

ILLINOIS POLLUTION CONTROL BOARD
May 15, 1975

OWENS-ILLINOIS, INC.,)
an Ohio Corporation,)
)
Petitioner,)
)
v.) PCB 75-7
)
ENVIRONMENTAL PROTECTION AGENCY,)
)
Respondent.)

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

This Variance case was commenced on January 6, 1975, by the filing of a "Petition to Extend Variance" by Owens-Illinois, Inc. (Owens-Illinois). This Petition relates to the Owens-Illinois Shabbona Sand Plant, located in Serena, LaSalle County, Illinois, and recites that it seeks extension of a Variance previously granted by the Board in Owens-Illinois, Inc. Shabbona Sand Plant v. EPA, PCB 73-237, 9 PCB 169 (1973). In support of this Petition, Owens-Illinois requests that the Board incorporate into this proceeding the record in the earlier matter.

First, the Board must note that the Petition in this matter is improperly titled. Although the Petition is styled as one to "Extend Variance", the relief sought here is not identical to that granted by the Board in the earlier case regarding Petitioner's Shabbona Sand Plant. In that case the Board granted a Variance until March 1, 1974, from Rule 3-3.111 of the Old Rules and Regulations Governing the Control of Air Pollution, and from Rules 104, 104(b), 114, 203(a) and 203(i)(2) of Chapter 2: Air Pollution of the Board's Rules and Regulations. 9 PCB at 172. On the other hand in Part 3, "Statement of Relief Sought" of the Variance Petition submitted in the instant case, Petitioner additionally seeks Variances from Section 9(a) and 9(b) of the Environmental Protection Act, and also from Rules 103(b)(2) and 208 of Chapter 2. Ill. Rev. Stat. Ch. 111 1/2, Sections 1009(a), 1009(b); PCB Regs., Ch. 2, Rules 103(b)(2), 208. It is obvious that Petitioner here seeks a much broader shield from enforcement than was granted in the earlier Petition. As will be discussed below, this fact alone would serve to render the Petition in this matter inadequate, and require its dismissal. But first, there are other issues raised here which merit our discussion and treatment.

The earlier Variance in this matter was granted with regard to an existing direct rotary dryer for sand drying at the Shabbona Sand Plant. Variance was granted to allow Petitioner sufficient opportunity to install, on the existing dryer, a W.W. Sly scrubber to control particulate emissions. Petitioner was to have installed the scrubber on its old dryer by March 1, 1974. As part of its Order in the earlier case the Board imposed upon Owens-Illinois several conditions regarding that proposed compliance plan:

a. Petitioner was to have submitted progress reports to the Agency on November 1, 1973 and January 1, 1974 regarding progress made towards completion of the compliance project.

b. Petitioner was to have applied for and obtained all necessary permits from the Agency.

c. Petitioner was to have executed an \$11,000 performance bond to insure the installation and operation of the wet scrubber.

d. Petitioner was to have performed, within 30 days after completing installation of the scrubber, a stack test, the results of which were to have been forwarded to the Agency.

Progress reports were in fact submitted to the Agency on September 26, 1973 and October 26, 1973. Petitioner complied with no other conditions of our earlier Order. In fact, Petitioner never did install a scrubber on its old dryer, as was envisioned in our earlier Order. Instead, Petitioner constructed and installed a new rotary dryer, which was to be ready for start up on January 1, 1975; Owens-Illinois now proposes to use the scrubber ordered as a part of its compliance plan under our previous Order in conjunction with this new dryer. By the terms of its own Petition, Owens-Illinois has failed to meet the conditions subject to which the prior Variance was granted. (We do not, however, here reach a decision on the merits as to Petitioner's liability under the earlier performance bond).

Owens-Illinois claims that these failures are the result of conditions beyond its control. Petitioner states that its wet scrubber was not delivered with all components and equipment until February, 1974; by that time, Petitioner had already elected to phase out the existing dryer, and contemplated that the new dryer would be in operation on or about August 1, 1974. Petitioner estimated that it could not have the scrubber completely operational on the old dryer until May 1, 1974. Petitioner further determined that as it had already ordered the new dryer, it would be required to begin dismantling the scrubber from the old dryer after only approximately 45 days of operation, in order to have it reinstalled on the new dryer by August 1, 1974. Petitioner thus determined that it would be uneconomical to complete the work required for compliance under our earlier Order, and did not do so.

Thereafter, Owens-Illinois experienced, according to the Petition in the instant case, considerable delay in the installation of its new dryer. Petitioner states that the new dryer was not to have been ready for start up until January 1, 1975, and would require two months for complete debugging and stack testing, so that it would not be fully operational until approximately March 1, 1975.

It is unclear in the instant Petition whether the new dryer has in fact become operational. The Petition states "that the new dryer will not be ready for start up until January 1, 1975", although the Petition itself was filed before the Board on January 6, 1975.

It is clear that by this Petition Owens-Illinois seeks a shield from enforcement for a period which has already passed. Petitioner delayed filing its Petition here for over nine months after the prior Variance had expired. Were the Board to grant this Variance, it would relate to a period already ended, and to a time more than a year past. We do not elect to grant such a shield.

In similar past cases, the Board has dismissed Variance Petitions for prior periods as moot. Owens-Illinois should be familiar with that fact. See, Owens-Illinois, Inc. v. EPA, PCB 70-31, 2 PCB 397 (1971) (supplementary opinion). See also, City of Highland v. EPA, PCB 71-181, 71-284 2 PCB 539 (1971); National Gypsum Co. v. EPA, PCB 71-99, 2 PCB 185 (1971) (The Board there stated: "therefore, notwithstanding the company's inexcusable delay in achieving compliance, a Variance is no longer necessary. We find the question of whether a Variance should be granted is now moot. Consequently we will dismiss the Petition.").

The question of mootness with regard to Variance for an expired period has been explored by this Board several times. A discussion of the issue is particularly apt where, as here, Petitioner seeks ~~immunity for past occurrences~~. The issue is properly described by Mr. Currie in a somewhat similar case: "We do not believe the case is moot in the technical sense, since a Variance grant today would immunize the company from any further prosecution for delay..." Midstate Foundry Co. v. EPA, PCB 70-53, 1 PCB 355 (1971) (Petition dismissed, by implication without prejudice).

The resolution of the problem was also reached by Mr. Currie, in two subsequent cases:

The period for which the Variance was requested has also expired, and there seems to be no present controversy as whether the late filing was justified. In the unlikely event an enforcement action is filed on the basis of...delay, we can consider the company's justification at that time. On the present facts the Petition is "dismissed as moot".

Babitrute Products Co. v. EPA, PCB 72-294, 5 PCB 643 (1972) (emphasis added). In an analogous case, when responding to a Motion to Withdraw Petition, Mr. Currie stated, "... the installation of the equipment leaves the company seeking nothing from the Board at this time. The opportunity will remain for either party to seek any relief that may seem appropriate in the future, through the filing of a Complaint, Petition for Variance, or otherwise." George E. Hoffman & Sons, Inc. v. EPA, PCB 71-204, 2 PCB 371 (1971) (emphasis added).

The analysis presented by those cases is applicable here. Petitioner Owens-Illinois has no need for Variance for its future operations, and has not demonstrated a need for one relating to past operations. On these grounds alone, we would dismiss the Petition. Further, Petitioner's unilateral decision, based on economic considerations, to ignore the conditions imposed by our prior Order would weigh heavily against the grant of a further Variance. The Environmental Protection Act requires a showing of progress as a condition for the grant of a Variance Extension, and it is difficult to determine whether Petitioner actively sought to achieve such progress during the now-past period for which it seeks a shield from enforcement. The Board has previously stated that a "Petitioner is not to conclude unilaterally that the conditions to a Variance are meaningless or unnecessary." Darling & Company v. EPA, PCB 75-18, April 10, 1975 (Opinion at 3).

Finally, returning to the problem we noted above regarding our treatment of this matter as a Petition for Variance Extension, we find that the Petition must also be dismissed for inadequacy on that basis. It is noted above, the instant Petition seeks considerably more protection than was granted in the earlier Variance. The instant Petition alleges as unreasonable hardship only the "install-dismantle-reinstall dilemma" described above with relation to the new and old dryers; the Petition does, however, make reference to the earlier record regarding the Shabbona Sand Plant. But that record, even when taken in conjunction with the instant Petition, certainly does not contain allegations of hardships sufficient on their face to justify the granting of a broader Variance protection, as is asked here. What is sought here is in reality a new Variance, with expanded coverage, based on the old hardship. That hardship would be insufficient, taken alone, to justify such an action by the Board.

No hearing was held in this matter. The Agency recommended that this Petition be either dismissed as moot or denied.

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

ORDER

IT IS THE ORDER of the Pollution Control Board that the Petition for Variance in this matter be dismissed without prejudice.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order of the Board were adopted on the 15th day of May, 1975 by a vote of 4 to 0.

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