

ILLINOIS POLLUTION CONTROL  
March 28, 1991

AMERICAN STEEL CONTAINER )  
COMPANY, DRUM SHOP, )  
 )  
Petitioner, )  
 )  
v. ) PCB 87-91  
 ) (Variance)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

ERICA TINA HELFER APPEARED ON BEHALF OF PETITIONER.

WILLIAM D. INGERSOLL APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on a second amended petition for variance filed October 5, 1987 by petitioner American Steel Container Company, Drum Shop (American) seeking a variance from 35 Ill. Adm. Code 215.204, 215.211 and 215.212 until June of 1991. On November 30, 1987 the Agency issued its recommendation of denial of the variance. Hearing was held September 12, 1990 in Chicago, Illinois at which no members of the public attended.

**BACKGROUND**

The facts of this case have been addressed in detail in prior Board opinions dealing with variance requests for the same operations involved here.<sup>1</sup> (PCB 83-114; PCB 83-115; PCB 86-22 and 86-23 (consolidated).) Those facts will not be reiterated here except when necessary. It is sufficient to note that American manufactures new fifty-five gallon steel drums and reconditions thirty and fifty-five gallon steel drums at its facility located at 4445 West Fifth Avenue, Chicago, Illinois. American coats the exterior of all drums and coats the interior of approximately 50% of the drums. (Tr. 12.) American has two operation lines; one is an interior line which sprays and coats the interior of the drums and one is an exterior line which paints the exterior of the drums, whether new or reconditioned. (Tr. 45.) Both lines have their own spray booth and bake oven. (Tr. 43-44.)

American has been unable to comply with the Board's regulation limitation on volatile organic material (VOM) emissions and

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<sup>1</sup> We note that since the Board's last opinion, American has closed its Pail Shop. (TR. at 40-14.)

received its first variance on August 2, 1984 which expired on December 31, 1985. On April 16, 1987, the Board granted American a variance extension based, in part, on "the 'promising' nature of the compliance plan proposed" for the same operations which are the subject of the instant variance. (PCB 86-22 and 86-23 (consolidated).) However, because of problems of compliance with certain conditions imposed in the variance, American never executed the certificate of acceptance of this variance. (Sec. Am. Pet. at 3.) American sought a modification of the variance and on June 25, 1987, the Board entered an order construing the request for modification as a new variance and ordering American to file a new petition with an appropriate compliance plan. The second amended variance petition which is the subject of the instant action was filed on October 7, 1987. The hearing was continued on the basis that the parties were engaged in settlement negotiations. On July 19, 1990, the Board ordered the case to proceed to hearing. Hearing was held on September 12, 1990. Testimony at hearing and the parties' post-hearing briefs establish that American's variance request and compliance plan have changed significantly from that proposed in the second amended petition, although American still seeks a variance from the VOM emissions regulation. With this in mind we turn to the merits.

#### PRELIMINARY ISSUE

On December 4, 1987, the Agency filed with the hearing officer a motion to compel American to comply with certain discovery requests seeking information on American's financial status from 1982 through 1987. American objected to the discovery as being overbroad, harassing and irrelevant alleging that its financial status was not at issue. On December 24, 1987, the hearing officer found that American's second amended petition raised the financial aspect of its business, that the Agency was entitled to most of the information sought and ordered American to provide responses to all but two of the interrogatories posed. By order entered July 19, 1990, the Board set this matter for hearing and directed American to comply with the hearing officer's discovery order.

As a result of American's continued failure to comply, the discovery issue was addressed at hearing. The Agency argued that such evidence is relevant to the issue of arbitrary and unreasonable hardship. American argued that it did not intend to present evidence of financial hardship and, therefore, it did not have to comply with the discovery orders. (Tr. 5-9.) The hearing officer referred the matter to the Board. In its post-hearing brief, the Agency asks that the matter be dismissed for American's failure to comply with the discovery orders. (Resp. Brief at 7-8.) American did not ask leave of the Board to respond to the Agency's request for dismissal.

35 Ill. Adm. Code 101.280(5) provides that "[i]f a party...

unreasonably refuses to comply with any ... order entered by the Board or hearing officer, the Board will order sanctions. ... the sanctions may include ... that the proceeding be dismissed with or without prejudice." Here, American chose to ignore both the hearing officer's order and the Board's order directing American to comply with discovery based upon American's own determination that such evidence was irrelevant. A party may not decide on its own what information is relevant or irrelevant and, having concluded that such evidence is irrelevant, refuse to comply with Board and hearing officer orders directing compliance with discovery. Therefore, we agree with the Agency that the proper sanction for American's failure to comply with discovery as ordered by the Board and the hearing officer is dismissal with prejudice of the second amended variance petition.<sup>2</sup> (See, Fredette v. Village of Beecher, PCB 89-61 (March 22, 1990).)

However, in the interest of administrative economy, the Board will address the substantive merits of American's variance request.

#### COMPLIANCE PLAN

Coating of the exteriors of the barrels is limited to 3.5 lb VOM/gal of coating material and coating of the interiors is limited to 4.3 lb VOM/gal. (35 Ill. Adm. Code 215.204(j)(1)(3).) American has a long history of investigating methods of compliance with the VOM emissions limitations; its first variance was granted in 1984. At one time, American proposed to vent fumes from the spray booths and the exterior and interior ovens to the drum incinerator. (PCB 86-22 and 86-23 (consolidated).) However, this plan was not implemented because it posed a potential fire hazard. (Tr. 27.) American has also explored the use of powder coatings, electrostatic application, water-based coatings, use of methylene chloride and after burners as means of attaining compliance. (Tr. 18-20, 49-51.) These alternatives have been rejected as being economically unreasonable, technically infeasible and for failure to meet customer specifications.

In October of 1987, American began investigating the feasibility of a thermal oxidizer to attain compliance. American consulted with the Agency as to whether thermal oxidization was a viable compliance method. (Tr. 33.) On March 21, 1989, American submitted an application for a construction permit for the thermal oxidizer. (Resp. Ex. 2; Tr. 36, 55.) On June 22, 1989, the Agency issued American a construction permit. (Resp. Ex. 3; Tr. 56.) In May of 1990, American purchased the thermal oxidizer. (Tr. 30, 37.) American's president, Mark Spitz, testified that he expected

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In the context of a variance proceeding, dismissal with prejudice means that petitioner may not file a petition for variance covering the same time period for which variance is sought in the instant petition.

the installation of the oxidizer to be complete by January of 1991. (Tr. 38; Resp. Ex. 1.) Spitz also testified that American had taken other measures designed to reduce emissions. (Tr. 40-41.) In addition to closing its Pail Shop in January of 1989, American has pursued more of the unlined drum business and has "shied away from going toward more of the lined business." (Tr. 40-41.)

Hence, after prolonged attempts at implementing a method of compliance, American has finally chosen thermal oxidization as a means of attaining compliance with the VOM emissions limitations. While the record establishes that the Agency has issued a construction permit for the thermal oxidizer, American presented no expert testimony demonstrating that the oxidizer will achieve compliance with the VOM emissions limitations. (Tr. 39, 65.)

#### HARDSHIP

Although at hearing American testified that it seeks a variance until mid-March of 1991, in its brief American requests a variance until June of 1991 to allow time after installation of the oxidizer to obtain operating permits. (Tr. 40; Pet. Brief at 13.) American argues that, considering that it "has undertaken, out of necessity due to the failure of any other means of achieving compliance, to expend the requisite funds to achieve compliance in perhaps the most expensive way, it is only just that [it] be granted the time to complete the project." (Pet. Brief. at 9.) According to American, denial of its variance request would impose an arbitrary and unreasonable hardship particularly "in light of the fact that [American] has diligently and in good faith over the years made every effort to comply with existing VOC regulations." (Pet. Brief at 10.)

The Agency argues that American has failed to make the requisite showing of arbitrary or unreasonable hardship. Harish Narayan, a field engineer for the Agency's air pollution division, testified that he is familiar with the thermal oxidizer equipment and that such equipment has been available "for a long, long time." (Tr. 85-86.) According to the Agency, "[American] was required to comply with the VOM limitations no later than December 31, 1983 and that "[a] more than seven-year delay without any showing of financial inability to install readily available afterburner technology is inexcusable."

While immediate compliance with the VOM regulation might impose a hardship on American, we do not find that hardship to be either arbitrary or unreasonable. The Agency established that the method of compliance finally implemented by American has been available for many years. American chose not to present any evidence of its financial situation which would enable the Board to find that only recently has the purchase of such equipment become an economically reasonable method of attaining compliance for American. American has been out of compliance since 1983.

While the Board granted a variance in 1984 which expired in 1985, American did not accept the variance granted it by the Board in 1986. Based upon the record, the Board finds that American has failed to present adequate proof that immediate compliance with the VOM emissions limitations would impose an arbitrary or unreasonable hardship on American.

#### **ENVIRONMENTAL IMPACT**

American asserts that its VOM emissions have a "minimal effect" on the ability of the state to attain National Ambient Air Quality Standards (NAAQS) for ozone." (Sec. Am. Pet. at 3.) While American's second amended petition incorporates its post-hearing brief and the Board's prior opinion issued in the previous variance (PCB 86-22 and PCB 86-23 (consolidated)), American makes no affirmative assertion that the emission rates are the same. American testified that it had not performed any environmental assessment of the impact of its emissions on the Chicago area or its immediate neighborhood. (Tr. 71.)

The Agency asks that the Board to reevaluate its determination in PCB 86-22 and 86-23 that American's showing of minimal adverse environmental impact was adequate. In the Board's April 16, 1987 opinion, it rejected American's attempt to prove minimal environmental effect by a comparison of its emissions to the emissions of mobile source emissions in the six county non-attainment area. (PCB 86-22 and PCB 86-23 (consolidated) at 14-15.) However, based upon the emissions data submitted and the acknowledgment that determining the contribution of any one source to ozone exceedance in a general area is difficult, the Board found that American's environmental showing was adequate.

American has failed to submit such emissions data in the instant case or to adequately tie-in the previously submitted data to this case. Therefore, the Board cannot conclude as it did in the previous matter that American's environmental showing is adequate.

#### **CONSISTENCY WITH FEDERAL LAW**

35 Ill. Adm. Code 104.122(a) requires that all petitions for variance from the Board's air pollution regulations indicate whether the grant of variance would be consistent with the Clean Air Act. American's second amended petition makes no such statement, nor does its post-hearing brief address this issue. The Agency, however, argues that the instant variance cannot be granted consistent with the Clean Air Act. The Agency bases this argument on the recently adopted Federal Implementation Plan (FIP). 55 Fed. Reg. 26814 (June 29, 1990.) American plans to install add-on equipment (ie., the thermal oxidizer) to control its exterior coating line emissions and, pursuant to 35 Ill. Adm. Code 215.207, offset against uncontrolled emissions from the interior line.

According to the Agency, "[t]his type of offset may have been allowable under Section 215.207 at the time the construction permit was granted on June 22, 1989, but it will not be allowed under the FIP." (Resp. Brief at 6.) The FIP disapproves Section 215.207 for inclusion in the Illinois State Implementation Plan (SIP). 55 Fed. Reg. 26847 (June 29, 1990).) Additionally, the Agency states that the FIP will not allow emissions-averaging across separate coating lines. 55 Fed. Reg. 26869-70 (June 29, 1990).) Consequently, the Agency argues that the variance requested by American cannot be granted consistent with federal law.

#### CONCLUSION

Based upon the foregoing, the Board concludes that the second amended petition is dismissed for American's failure to comply with discovery. Additionally, in the interest of administrative economy, the Board has reached the merits of this case and concludes that American has failed to present adequate proof that immediate compliance with the Board's VOM regulation would result in the imposition of arbitrary or unreasonable hardship. Furthermore, American has failed to demonstrate compliance with federal law. Therefore, American's variance request is hereby denied.


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

IT IS SO ORDERED.

J.D. Dumelle concurs.

Section 41 of the Environmental Protection Act provides for appeal of final Board Orders within 35 days. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041) The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 28<sup>th</sup> day of March, 1991 by a vote of 7-0.

  
 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board