NORFOLK AND WESTERN RAILWAY COMPANY)
)
v.) #PCB70-41
)
ENVIRONMENTAL PROTECTION AGENCY)

Opinion of the Board (by Mr. Currie):

The Norfolk and Western Railway Company ("N & W") operates a central locomotive and rolling stock maintenance shop facility at Decatur, Illinois. The facility includes twenty-nine (29) separate buildings served by a central heating plant composed of four (4) coal-fired boilers. The N & W filed a variance petition early in November, 1970 seeking permission to emit particulate matter in excess of regulation limits while converting to cleaner fuels. Since that document failed to indicate the exact time period for which the variance was sought, a supplemental petition was filed on November 30, 1970.

According to the petitions, the boilers together consume an average of 2,210,000 pounds of No. 10 Peabody Coal per month. The original petition states that there is a mechanical collector located above the combustion chamber with an efficiency of approximately 60%. The petitions as read together (hereinafter considered as one document) state that upon notification by the Illinois Environmental Protection Agency that the heating plant was being operated in violation of Rule 3-3.112[1] of the State's Rules and Regulations Governing the Control of Air Pollution, the N & W retained the services of an independent contractor to prepare recommendations relating to the conversion of the plant. A one-year variance was requested to allow these studies to progress and to arrange for and complete necessary work for the conversion of the plant in order to comply with the regulations. The petition went on to outline what the N & W considered would be the widespread and substantial effect of immediate enforcement of the air pollution laws and regulations on railway operations and employees as well as on the general public.

A public hearing was held in Decatur on January 22, 1970, and after a thorough review of the record, we are of the opinion that the request for a variance in this case should be denied for the reasons set forth below.

At the outset, we find that the petition itself is insufficient.

1. Rule 3-3.112 provides that the maximum allowable emission from any stack or plant shall be 0.6 pounds of particulates per million B.T.U. input.

It neither touches upon nor details the extent to which the community would be harmed by continued violations of particulate emission regulations by petitioner. The Procedural Rules of the Illinois Pollution Control Board clearly specify the essential elements of a variance petition. Rule 401 (a) (2) provides that the petition must contain ". . . a concise statement of why the petitioner believes that compliance with the provision from which variance is sought would impose an arbitrary or unreasonable hardship, including a description of the costs that compliance would impose on the petitioner and others and of the injury that the grant of the variance would impose on the public. . ." The petition here contained no allegation regarding harm to the community. Although we could forgive this omission and allow the pleadings to conform to the proof, no evidence whatsoever was offered at the hearing that the ultimate harm to the community was tolerable or excusable when balanced against the effect of a denial of the variance.

We recognize the importance of railway operations to the general welfare and economy of the region. We also appreciate the importance of the heating plant which serves the shops of petitioner at the hub of its regional operations. But section 37 of the Environmental Protection Act makes plain that the petitioner must prove that the pollution caused by its continued violation is not so great as to justify the hardship that immediate compliance would produce. We cannot determine whether or not the costs of compliance significantly outweigh the benefits as the statute requires, see Environmental Protection Agency v. Lindgren Foundry Co., #PCB70-1 (decided Sept. 25, 1970), unless we have some idea of what the benefits are. For all we know on the present record, the railroad's shops may be an unbearable nuisance and health hazard. The petitioner has clearly failed to meet its burden of proof.

More distressing, perhaps, than the insufficiency of the petition and than the failure of petitioner to meet its burden of proof, is the extent to which petitioner was completely oblivious of its legal obligations and unaware of the actual amount of particulate matter being poured into the air from its heating plant. The following exchange occurred at the hearing (R.110-112):

> HEARING OFFICER KLEIN: One point disturbs me, Mr, Sample. In considering the transcript of this case, the Pollution Control Board will want to know what the impact on the community would be of continued unabated emissions. I think that the best evidence of that goes towards the level and intensity of the emissions, and I don't think that we have had--
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> MR. SAMPLE: We frankly don't know. I mean, we are very truthful about this, we didn't think we were a pollution problem. . . We have not made a test of the particulate that is being emitted. We frankly don't know the amount. . .

HEARING OFFICER KLEIN: I take it, then, you are requesting a variance for a period of one year to continue emitting an amount of pollutants, the degree and intensity of which you do not know?

MR. SAMPLE: We don't know. I think what you are saying may be correct, but we are asking for a variance to install a new heating system, and we are willing to discard this old one. But as far as what we are discarding in the way of pollution, we don't know what it is. The Agency alleges that it's in violation and we are willing to accept that.

The particulate regulation which applies to petitioner's operations has been in effect since 1967. Petitioner has been running its facility at Decatur for longer than that. Yet petitioner blithely admits that it has no knowledge whatsoever of the quantity, amount, level, or degree of particulate discharges from its Decatur facility and is so ignorant of the extent to which it may be violating the law that it is willing to embark on a conversion project which may cost $500,000, on nothing more than the allegation of the Environmental Protection Agency. We think this a rather extraordinary way to run a railroad.

In our opinion it is time that those who engage in business operations in Illinois recognize that our pollution control laws and regulations must be complied with in the same way as must other laws respecting the transaction of business in this state. There is ample testimony in the record to show that the petitioner was well aware of the tax obligations which arise as a consequence of its business operations and we are certain that petitioner is equally apprised of relevant licensing restrictions, real estate and corporate law requirements and other measures regulating the transaction of petitioner's business in Illinois. We think the complete disregard for the air pollution laws shown by petitioner, and evidenced by its total lack of knowledge respecting the consequences of its operations on the community nearby, is inexcusable.

Since we have held that the petitioner has not made a sufficient case to justify the granting of the variance, there is no need for us to reach the issue of the effect of the untimely recommendation filed by the Agency in this case. In computing the time for the submission of documents herein, we construe the supplemental petition filed on November 30, 1970, as the initiation of the case. Rule 403 (a) of the Procedural Rules requires the Agency to file its recommendation within 21 days after the filing of the petition, but here the Agency filed its recommendation only on the day of the hearing.

The petitioner in a variance case is entitled to fair notice of the case it must meet and to sufficient time to prepare to meet issues

raised by the Agency. Furthermore, Section 38 of the Environmental Protection Act requires the Pollution Control Board to decide a variance case within 90 days after the filing of the petition or else the request may be deemed granted. The Norfolk and Western, in order to enable us to assemble a more adequate record, has waived application of the 90-day provision in this case. We have asked that the Act be amended in this area but, in the meantime, we urge the Agency to file its Recommendations more expeditiously in the future.

The Agency's recommendation, discussed above, was to grant the variance but only subject to certain conditions. We have denied the variance. We construe the Agency's request for a money penalty as a countercomplaint and schedule a hearing at which the Agency's enforcement case can be presented. Leave will be granted to the Environmental Protection Agency to amend the countercomplaint.

Our denial of the variance does not automatically shut the heating plant or force the halting of all related railroad activities by petitioner in the region. We do not order the railroad to do or not to do anything. We simply refuse on the present record to give the railroad protection against an enforcement action for violation of the air pollution laws. At the hearing on the enforcement action, the railroad may attempt, as a defense, to prove the same matters put forth unsuccessfully in the variance case. In any event, the petitioner would be well advised to move ahead toward compliance with the law as rapidly as possible. Whatever the reasons may be for three years of inaction, there is no longer any semblance of an excuse for further delay. The Company should be aware that this Board will not take kindly to any attempt to use the importance of railroad operations as an excuse for callous disregard of the pollution laws.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The Board, having considered the transcript and exhibits in this proceeding, hereby enters the following order:

1. The petition of the Norfolk and Western Railway Company for a Variance is hereby denied;

2. A hearing will be held on the Agency's countercomplaint for money penalties Friday, April 2, 1971, in Decatur, Illinois at a location to be designated;

3. Leave is hereby granted to the Environmental Protection Agency to amend said countercomplaint.

I, Regina E. Ryan, certify that the Board adopted the above opinion and order this ____ day of _____, 1971.

REGINA E. RYAN
Clerk of the Board