ILLINOIS POLLUTION CONTROL BOARD
September 15, 1976

INTERNATIONAL HARVESTER COMPANY, Petitioner,	)	
v.	)	PCB 75-271
ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

Mr. Alan I. Becker, Kirkland & Ellis, appeared on behalf of International Harvester Company;
Mr. Michael R. Berman, appeared on behalf of Intervenor Citizens For A Better Environment;
Mr. John Palincsar, appeared on behalf of the Illinois Environmental Protection Agency.

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

This matter comes before the Board upon Petition for Variance filed by International Harvester (Harvester) for its coke facilities located at its Wisconsin Steel Division Plant in Chicago, Illinois. On August 20, 1975, Citizens For A Better Environment (CBE) filed a Petition for Leave to Intervene, which was granted on September 5, 1975. Hearing was held herein on April 15, 1976, at which time Harvester filed an Amended Petition for Variance. On May 4, 1976, the Hearing Officer herein reinstated the September 12, 1975 Motion to Dismiss, and ordered that said Motion be taken by the Board with the case. The Board hereby denies CBE's September 12, 1975 Motion to Dismiss.

On May 10, 1976, a Stipulation of Facts between the Illinois Environmental Protection Agency (Agency) and Harvester was filed and the Agency's final recommendation in this matter was filed on June 1, 1976.

Harvester has previously been granted variance for these facilities in PCB 73-176, which variance was extended by the Board until July 26, 1975 in PCB 74-277. Harvester here seeks an extension of time to complete the installation of a pushing control system on coke battery #4 and to allow the retirement of coke battery #3. All

of the technical information appropriate to this request for variance is contained in the Opinions and Orders in PCB 73-176 and PCB 74-277 and will, therefore, not be recited here. Harvester has essentially complied with the Orders in the two previous variances and is expected to have its coke side shed installed and operative by August 31, 1976 (Exhibit B, Agency Amended Recommendation). Harvester plans to retire #3 coke battery by October 31, 1976 at the latest, which is some nine months in advance of the date envisioned in PCB 74-277. The Agency recommends that the petition be granted subject to certain conditions, including a program of coke oven door and jam maintenance as indicated in Exhibit D of the Agency Recommendation, compliance progress reports to be sent to the Agency, and the submission of a performance bond.

In general, the variance will be an extension of time to complete the program previously approved by the Board and to prevent unreasonable hardship to Petitioner. Considering the good faith efforts of Harvester to comply with the conditions of the previous variance and the continuing unreasonable hardship to the Petitioner should the variance petition be denied, the Board finds an extended variance to be appropriate in this case.

Variance from Rule 203(d)(6)(B)(ii)(bb) relative to coke pushing and quenching will be granted for battery #3 until October 31, 1976, or until the coke side shed for battery #4 becomes operational, or until the signing of a coke supply contract to replace the capacity of battery #3, whichever comes first. Variance from Rule 203(d)(6)(B)(ii)(bb) with regard to coke pushing and quenching for coke battery #4 will be granted until August 31, 1976 or until the enclosed pushing and quenching operation becomes operational, whichever comes first. Variance from Rule 203(d)(6)(B)(iv)(aa), concerning coke oven door and jamb emissions, will be granted until May 31, 1977 under the condition that the Agency-suggested coke oven door and jamb leakage maintenance program be instituted as indicated in Exhibit D of the Agency's Amended Recommendation. Variance from Rule 202(b) for coke battery #3 stacks will be granted during the term of the variance for coke pushing and quenching of that installation.

The Train Decision

Citizens for a Better Environment (CBE) is an Intervenor in this action and did not enter into the Stipulation of Facts submitted by the Agency and Harvester. CBE raises the question of the effect of the U. S. Supreme Court's decision in Train v. NRDC, 421 U.S.60 (1975), upon the State's power to grant variances under the Illinois Environmental Protection Act (Act). Specifically, CBE alleges that, because the date has passed for compliance with the Federal Clean Air Act for the type of emissions involved herein, the Board has no power to grant the requested variance. A variance in this case would, CBE contends, be a revision of the Illinois State Implementation Plan

(SIP), subject to the approval of the Administrator of the United States Environmental Protection Agency (U.S. EPA). CBE argues that because Harvester's plant contributes to the Chicago area's failure to meet the national ambient air quality standards for particulate matter, the Board is precluded by the Train (supra) decision from granting the variance. Indeed, CBE alleges that the Board is without power to grant any variance beyond the attainment date for national primary ambient air quality standards for particulate matter in the Chicago metropolitan area.

The Board finds that Harvester's emissions from the coke oven installations do contribute to the violation in the Chicago area of the national primary ambient air quality standards for particulate matter. Harvester's attempt to aggregate particulate readings for all sampling stations in the Cook County Illinois area in order to prove ambient air quality for the area approximate to Harvester's plant is rejected as being nonresponsive to the problem of ambient air quality.

Following the Train decision, in King-Seeley Co., Thermos Division v. EPA, 16 PCB 505, the Board stated:

> "The April 16, 1975 decision in Train v. N.R.D.C, 43 U.S.L.W. 4467 (U.S. April 16, 1975), gives us several tests which we will follow in all cases of variances from the Air Pollution Regulations. (Our authority to so act is clear under Sections 5(b), 5(c) and 26 of the Environmental Protection Act, Ill. Rev. Stat. Ch. 111-1/2, Sec. 5(b), 5(c), 26 (1975).
>
> As we interpret the Court's decision, we shall not, in essence, grant variances beyond July 31, 1975 which result in violations of the Primary Ambient Air Quality Standards adopted by the Board in R72-7, May 3, 1973."

The Board then went forward to state that a petition for variance would be deemed inadequate under Procedural Rule 401(c) unless the following showing were made:

1. Whether the ambient air quality of the area affected by the variance meets the Primary Ambient Air Quality Standards adopted by the Board;

2. If the emission source is contained within an area which does meet or exceed Ambient Air Quality Standards, that its emissions, alone or in conjunction with other sources, will not cause such a violation, or cause a failure to maintain the applicable standards;

3. If the emission source is contained within an area which does not currently meet or exceed Ambient Air Quality Standards, that its emissions, alone or in conjunction with other sources, do not cause or contribute to such a violation.

This policy has been generally followed by the Board up to the present time. Upon reconsideration of the situation, however, the Board hereby overturns its previous policy and interpretation of the impact of the Train decision upon the Board's power to grant variances under the Act.

When the Illinois General Assembly, in its wisdom, enacted the Environmental Protection Act, it included a provision under Title 19 which permits the Board to grant individual variances beyond the limitations prescribed in the Act. The individual variances are restricted to situations where the Board finds that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. Section 36 of the Act authorizes the Board to impose upon variances such conditions as the policies of the Act may require. The variance section of the Act has proven to be a very useful tool in the fight against pollution. The provision allows the Board to review individual situations and grant justified temporary exemptions from the Rules and Regulations, while, at the same time, it permits the Board to impose such conditions upon these exemptions as the policies of the Act may require.

The Board is a creature of State Law. Any act by the Board must necessarily be limited to state-wide authority and cannot be construed to affect federal law or authority. A variance granted by the Board under the Environmental Protection Act does not and cannot protect the recipient from federal actions under federal acts unless that variance is ratified by the federal government through the U.S. EPA. It is the opinion of the Board that the Supreme Court in the Train case (supra) acknowledged that situation by insisting that U.S. EPA endorse any variance granted by the state of Georgia in order for that variance to be implemented as a change in the State Implementation Plan and, therefore, act as a shield against federal prosecution under the Clean Air Act.

So far as the Board is aware, none of the variances from the Illinois Act and Regulations granted by the Board thus far have ever been submitted to or ratified by U.S. EPA as a change in the Illinois State Implementation Plan. It is thus apparent that any variance granted by this Board has been and is a variance from State Regulations only. By the same token, the Board can find no reason why it may not grant variances from its own regulations, as mandated in the Act, for local situations so long as it does not purport to grant variance from federal legislation or regulation. Under such a variance, a Petitioner would still be subject to enforcement action by U.S. EPA pursuant to Section 113 of the Clean Air Act and by citizens pursuant to Section 304 of the same Act.

The Board must nevertheless find adequate proof that denial of a variance would impose an arbitrary and unreasonable hardship. There can be no argument that achievement of ambient air quality as dictated by both the state and federal regulations must be of primary importance in any Board decision concerning a variance petition. In this case the Board finds that Harvester has followed a program of compliance under previous variances in a good faith manner and is therefore entitled, under the circumstances, to the requested extension in order to complete the aforementioned compliance program.

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

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that International Harvester Company be granted variance from Rule 202(b) and Rule 203(d)(6)(B)(ii)(bb) and Rule 203(d)(6)(B)(iv)(aa) with regard to their coke oven operations of the Wisconsin Steel Division Plant in Chicago, Illinois until October 31, 1976 with respect to pushing operations and July 31, 1977 with respect to door leakage under the following conditions:

1. Variance from Rule 203(d)(6)(B)(ii)(bb) with respect to battery #3 shall terminate in the event that a coke supply contract to replace the capacity of battery #3 is signed or the coke side shed for battery #4 becomes operational, prior to October 31, 1976.

2. Variance from Rule 203(d)(6)(B)(ii)(bb) with respect to coke battery #4 shall terminate in the event the coke side shed for said battery #4 becomes operational prior to August 31, 1976.

3. Harvester shall conduct a program of coke oven door and jamb maintenance to minimize emission as outlined in Exhibit D of the Agency's Amended Recommendation filed June 1, 1976, which Exhibit D is hereby incorporated by reference as if fully set forth herein.

4. Variance from Rule 202(b) with respect to coke battery #3 stacks shall terminate in the event the coke side battery for battery #4 becomes operational or until a coke supply contract is signed prior to October 31, 1976.

5. Harvester shall submit reports to the Agency indicating the progress of its final control program, said report to be sent to:

Illinois Environmental Protection Agency
Control Program Coordinator
2200 Churchill Road
Springfield, Illinois 62706

6. Harvester shall submit a performance bond to the Agency in a form acceptable to the Agency in the amount of $25,000.00 no later than 21 days from the date of this Order, said bond to be submitted to the Control Program Coordinator.

7. Harvester shall, within 21 days of the date of this Order, execute and forward to the address as shown above, a Certificate of Acceptance in the following form:

CERTIFICATION

I, (We), _____ having read the Order of the Illinois Pollution Control Board in case No. PCB 75-271, understand and accept said Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

_____
SIGNED

_____
TITLE

_____
DATE

Mr. Dumelle dissented.

Mr. Zeitlin concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 15th day of September 1976, by a vote of 4-1.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board