ILLINOIS POLLUTION CONTROL BOARD
December 17, 1987

GENERAL TIRE, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 86-224
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

MESSERS JEFFREY C. FORT AND DANIEL F. O'CONNELL OF MARTIN, CRAIG, CHESTER AND SONNENSCHEIN APPEARED ON BEHALF OF PETITIONER; AND

MS. BOBELLA GLATZ APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board upon a Petition for Variance filed December 30, 1986, by General Tire, Inc. ("General Tire"). On January 8, 1987, the Board received an objection from the Illinois Environmental Protection Agency ("Agency"). The Board issued a "more information" order on January 8, 1987. A citizen's objection was filed with the Board on January 21, 1987. On February 6, 1987, General Tire filed an Amendment to Petition for Variance.

In its amended petition, General Tire failed to respond to that portion of the Board's "more information" order that directed General Tire to "explain the rationale for extending compliance with 35 Ill. Adm. Code Sections 215.462 and 215.465(b) until December 31, 1991, when the compliance option has not yet been selected". General Tire amended its compliance date to December 31, 1989, without further comment (Amend. Pet. p. 3). On February 19, 1987, the Board accepted the matter for hearing.

The amended petition requests: (1) a one-year variance from the December 31, 1986 Compliance Plan submittal requirement of 35 Ill. Adm. Code Section 215.466(b); and (2) a two-year variance from 35 Ill. Adm. Code Sections 215.462 and 215.465(b) (Tr. 132). The Agency filed its Recommendation ("Rec.") in this case on April 8, 1987, recommending that General Tire's request for variance relief be denied. Hearing was held in this matter on July 16, 1987 in Mt. Vernon, Illinois. Post-Hearing Briefs were filed by General Tire on September 4, 1987 ("Br. 1") and by the Agency on October 14, 1987 ("Br. 2"). A Reply Brief was filed by General Tire on October 23, 1987 ("Br. 3").

On September 8, 1987, the Board was advised that General Tire is a wholly-owned subsidiary of GenCorp, Inc. General Tire also informed the Board that GenCorp, Inc. has entered into a stock purchase agreement with Continental Gummi-Werke, A.G. and G.T. Acquisition Corporation to sell all of its shares of General Tire (which represents all of the shares of General Tire) in a transaction which is scheduled to be closed on or before November 1, 1987 (Letter from Daniel F. O'Connell, filed on September 8, 1987).

For the reasons developed below, including General Tire's failure to state a compliance plan and General Tire's failure to provide adequate proof that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship, the Board denies the requested relief.

BACKGROUND

General Tire owns and operates a tire manufacturing plant in Mt. Vernon, Illinois, Jefferson County (Tr. 132). Production of the tires is accomplished through the compounding and mixing of raw materials to produce an extruded rubber stock which is then built through a number of individual processes into the form of a green tire. The green tire has the general form of a finished automobile or truck tire but does not exhibit the tread details or sidewall details of the finished tire. The green tire is coated and placed in a mold which transforms the green tire into the finished product. The molded tire is buffed and subjected to a number of quality control checks before being stored in the warehouse at the facility (Tr. 136-141).

The subject of the variance petition deals with the spraying of green tires prior to the molding process. The plant uses 4 green tire spray booths which are semi-automatic. Green tires are placed in each booth manually at a rate of 202 tires per hour, a rate which is equivalent to a production of 19,392 tires per day. Once the tires are placed in the booth, they are automatically turned and sprayed both inside and out with a tire lubricant material. Each tire is sprayed with an estimated 55 grams of an organic-based outside lubricant designated as C-261, which does not comply with Section 215.462 (Tr. 131). The primary purpose of this lubricant is to assist in bleeding off the air from inside the tire molding presses during the molding process (Tr. 140). This lubricant (C-261) is the subject of the variance petition before the Board.

TESTIMONY OF JOHN B. JUSTICE

In its Post-Hearing Brief, General Tire argues that the Board should disregard the limited testimony of the Agency's one witness because his identity and the subject matter of his testimony was withheld in violation of the Hearing Officer's

discovery order, and because it is not relevant to the issues in this proceeding. In the alternative, General Tire argues that the Board should find that his testimony supports a grant of a variance. General Tire also argues that the Agency has unfairly contended "that General Tire should be required to convert its operations to a water-based outside lubricant without first testing the available lubricants to see if they will produce an acceptable tire" (Br. 1, p. 38).

General Tire has misstated the claim of the Agency. What the Agency contends is stated in its response to interrogatories in which it states that:

> The Agency does contend that it is unreasonable for General Tire to test water-based outside lubricants before committing to a compliance plan. 1) General Tire's own plant in North Carolina uses water-based outside lubricants, and the company, therefore, has experience with these lubricants. 2) Water-based outside lubricants are currently in use at other tire manufacturing plants in Illinois. (Letter from Bobella Glatz/IEPA to Dan O'Connell, filed with the Board on 7/15/87.)

Mr. Justice is the regional manager for the Division of Air pollution Control with the Agency office located in Collinsville, Illinois. He is familiar with the General Tire manufacturing facility at Mt. Vernon, Illinois, based on inspections he made for approximately 12 years as a district engineer (Tr. 208-09). He was not presented by the Agency as an expert witness, but simply as a person who has visited and observed another tire manufacturing plant in Illinois (Tr. 212).

At the hearing, General Tire objected to allowing Mr. Justice to testify on the basis that: (1) his testimony is not relevant; (2) his testimony exceeds the Agency Recommendation which did not make an issue of any other facilities; and (3) the Hearing Officer's Discovery Order required that all expert witnesses be disclosed and Mr. Justice was not disclosed prior to hearing (Tr. 211). General Tire also objected on the basis of surprise since there was no indication in the Agency Recommendation or any of the answers to discovery about experience in other plants that would be relevant to this proceeding (Tr. 213 and 215). The hearing officer expressed concern about presenting the Board with something less than expert testimony with regard to the issue of whether or not the water-based outside lubricant system can be used by General Tire's Mt. Vernon facility (Tr. 214). But he did allow Mr. Justice to testify (Tr. 215 and 216).

The Board finds the admission of Mr. Justice's testimony proper. The testimony is relevant because it goes to the issue of hardship, i.e., the availability of alternative compliance plans and efforts made by General Tire to investigate for such alternatives. As pointed out to General Tire at the hearing, the testimony does not exceed the Agency Recommendation. In the Recommendation, the Agency states one reason for denial of variance is that "the water-based lubricants are currently used at other similar facilities" (Rec., p. 12). General Tire's third basis for objection is irrelevant since Mr. Justice did not testify as an expert witness. Clearly, the Agency had previously raised, as a factual issue, the matter about which Mr. Justice subsequently testified. Therefore, there was no surprise.

During the testimony by Mr. Justice, the hearing officer sustained the hearsay objection as to the commercial availability of the beehive rack (Tr. 221). The reason for sustaining the objection was the hearing officer's belief that the Agency "could have brought somebody in that could, perhaps, testify to that directly" (Tr. 221). The Agency made an offer of proof (Tr. 222). The Board finds that denying admission of this information over a hearsay objection was improper since it is "evidence which is material, relevant, and would be relied upon by reasonably prudent persons in the conduct of serious affairs" (35 Ill. Adm. Code Section 103.204(a)). The Board recognizes that the hearing officer had discretion on whether to allow this testimony into evidence, but still finds that the hearing officer should have done so.

Another argument made by General Tire is that if the Board chooses to consider Mr. Justice's testimony, that the Board should find that his testimony supports a grant of a variance. The Board finds that the testimony of Mr. Justice goes to the issue of hardship, not to the issue of whether General Tire will be able to successfully convert its outside spraying operations to a water-based lubricant. Therefore, the Board finds his testimony does not support the grant of a variance.

The final contention of General Tire is that the Board should remand this proceeding if it finds that the testimony of Mr. Justice is proper because the hearing officer improperly limited General Tire's attempts to impeach Mr. Justice (Br. 1, p. 43). The Board disagrees with this contention. As stated by the hearing officer, even though Mr. Justice's testimony is admissible, the Board will determine what weight to give his testimony (Tr. 232). General Tire was given ample opportunity to cross-examine Mr. Justice for the purpose of allowing the Board to determine what weight to attribute to his testimony (Tr. 224-254). The limitation imposed by the hearing officer was in response to cross-examination by General Tire designed to prove that Mr. Justice was not an expert witness. Since Mr. Justice was not claiming to testify as an expert, the Board finds that

General Tire was not improperly limited by the hearing officer during its cross-examination of Mr. Justice. Therefore, General Tire's request for a remand is denied.

COMPLIANCE PLAN

It is axiomatic that a variance does not grant permanent relief from compliance with a regulatory requirement. One necessary aspect of a variance petition is that it describe how and when the facility will come into compliance. This concept is articulated at 35 Ill. Adm. Code 104.121(f):

> A detailed description of the existing and proposed equipment or proposed method of control to be undertaken to achieve full compliance with the Act and regulations, including a time schedule for the implementation of all phases of the control program from initiation of design to program completion and the estimated costs involved for each phase and the total cost to achieve compliance.

General Tire's petition for variance requests relief for a one-year period from December 31, 1986 Compliance Plan submittal requirement of 35 Ill. Adm. Code Section 215.466(b) and for a two-year period from the requirements of the regulations pertaining to Green Tire Spraying operations (35 Ill. Adm. Code Sections 215.462 and 215.465(b)). The proposed method of compliance is to file a compliance plan by December 31, 1987. As stated by Mr. James B. Rippy of General Tire, "General Tire is testing water-based outside lubricants to determine if it could use these in its regular tire production. When General Tire obtains the results of these tests this fall, it will decide how to bring its outside spraying operation into compliance" (Tr. 131-132).

At hearing, General Tire presented evidence on three methods that could be employed to secure compliance. The three methods are as follows:

1. Eliminate the use of a solvent-based outside lubricant in its tire manufacturing process by substituting a water-based outside lubricant in accordance with Section 215.462;

2. File a request with the Board for site-specific regulatory relief to allow General Tire to install a catalytic incinerator on its existing collection system, which does not meet the 90

percent capture requirement of Section 215.462(a)(1); or

3. Install a catalytic incinerator and two(2) Ilmberger spray booths to meet the capture and destruction efficiency requirements of Section 215.462.

General Tire began experimenting with water-based outside lubricants in the early 1970s (Tr. 68). General Tire's objective was to eliminate the use of petroleum-based solvents to avoid problems with possible oil shortages and to reduce possible worker exposure (Tr. 68). In March, 1986, General Tire concluded that it could not achieve compliance by the December 31, 1987 deadline in the Board's rules with the water-based outside lubricant option (Tr. 176). Therefore, at that time, General Tire began development of an incinerator control system (Tr. 176). The final engineering report on the Ilmberger spray booths/incineration system (identified above as Method No. 3) was received in November, 1986 (Tr. 179). General Tire concluded that "the cost of complying by this means was totally unreasonable" (Tr. 181). Therefore, General Tire "decided to undertake a test of water-based lubricants on actual production tires at the plant" (Tr. 181).

On December 30, 1986, General Tire initiated this variance proceeding to obtain time to "aggressively pursue the use of a water-based outside lubricant to achieve compliance" (Petition for Variance (hereinafter "Pet."), p. 7) and to develop a compliance plan by December 31, 1987.

In the Petition for Variance and at hearing, General Tire made it clear that the chances for successfully using a water-based outside lubricant were minimal. At hearing on July 16, 1987, General Tire testified that it planned to run tests on water-based lubricants beginning in August of 1987 (Tr. 181). Also at hearing, General Tire's expert witness on water-based outside lubricants was asked by General Tire's counsel if he anticipated that there would be a significant danger of an unacceptably high rate of anomalies. His response was that "[b]ased on past data, I predict it" (Tr. 122).

In its Petition for Variance, General Tire has agreed to "diligently investigate the utilization of a water-based outside lubricant" (Pet., p. 9). But as already indicated, it did not offer a compliance plan. At hearing, General Tire has again promised to test the use of water-based outside lubricants, but it is clearly not committed to the use of such lubricants as a means to obtain compliance. In fact, General Tire has retained the right to decide that a water-based outside lubricant is not an acceptable alternative to the use of the organic-based outside lubricant currently being used. Therefore, the Board finds that

since General Tire is not committed to Method No. 1, then Method No. 1 is not a compliance plan. Retaining the right not to perform in accordance with Method No. 1, the history of extensive testing done by General Tire, the timing of events, and General Tire's own witnesses' testimony convinces the Board that Method No. 1 is not an acceptable compliance plan.

With regard to Method No. 2, the Board has repeatedly held that in the context of a variance proceeding, an "intention" to file for site-specific relief does not represent a compliance plan justifying long-term variance relief. Modine Manufacturing v. IEPA, PCB 79-112, August 18, 1982; Modine Manufacturing v. IEPA, PCB 85-59, May 16, 1985; Borden Chemical v. IEPA, PCB 82-82, December 5, 1985. Consequently, General Tire's "possible intention" to file a site-specific regulatory proposal does not represent a compliance plan to support a multi-year variance.

With regard to Method No. 3, it is clear that General Tire has not committed itself to this method as its compliance plan. In fact, in General Tire's Post-Hearing Brief, General Tire states that it could agree to install Method No. 3 (Br. 1, p. 32). But then it states that it could choose (because of the cost of the Ilmberger System) to request the Board to adopt a site-specific rule, i.e., Method No. 2 (Br. 1, p . 33). Thus, it is clear, based on testimony at hearing and from General Tire's Post-Hearing and Reply Briefs, that General Tire considers the cost for Method No. 3 to be economically unreasonable (Br. 1, p. 27). For these reasons, although General Tire presented a lot of evidence regarding the description and cost of Method No. 3, the Board finds that General Tire is not committed to Method No. 3 as an alternative compliance plan to water-based outside lubricants. The Board makes no finding as to whether or not sufficient evidence has been presented regarding the accuracy of the cost estimate for Method No. 3, which was challenged by the Agency. Therefore, the Board makes no finding as to whether or not Method No. 3 is economically unreasonable.

The Board has previously held that contemplation of a proposal for regulatory relief does not constitute a compliance plan (Citizens Utilities Company of Illinois v. EPA, PCB 85-95, April 10, 1986; City of Mendota v. Illinois Environmental Protection Agency, PCB 85-182, July 11, 1986). Since General Tire has not committed itself to any of the three (3) methods for compliance presented at hearing, the Board finds that General Tire has not presented a compliance plan. Therefore, the Board is not able to grant variance relief in this case, where the relief is not conditioned upon identification of and commitment to a compliance plan.

HARDSHIP

Section 35 of the Environmental Protection Act ("Act")

grants authority to the Board to grant a variance whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. Ill.Rev.Stat. 1985, ch. 111-1/2, par. 1035. Section 37 of the Act places the burden of proof on the person seeking a variance.

The standard for granting a variance regarding the issue of hardship was reviewed in City of Mendota v. Pollution Control Board and IEPA, No. 3-86-0549, Third District, Slip. Op., October 1, 1987 (hereinafter "Mendota II"). The Mendota II court stated that:

> In granting or denying a variance the Board must balance individual hardship against environmental impact (Monsanto Co. v. Pollution Control Bd., (1977), 67 Ill.2d 276, 367 N.E.2d 684.) To this end the Board requires that one who seeks a variance provide:
>
> > "An assessment, with supporting factual information, of the environmental impact that the variance will impose on human, plant, and animal life in the affected area, including, where applicable, data describing the existing air and water quality which the discharge may affect;" 35 Ill. Adm. Code Section 104.121(g).
>
> Id. at p. 7

In addition, the Board requires that one who seeks a variance also provide:

1. A discussion of the availability of alternate methods of compliance, the extent that such methods were studied, and the comparative factors leading to the selection of the control program proposed to achieve compliance. 35 Ill. Adm. Code Section 104.121(i)

2. A concise factual statement of the reasons the petitioner believes that compliance with the particular provisions of the regulations or Board Order would impose an arbitrary or unreasonable hardship. 35 Ill. Adm. Code Section 104.121(k)

The outside lubricant used in General Tire's operations contain volatile organic material (VOM). Four individual spray booths discharge through a common exhaust duct (Ex. 1).

In General Tire's Post-Hearing Brief, it is stated that "General Tire's emissions do not interfere with the maintenance of ambient air quality standards" (Br. 1, p. 30). General Tire also points out that Jefferson County has always been designated attainment for ozone (Br. 1, p. 29) and there has not been a monitored air quality violation in Jefferson County in the last five years (Br. 1, p. 30). This argument is insufficient. General Tire has not complied with the requirement of an assessment of the environmental impact that a variance would impose on human, plant, and animal life in the affected area. If a variance is not granted and General Tire complied with Sections 215.462 and 215.465(b), General Tire has testified that VOM emissions would be reduced from its plant by 170 tons during the 7-month ozone season (Tr. 183-84). This is based on VOM emissions for 1986 of 360 T/y. Based on projected 1987 VOM emissions or the projected maximum of 455 T/y, the reduction during the 7-month ozone season would be 193 tons and 215 tons, respectively. General Tire failed to present an environmental assessment on the effect that 215 tons of VOM emissions would have on human, plant, and animal life in the affected area during the 7-month ozone season. Since General Tire has not presented such assessment, it has failed to meet its burden as established by Section 104.121(g).

With regard to the availability of alternate methods of compliance, the Agency contends that General Tire did not present documentation of a thorough investigation (Br. 2, p. 5). The Agency also contends that insufficient information was presented by General Tire to determine that the fully automatic Ilmberger Spray Booth/Incineration System (Method No. 3) was required to achieve compliance with the Board's regulations (Br. 2, p. 5). The Agency points out that no testing information or calculations were presented to support General Tire's assertion that the present capture efficiency is only 35-50 percent. Also, no information was presented as to which spray booths General Tire investigated, and why it rejected all but the Ilmberger System (Br. 2, p. 5). In addition, the Agency claims that less costly approaches, such as the High Thermal Recovery Systems, as well as the Combined Carbon Adsorption Afterburner System, are available (Br. 2, p. 5).

General Tire counters the above claims of the Agency by pointing out that there is absolutely no evidence in the record regarding the High Thermal Recovery Systems or the Combined Carbon Adsorption Afterburner System (Br. 3, pp. 5-6). General Tire also claims that the real costs of compliance are those necessary to assure 90 percent capture efficiency (Br. 3, p. 6). It claims that "it takes approximately thirty minutes for 90

percent of the C-261 solvent to evaporate off the green tires" (Br. 3, p. 6). General Tire also argues that the Agency made no attempt to raise a factual issue as to General Tire's evidence regarding capture efficiency of existing equipment (Br. 3, p. 7).

In accordance with Section 37 of the Act, General Tire bears the burden of proof that alternate methods of compliance do not exist. This burden is not on the Agency, but on the person seeking a variance (Mendota II). If the record is insufficient in this regard, then the petitioner has not met its burden of proof.

With regard to General Tire's argument that it takes approximately thirty minutes for 90 percent of the C-261 solvent to evaporate off the green tires, the Board takes note of the fact that this data was obtained at ambient temperature in still air (Tr. 177). Clearly these are not the conditions at which Ilmberger proposes to operate its drying ovens, since a two minute residence time is provided at a temperature of 120 to 160 degrees Fahrenheit (see Ex. 21). In reviewing the information presented by General Tire, it appears to the Board that the only additional equipment required is a drying oven, an incinerator, and miscellaneous ducting and conveyors. The Board is not making a finding as to exactly what equipment is required, since that burden is on General Tire. But the Board does find, in agreement with the Agency contentions, that General Tire has not borne its burden of presenting sufficient information to conclude that alternative, less costly compliance plans are not available.

General Tire argues that denial of the requested variance from the December 31, 1986 Compliance Plan deadline would impose an arbitrary and unreasonable hardship on General Tire because General Tire must test water-based lubricants before committing to use them in production. General Tire also argues that requiring General Tire to install the Ilmberger/Incinerator Control System (Method No. 3) would impose an arbitrary and unreasonable hardship because the cost of such a system is not economically reasonable.

Since the Board has determined that insufficient information was presented as to whether or not alternative, less costly compliance plans are available, it has not reached the issue of whether the Ilmberger/Incinerator System is economically reasonable. The Board agrees with General Tire that it must test water-based outside lubricants before committing to use them in production. But the Board notes that General Tire has been testing such lubricants since the early 1970s, and that is uses such a lubricant at its North Carolina plant. The Board also notes that General Tire concluded in March, 1986, that it could not achieve compliance by the December 31, 1987 deadline with the water-based outside lubricant option. Therefore, the Board does not find that denial of the requested variance from the December

31, 1986 Compliance Plan deadline would impose an arbitrary and unreasonable hardship on General Tire. Rather, the Board finds that General Tire's situation is similar to the "far from unusual difficulty of not providing sufficient time to finish your plans, order the equipment and deliver and install such equipment in order to meet a specific compliance date" (GTE Automatic Electric, Inc. v. IEPA, PCB 80-225, September 3, 1981). As in GTE, the Board holds that inadequate planning by General Tire for a variance is not a basis for granting a variance from compliance.

General Tire has failed to present an assessment of environmental impact as required by Section 104.121(g). General Tire has failed to adequately discuss the availability of alternate methods of compliance as required by Section 104.121(i). And General Tire has failed to provide sufficient time to finish its plans in order to meet the specified compliance dates in the Board's regulations. Therefore, the Board concludes that General Tire failed to meet its burden of showing an arbitrary or unreasonable hardship and its request for variance is denied.

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

ORDER

The December 30, 1986, Petition by General Tire, Inc., for Variance from 35 Ill. Adm. Code Sections 215.466(b), 215.462 and 215.465(b) is hereby denied.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985, ch. 111-1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED

Chairman J.D. Dumelle dissented and Board Member John Marlin concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 17th day of December, 1987, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board