10/29/75

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

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| In re | ) | |
| | ) | |
| John L. Beaulieu, d/b/a Beaulieu Chemical Company, | ) | I.F. & R. Docket No. IX-77C Docket No. 141.28(P) |
| | ) | |
| Respondent | ) | |

ACCELERATED DECISION[1/]

On November 27, 1974 Complaint and Notice of Opportunity for Hearing was issued in the above matter by Director, Enforcement Division, Region IX, alleging ten counts of violation of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C., Section 136-136z), by respondent holding for sale the pesticides Beaulieu Concentrate B-San Powdered Bactericide (I.D. No. 113659), Beaulieu Sani Jon (I.D. No. 113660), Beaulieu Triple Action (I.D. No. 113661) and Beaulieu Amicide (I.D. No. 113662), which pesticides were not in compliance with the provisions of said Act and assessing a proposed civil penalty.

By Answer to Complaint dated February 10, 1975, respondent substantially denied each and every allegation of the Complaint and as a separate, distinct and affirmative defense, respondent alleges that the causes of action asserted by Complainant in this action have been

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1/Issued pursuant to Sec. 168.37 of the Rules of Practice, 40 C.F.R. 168.37.

merged into a Final Order, dated October 30, 1974, in a previous action involving the same parties and similar issues and that said previous Final Order is res judicata of this action.[2/]

Briefly stated, the prior action was based upon a complaint involving these same parties and relating to the pesticide Beaulieu Udder-Dyne Sanitizing Udder Wash. In substance it was alleged that the composition of that product differed from its composition as presented in connection with its registration with EPA and that the product was misbranded in that its label was different from the label submitted and approved in connection with the registration of the product.

Hearing was held on May 21, 1974 and after proposed findings of fact and conclusions were considered, an Initial Decision and Final Order were issued wherein a civil penalty of $1500 was assessed.

It is alleged by respondent that the doctrine of res judicata applies based upon the admission into evidence in the prior action, over respondent's objection, the results and analysis relating to four products of which samples were taken by an EPA inspector during an inspection of respondent's plant on April 4, 1974.[3/] While complainant offered this evidence to show "continuing violations and lack of good faith by respondent," respondent contends the evidence was treated

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2/In re Beaulieu Chemical Co. (John L. Beaulieu, Owner), I.F. & R. No. IX-10C, Docket No. 141.12(P).

3/Evidence which formed the basis for complaint in the prior proceeding was obtained in November, 1972.

during the proceeding as being "in dispute" and thereafter findings and rulings were made thereon which act as a bar to the institution of any subsequent action based thereon.

The pertinent part of Judge Levinson's Initial Decision relating to the four products in question, reads as follows:

> "Mr. Beaulieu testified in substance that the company does not have stock on hand for products that are to be shipped outside of California and that such products are compounded in response to specific orders and that the products from which samples were taken were not intended for interstate shipment. However, records of interstate shipments of these products were examined by the EPA inspector and Mr. Beaulieu signed a statement to the effect that such products from which samples were taken had been shipped in interstate commerce. Further, the samples of the products were taken from stock on hand and the label of each product bore an EPA registration number. We find that products from which the samples were taken were being held for sale for interstate shipment. (Emphasis supplied)
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> "Two of the products were deficient in active ingredients and one had an excess of active ingredients. The labels of three of the products were not in accordance with the labels as accepted at time of registration. (Emphasis supplied)
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> "At the hearing on May 21, 1974, Mr. Beaulieu stated that he had sent samples of the four products to an independent chemical laboratory for analysis about a week previously and that the results were expected in about a week. We granted respondent 10 days within which to submit results of these analyses. The respondent submitted a copy of letter from a laboratory dated June 20, 1974, showing results of analyses of four named products which the laboratory received on June 18, 1974. Although the names of the products were the same as those taken during the plant inspection there is no proof that they were from the same batch as the samples that were taken on April 4. Further,

> it is obvious that the samples tested were not the ones that Mr. Beaulieu said he sent to the laboratory around the middle of May. The complainant offered to furnish respondent with portions of the samples taken on April 4 but it appears that respondent did not accept the offer. We do not consider the letter from the laboratory as reliable evidence for the purpose of establishing the chemical content of the products of which samples were taken on April 4."

And further, still quoting from the Initial Decision:

> "The respondent's continued history of non-compliance with the Act has defeated some of its prime purposes which are to eliminate unregistered, adulterated, and misbranded pesticides from the channels of commerce."

In any determination as to the application of either the doctrine of "res judicata" or "collateral estoppel," it is essential that we look to the prior proceeding and analyze the facts with regard to the extent and in what manner the present proceeding includes the same allegations, products and findings as would result if the present proceeding proceeded to conclusion.

In so doing in this instance, we need only refer to the Initial Decision of Judge Levinson where he refers to how he treated these facts and the weight he gave to them in deciding the prior matter.

First, there is no question that the documents and results of analysis relating to the four products which are the subject of this proceeding were received in evidence in the prior matter, even though over the objection of respondent. And that samples of these four products were taken by an EPA inspector during an inspection of respondent's plant on April 4, 1974. These exhibits were offered to show continuing violations and lack of good faith. Initial Decision, p. 15.

The folders containing all original documents, including the reports of analysis and all pertinent labels, relating to I.D. Nos. 113659, 113660, 113661 and 113662, which products are the subject of the instant proceeding, were introduced by the complainant into evidence as Exhibits 24, 25, 26, 27, respectively, in the prior proceeding entitled In Re Beaulieu Chemical Company, I.F. & R. No. IX-10C (July 24, 1974), Reporter's Transcript, page 142, Docket No. 141.12(P).

Secondly, Judge Levinson found "that products from which the samples were taken were being held for sale for interstate shipment." Initial Decision, p. 15. Respondent averred that the products from which the samples were taken were not intended for interstate shipment, but complainant showed that Mr. Beaulieu signed a statement for the EPA inspector to the effect that such products from which samples were taken had been shipped in interstate commerce. Initial Decision, p. 15.

Thirdly, Judge Levinson, in the prior proceeding, made the following findings as to the four products which are the subject of this proceeding:

1. "Two products were deficient in active ingredients." (Initial Decision, p. 15).

   A. I.D. No. 113659 - Beaulieu Concentrate B-San

   B. I.D. No. 113662 - Beaulieu Amicide

2. "One had an excess of active ingredients." (Initial Decision, p. 15).

   A. I.D. No. 113660 - Beaulieu Sani Jon

3. "The labels of three of the products were not in accordance with the labels as accepted at time of registration." (Initial Decision, p. 15).

A. I.D. No. 113659 - Beaulieu Concentrate B-San

B. I.D. No. 113660 - Beaulieu Sani Jon

C. I.D. No. 113661 - Beaulieu Triple Action

These findings were not based solely on complainant's allegations, but were actually the subject of considerable discussion during the hearing which, taking into consideration the fact that this evidence was admitted over respondent's objection, leads me to conclude that all of the facts related to these four products, particularly as to the chemical composition thereof, and interstate shipment, were definitely "in dispute" in the prior proceeding. Initial Decision, pp. 15, 16. Tr. pp. 34-35, 134-142.

An additional factor which leads me to conclude that the violations which were found by Judge Levinson to exist in the prior hearing were considered in aggravation of the penalty invoked is the statement by him, "The respondent's continued history of non-compliance with the Act has defeated some of its prime purposes which are to eliminate unregistered, adulterated, and misbranded pesticides from the channels of commerce." Initial Decision, p. 17.

In support of this conclusion and keeping in mind that the evidence relating to the alleged violations involved in this proceeding were introduced by Complaint Counsel in the prior proceeding to show lack of

good faith, I quote, in part, from Section 168.46(b) of the Rules of Practice:

> (b) Evaluation of Proposed Civil Penalty. In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Administrative Law Judge shall consider all elements regarding the appropriateness of civil penalty set forth in Section 168.60(b).

which reads in part as follows:

> (b) Evaluation of Civil Penalty. The Final Order of the Regional Administrator shall consider the appropriateness of the penalty proposed to be assessed in the . . . initial decision out of which the final order originates.
>
> (2) In evaluating the gravity of the violation, the Regional Administrator shall also consider . . . (b) any evidence of good faith or lack thereof. . .

Counsel for Complainant in his response to prehearing letter dated April 10, 1975 and in his Memoranda of Points and Authorities has presented a logical but incomplete argument in opposition to the granting of respondent's motion for dismissal of the complaint based on either the doctrine of "res judicata" or "collateral estoppel."

Counsel admits only certain facts were conclusively decided in the prior proceeding as evidenced by the following excerpts from the Initial Decision therein:

> 1) We find that products from which the samples were taken were being held for sale for interstate shipment. (at 15)
>
> 2) We do not consider the letter from the laboratory as reliable evidence for the purpose of establishing

> the chemical content of the products of which samples were taken on April 4 . . . (at 16)
>
> 3) The respondent's continued history of non-compliance with the Act has defeated some of its prime purposes which are to eliminate unregistered, adulterated, and misbranded pesticides from the channels of commerce. (at 17)

And further avers that it is these facts which were placed in issue at the hearing of May 21, 1974, and were adjudicated, that are relevant to the instant case. That the parties are identical in both instances is beyond dispute. These facts were subject to direct and cross-examination before Judge Levinson at the hearing of May 21, 1974.

Counsel for Complainant has failed to fully reason out the consequences of the statement in 2) above. This statement was made by Judge Levinson only after respondent had attempted, unsuccessfully, to dispute complainant's allegation that the four products were either deficient in active ingredients, had an excess of active ingredients and therefore the labels were in accordance with the labels accepted at the time of registration. Tr. pp. 134-142 - Initial Decision, p. 15.

While the mere mention of additional facts or evidence by counsel during a hearing will not bar a new or later action on that evidence, introduction of such evidence in the proceeding puts such evidence in issue. And while new violations would have supported a new proceeding where there is no indication of harassment by the agency, a new proceeding is barred where those facts or evidence were introduced into

the record and were at issue in a prior hearing. F.T.C. v. Exposition Press, Inc., et al., 295 F.2d 869 (1961).

I must therefore conclude that the parties and issues presented in the instant matter are the same as those presented in the prior proceeding which were considered and upon which a valid and final judgment was made. This would supply the elements necessary to apply the doctrine of "collateral estoppel." Ashe v. Swenson, 387 U.S. 336, 443 (1970).

Complaint Counsel alleges that consideration of these four exhibits in the prior proceeding was only incidental to the former determination and does not constitute estoppel even though they were litigated and decided therein.

This Court takes the position that these facts were not only litigated and decided in the prior proceeding, but also that they were considered in aggravation of the civil penalty which was incorporated into a Final Order of the Regional Administrator. This finding, therefore, places this matter directly within the requirements of the general rule relating to the doctrine "res judicata," (a) there has been a previous action between the same parties; (b) involving the same matter; (c) a final judgment on the merits has been rendered with respect to the same cause of action. Rhodes v. Jones, 351 F.2d 884, 886 (1965), cert. den. 383 U.S. 919.

The major purpose of the prior hearing was to determine if a violation existed and if so to impose a penalty.

Since, prior to assessing the penalty, the court must consider all evidence before it, I must conclude that Judge Levinson considered the alleged violations which are the subject of the instant case in aggravation of the penalty in the prior proceeding.

Therefore, it is ORDERED that for the reasons stated above, the complaint herein be, and the same hereby is dismissed.

Edward B. Finch
Administrative Law Judge

October 29, 1975

NOTE: Pursuant to section 168.46(c) of the rules of practice, this accelerated decision shall become the final order of the Regional Administrator without further proceedings unless an appeal is taken within twenty days after service, by the filing of exceptions pursuant to section 168.51(a) or the Regional Administrator orders review on his own motion pursuant to section 168.51(b).