ILLINOIS POLLUTION CONTROL BOARD
October 14, 1976

ENVIRONMENTAL PROTECTION AGENCY, Complainant, v. GENERAL MOTORS CORPORATION, a Delaware corporation, Respondent; GENERAL MOTORS CORPORATION, a Delaware corporation, Petitioner, v. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 74-475 PCB 75-35 (CONSOLIDATED)

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

The Complaint in the Enforcement action here, PCB 74-475, was filed by the Environmental Protection Agency (Agency) on December 17, 1974. That Complaint alleged, in two counts, that Respondent General Motors Corporation (General Motors) operated three coal-fired boilers at its locomotive manufacuturing facility in McCook, Cook County, Illinois, without the requisite operating permits from the Agency, in violation of Rule 103(b)(2) of this Board's Air Pollution Regulations and Section 9(b) of the Environmental Protection Act (Act), and without a compliance program and project completion schedule approved by the Agency indicating compliance with the particulate limitations of Rule 203(g) of the Air Pollution Regulations, in violation of Rule 104(g) of the Air Pollution Regulations, and thereby in violation of Section 9(a) of the Act. Ill. Rev. Stat., Ch. 111-1/2, §§1009(a), 1009(b)(1975); Ill. PCB Regs., Ch. 2: Air Pollution, Rules 103(b)(2), 104(g), 203(g). (Although the docket does not indicate formal amendment, the Agency did note at a pre-hearing conference, (R.4), an indication to amend the alleged violation of Rule 104(g) to indicate an alleged violation of Rule 104(a).)

The Permit Appeal portion of this matter, PCB 75-35, was filed as a "Counter-Claim Requesting Review of Environmental Protection Agency Refusal to Issue Operating Permits" along with General Motors' Answer and Affirmative Defense to the Enforcement matter on Jan. 24, 1975. PCB 74-475 and PCB 75-35 were consolidated for hearing by order of the Hearing Officer on February 13, 1975. Although several pre-hearing conferences have been held, and the records thereof filed with the Board, no true public hearing has been held to date.

The Board has considered this matter several times previously, largely on procedural grounds, including several Motions for Stay or for continuances. Interim Orders were entered on:

January 9, 1975	January 8, 1976
March 13, 1975 (two Orders)	April 8, 1976
August 7, 1975	April 22, 1976
August 14, 1975	July 8, 1976
November 6, 1975	

The matter is now before the Board on a Motion for Judgement on the Pleadings, filed by General Motors on April 2, 1976. That Motion asks that both counts of the Enforcement matter, PCB 74-475, be summarily dismissed, and that the Permit Appeal, PCB 75-35, be decided summarily for General Motors. General Motors asks that the Board order the Agency to issue all appropriate permits for General Motors' operation of the boilers in question, instanter.

ARGUMENTS

The instant Motion by General Motors is based entirely on the Illinois Supreme Court's January 20, 1976 decision in Commonwealth Edison v. Pollution Control Board, 62 Ill.2d 494, 343 N.E.2d 459 (1976). In pertinent part, the Supreme Court there said that:

> ...*[W]e decline to determine the validity of Rules* 203(g)(1), 204(a)(1) and 204(c)(1)(A) on the basis of evidence adduced at hearings held in 1970, 1971 and 1972, and the Board's Opinion of April 13, 1972.
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> ...
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> ...Under these circumstances, the Judgement of the Appellate Court reversing the Board's adoption of Rules 203(g)(1) and 204(a)(1) and (c)(1)(A) is affirmed.
>
> For the reasons stated, the Judgement of the Appellate Court holding Rule 303 invalid is reversed, and its Judgement reversing the adoption of Rules 203(g)(1) and 204(a)(1) and (c)(1)(A) and remanding for further consideration is affirmed. Slip Opinion at 6, 7.

General Motors claims that Count II of the Complaint in PCB 74-475, alleging violation of Rule 204(a) must be dismissed, inasmuch as that Count is grounded on a failure of General Motors to have a compliance plan indicating timely compliance with Rule 203(g)(1). General Motors claims that Count I, alleging violation of the permit requirement, should be dismissed inasmuch as it, (a) had timely applied for the appropriate permits, and (b) those permits were denied by the Agency based only on a failure of General Motors to show that it could achieve compliance with Rule 203(g)(1). General Motors alleges that, as a matter of law, the Supreme Court's action with regard to Rule 203(g)(1) provides it a complete defense for each of the violations alleged in PCB 74-475.

Relying again on Commonwealth Edison, General Motors argues for Judgement on the Pleadings in the Permit Appeal, PCB 75-35, alleging that the Agency's refusal to grant the permits in question was based entirely on Rule 203(g)(1). General Motors argues that the Edison decision operates by rule of law to reinstate the previously applicable particulate limitation under the old Rules and Regulations of this Board's predecessor, the Illinois Air Pollution Control Board (APCB). General Motors further alleges that it is in compliance with the applicable APCB rule, Rule 3.112, and based on such compliance, a permit should issue forthwith by Order of this Board.

The Agency argues, on the contrary, that in refusing various permit applications by General Motors, it did only as it was required under then-applicable law. Following that reasoning, the Agency claims that its refusal to issue permits was a valid act, and that General Motors is culpable for any operation without a permit. The Agency argues that the Supreme Court's decision did not void the applicable rules ab initio, and that the Supreme Court's action in Edison does not preclude a Board finding of violation under the Complaint in PCB 74-475. Nor, the Agency argues, did the Edison decision affect in any way the permit requirement itself.

The Agency also raises with regard to the Permit Appeal (PCB 75-35), a factual issue as to whether the emissions from General Motors' facility are in compliance with either APCB Rule 3.112 or Rule 203(g)(1).

Finally, the parties have argued the basic issue of whether this Board is empowered to grant Judgement on the Pleadings. General Motors argues in its Motion, and in a later memorandum in support thereof, that the Board is so empowered under applicable portions of the Civil Practice Act of Illinois, which act is alleged to be applicable in the absence of any special statutory procedure. The Agency argues that issues of fact remain outstanding in this case, and that Judgement on the Pleadings cannot be granted, in either the Enforcement or Permit Appeal cases; these remaining facts are, (a) compliance with the existing emission standards (whether APCB Rule 3.112 or Rule 203(g)(1)), applicable to General Motors during the relevant period, and (b) the issue of the need for permits.

DISCUSSION

With regard to the Enforcement matter, PCB 74-475, the question which must be decided is: Where the Agency has denied a permit solely on the grounds of non-compliance with a Regulation later invalidated by the Supreme Court, citing no other reasons for a permit denial, does the Supreme Court's action provide a permit applicant a complete defense to an Enforcement action later brought for failure to have the permits applied for? The Board has previously stated that:

> Even if it was established that the permit was not issued solely on the basis that Winnetka had failed to comply with Rule 203(g)(1)(A), such fact would not constitute a defense but would be considered solely in mitigation. Winnetkans Interested in Protecting the Environment (WIPE) v. Village of Winnetka, PCB 75-363, _____ PCB _____ (Feb. 19, 1976).

Our opinion in this matter has not changed. Respondent's Motion here does not, as a matter of law, provide grounds for Judgement on the Pleadings based on the existence of a complete defense to the offense charged with regard to the permit violation.

With regard, however, to the remaining allegations as to violation of Rule 104(a), we have no applicable precedent. Rule 104 states that,

> a. PROHIBITION. No person shall cause or allow the operation of an emission source which is not in compliance with the standards or limitations set forth in Part II of this Chapter (after the date by which such emission source is required to have an Operating Permit pursuant to Rule 103) without a Compliance Program and a Project Completion Schedule approved by the Agency.

Essentially, an analysis of Edison as a complete defense with regard to Rule 104 is the same as that for the permit requirements. Respondent's argument in this regard is the same as that with regard to the operating permit requirement: (a) We are unable to have a compliance program and project completion schedule approved by the Agency because the Agency does not feel that our program and schedule indicates compliance with Rule 203(g)(1) by the applicable date; (b) the Supreme Court has invalidated Rule 203(g)(1) in the Edison case; (c) we cannot be held liable for a violation of Rule 104(a) under those circumstances.

We feel that the above quoted language from WIPE v. Winnetka, supra, is again applicable. As is true of the operating permit requirements, the compliance program and permit completion schedule requirements exist independently of the rules discussed by the Supreme Court in the Edison case. That being the case, Respondent has not stated grounds for Judgement on the Pleadings in its favor.

Although General Motors argues at length that this case may be distinguished from WIPE v. Winnetka on several grounds, we fail to see a distinction. First, General Motors' claim that it does not contest the necessity of operating permits generally, as it claims was the case in WIPE v. Winnetka, is not relevant here to Edison's status as a defense, complete or otherwise. Second, General Motors' argument that this case has no possible issues of fact remaining to be determined, unlike WIPE v. Winnetka where we said that, "[f]urthermore, the exact reason(s) the operating permit has not been issued, if in fact it has not, has yet to be determined," is unfounded; General Motors itself raises compliance with Rule 203(g)(1) and APCB Rule 3.112 as an issue.

In a later Interim Order in WIPE v. Winnetka (entered April 8, 1976), we further stated that,

> In situations of this nature, it seems fair and equitable for all parties concerned to allow for a resubmission of a permit application for Agency consideration hereof. The Board would be willing to entertain a Motion of Respondents staying these proceedings pending such a permit reconsideration.

We shall follow the same course of action in this case.

Turning to the Permit Appeal, PCB 75-35, we also find that Respondent's Motion for Judgement on the Pleadings cannot be granted, and that the proper course is submission of a new permit application by General Motors. General Motors argues at length that, under Edison, the particulate limitation applicable is that of APCB Rule 3.112, and further that its permit should be issued by this Board as a matter of law, inasmuch as General Motors complies with the limitations of that rule. Even assuming that that rule is found to be applicable in this situation, such compliance remains a contested issue of fact.

Beyond the existence of those fact issues, however, we find sua sponte that compliance with APCB Rule 3.112 is not properly an issue in this case, for proof at hearing or otherwise. Likewise, because Rule 203(g)(1) is no longer the test for issuance of permits under the Air Pollution Regulations, such compliance is not properly in issue in a Permit Appeal before this Board subsequent to the Edison decision. Our finding, in keeping with the above decision concerning Respondent's motions on PCB 74-475, is that this case must be dismissed as moot in light of Edison.

As was the case in WIPE v. Winnetka,

> When the Agency denied the permit in this case, it cited as grounds a regulation which then assured compliance with the Act, the Regulations and Ambient Air Quality Standards. Since that regulation has subsequently been held invalid, Respondent is not entitled to a permit without any further action on his part, but must resubmit an application with proof that the facility will comply with the provisions of the Act and any other regulations. (Interim Order, April 8, 1976.)

Inasmuch as APCB Rule 3.112 was not an issue before the Agency previously, compliance with that Rule does not provide the basis for a Permit Appeal before us. Such compliance should be raised if necessary in a future Permit Appeal.

INTERIM ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that:

1. Respondent's Motion for Judgement on the Pleadings be denied; and

2. Case No. PCB 75-35 be dismissed as moot.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Interim Opinion and Order were adopted on the 14th day of October, 1976, by a vote of 5-0.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board