time frame without the requisite permits (R. 20, 21). Mr. William R. Quail, plant manager, stated U. S. Tobacco made a conscious decision not to obtain the requisite permits (R. 153). Mr. Anton M. Telford, an Agency engineer, detailed the Agency's action with regards to the permit applications and the reasons for the denials therefor (R. 86, 89). On the basis of the foregoing admissions and the accompanying testimony, the Board concludes that the violations were proven. Before deciding what remedy is appropriate, however, a discussion of the circumstances presented in this case is required.

For many years U. S. Tobacco has owned and operated a tobacco products manufacturing facility at 4325 West Fifth Avenue in Chicago. In 1971 Respondent's management decided to construct a new facility in Franklin Park and to phase out all operations at the Fifth Avenue plant. It was Respondent's belief that the new facility would be available in June 1973 (R. 172), and Respondent's timetables indicate the move should have been completed by December of 1973 (Resp. Exh. 4, 5). The

move did not take place as scheduled and in fact was not completed until March 17, 1975 (R. 142). Respondent did not offer any explanation for the delay. The Board notes that much of the move was completed sometime prior to March 1975. An Agency memo indicates that by September 18, 1974, all processing and manufacturing equipment had been moved to the new plant as well as 60% of the finishing and packing departments (Resp. Exh. #1B).

Respondent was required to have operating permits for its boiler on May 1, 1973. The Agency received Respondent's application therefor on March 30, 1973, and subsequently denied the permit on April 27, 1973. Although the denial letter does not specifically cite the regulation allegedly violated, a fair reading of the letter indicates that the denial occurred because of Respondent's failure to show compliance with the then applicable particulate emission standard, that being Rule 3-3.112 of the Air Pollution Control Board, which permits a maximum emission of 0.6 pounds of particulate per million BTU imput. Upon receiving the permit denial letter, Mr. Arthur I. Jacobson, Respondent's lead chemist, called the Agency and was informed that the permit was denied because of Respondent's failure to prove compliance with the existing particulate emission limitations (R. 191). Knowing that either additional data or control equipment was required, Respondent contacted some firms that conduct stack tests and manufacture control equipment (R. 192). Installation of a precipitator was estimated to cost upwards of $250,000, and the installation itself was expected to require more than a year's time (R. 192). In late 1974, 18 months after the permit was required, the Respondent also considered converting the boilers from being coal fired to either gas or oil fired (R. 197). This alternative was rejected because such a conversion was estimated to cost in excess of $100,000.00 (Resp. Exh. #14).

During an inspection of Respondent's power plant on January 23, 1975, a low draft dust collector was discovered to be in existence. With this type of equipment in place, Respondent's consulting engineer calculated that particulate emissions would be approximately 0.3 pounds per million BTU imput, well within the limitation set by 3-3.112. Manufacturing operations ceased in March 1975, but Respondent reapplied for a permit in September 1975 so that the boilers could be used to generate heat to prevent the facility's pipes and equipment from freezing in periods of cold weather. This permit application was denied by the Agency on the basis of Rule 203(g)(1)(A) of the Board's Air Rules and which had an effective date of May 30, 1975. Based upon the information supplied by the Respondent, the Agency's denial letter includes its assessment of Respondent's particulate emission rate

which was calculated to be 0.34 pounds per million BTU imput (Comp. Exh. #5). Respondent filed an appeal, PCB 75-480, of this permit denial based upon the application of Rule 203 (g)(1)(C). This appeal is still pending before the Board although the Board's adoption of all of Rule 203(g)(1) was vacated by the Supreme Court in Commonwealth Edison v. PCB, 62 Ill. 2d 494 (1976). Finally, subsequent to the hearing in this matter, Respondent disposed of all its interest in the Fifth Avenue facility.

Because Respondent no longer owns or operates this facility, the only determination that remains is how large a monetary penalty, if any, should be imposed. Under Section 31(c) of the Act it was the Respondent's obligation at the hearing, upon proof of the violation by the Agency, to show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship. The Board believes the aforementioned evidence introduced by Respondent indicates that the alternatives considered by Respondent to assure compliance with the particulate regulations would have placed a considerable hardship upon it. It must be remembered that this matter concerns only a permit violation, not an emission limitation violation, and there is no evidence to indicate that compliance with the permit requirement would have imposed either an arbitrary or unreasonable hardship. If Respondent believed that achieving compliance with the emission limitations would have imposed an unreasonable hardship upon it, Respondent should have filed for a variance from such requirements. Section 35 of the Act authorizes the Board to grant variances from regulations whenever a party can prove that compliance would impose an arbitrary or unreasonable hardship. By following this procedure, it would have been possible for Respondent to have operated with the requisite permits during the entire relevant time period. By following this procedure, the Board would have been permitted to consider all the relevant facts and circumstances before, not after, the violation occurred. In numerous opinions the Board has emphasized that the achievement of the State's environmental goals rests largely upon the maintenance of an effective permit system. If such a system is to become and remain effective, it is necessary that the Board encourage full compliance with its provisions in all cases, and this case is no exception.

In the assessment of a penalty the Board is required to consider the specific factors enumerated in Section 33(c) of the Act. In doing so, the Board finds that there has been no showing of environmental harm resulting from the violation. As discussed earlier, the injury that has occurred is that injury inherent in any violation of the permit system. Neither the

social nor economic value of the pollution source were ever seriously questioned by the Agency, and the Fifth Avenue facility was compatible with the area in which it was located. Finally, the Board finds that Respondent would have suffered considerable hardship if it had chosen to follow any of the alternatives it considered for emission reduction. The Board does not believe, however, that filing a variance petition would have placed such a hardship upon Respondent. The period of the violation extended much too long to be considered de minimus.

In view of all these considerations, the Board will assess $500.00 in this matter as an aid to the enforcement of the Act. This assessment should once again emphasize that the Board will insist on compliance with the permit requirements and restate that even strong mitigating circumstances herein do not outweigh the obligation to obtain a permit, given the variance provisions of the Act.

Finally, several motions remain yet to be decided. Respondent's Motion to Dismiss filed at the close of Complainant's case is hereby denied. The Board also denies Complainant's Motion for Witness Expenses incurred by the Agency in proving at hearing certain facts of which admissions were requested. The part of the Motion not ruled on by the Hearing Officer concerns a request upon which the Respondent had filed an objection. Although it was evidently overlooked by both parties, Rule 314(c) requires that a party making a request for admission must promptly seek a ruling from the Hearing Officer upon the propriety of the objection, if such a ruling is desired. This procedure allows the answering party an opportunity to respond to the request should the Hearing Officer rule against the objection. Any other procedure would unfairly jeopardize any answering party who files an objection. By failing to promptly seek a ruling, the Complainant did not preserve its right to request expenses at the hearing; a hearing held some five months after the answer was filed.

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

ORDER

1. Respondent, U. S. Tobacco, is found to have operated its coal-fired boilers without the requisite operating permits in violation of Rule 103(b)(2) of Chapter 2: Air Pollution Control Regulations, and in further violation of Section 9(b) of the Act and is hereby assessed a penalty of $500.00. Penalty payment by certified check or money order payable to the State of Illinois shall be made within 35 days of the date of this Order to: Fiscal Services Division, Illinois Environmental

Protection Agency, 2200 Churchill Road, Springfield, Illinois, 62706.

2. Respondent's Motion to Dismiss is hereby denied.

3. Complainant's Motion for Witness Expenses is hereby denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 28th day of March, 1977 by a vote of 5-0.

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