10/16/75

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In re	)	
	)	
Time Chemical, Inc.,	)	I.F.&R. Docket No. V-237-C
	)	
Respondent	)	

Initial Decision

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA)[1/] for assessment of a civil penalty for alleged violations of the Act. The proceeding was initiated by Complaint issued on April 14, 1975 by the Director, Enforcement Division, Region V, EPA (Complainant) against Time Chemical, Inc., with a place of business in Chicago, Illinois (Respondent).

The Complaint alleges that on September 11, 1974, the Respondent delivered for shipment from Chicago to Kansas City, Missouri, the pesticide called Mokan Chlorinated Porcelain Cleaner (Mokan) that failed to comply with the provisions of the Act in that it was not registered as required by the Act; (2) was misbranded in that the label did not bear the signal word "Caution" and the statement "Keep out of reach of children" and (3) was misbranded in that the label did not bear an ingredient statement.[2/]

1/ For parallel citations of FIFRA (86 Stat. 973) and United States Code see Attachment A.

2/ At the hearing counsel for Complainant acknowledged that the label did bear an ingredient statement. However, he stated that the charge was inadequate and should have charged that the ingredient statement did not appear on that part of the label that is generally facing the public when the product is placed on the shelf. Because of the deficiency in pleading the undersigned is disregarding this charge of misbranding.

The penalty proposed to be assessed was $3200 based only on the non-registration charge.

The Respondent by Jerome A. Goldman, its Vice President and General Manager, filed an answer and requested a hearing. A hearing was held in Chicago, Illinois, on August 21, 1975. The Complainant was represented by Chester W. Sawyer, Esq., attorney, Enforcement Division, EPA, Region V and Respondent was represented by Mr. Goldman.

The Respondent, in its answer and at the hearing, admitted the charges, and sole purpose of the hearing was to consider the appropriateness of the penalty. It is Respondent's position that the proposed penalty of $3200 is excessive in the circumstances and should be reduced to $1000 or less. The Complainant submitted proposed findings of fact, conclusions and a brief in support thereof. The Respondent submitted a statement to support a reduction of the proposed penalty and also a reply brief to the documents submitted by Complainant. These have been duly considered.

Findings of Fact

1. The Respondent Time Chemical, Inc. is a corporation with a plant and place of business in Chicago, Illinois. It also has a plant in Atlanta, Georgia. The company is a manufacturer of detergents and sanitation chemicals for industrial and institutional use. Its gross sales in 1974 were approximately $8,800,000.

2. The Respondent manufactured the product called Mokan Chlorinated Porcelain Cleaner (Mokan) which was represented on the label as a disinfectant and sanitizer. The label also made the claim that the product

"Kills bacteria". The product was a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA).

3. The product Mokan was not registered as required by FIFRA.

4. On September 11, 1974 the Respondent shipped from Chicago, Illinois, to Kansas City, Missouri, fifty cases of Mokan, each case containing 18 cans of two pounds each. The label of the containers did not bear the signal word "Caution" or the statement "Keep out of reach of children" as required by the applicable regulations than in effect (40 CFR 162.9(a)). The product was misbranded within the meaning of section 2(q)(1)(G) of FIFRA.

5. The Respondent is subject to assessment of penalties under section 14(a) of FIFRA for violations of section 12(a)(1)(E) of the Act and 7 U.S.C. 135a(a)(1) as continued in effect by section 4 of Federal Environmental Pesticide Control Act of 1972, 86 Stat. 998.

Conclusions and Reasons

In determining the appropriateness of the penalty the statute and regulations require that the following factors be considered: size of respondent's business; effect on respondent's ability to continue in business; and gravity of the violation. In evaluating the gravity of the violation the regulations require that the following be considered: history of respondent's compliance with the Act; and good faith or lack thereof. The Respondent does not contend that its ability to continue in business will be affected if it is required to pay the proposed penalty.

The Respondent's gross sales in 1974 were approximately $8,800,000. While it is not what would be considered one of the giant corporations, it is a relatively large company. As to size of company it falls into category V (annual gross sales exceeding a million dollars) as set forth in the Guidelines for the Assessment of Civil Penalties under FIFRA. (39 F.R. 27711, July 31, 1974).

It has been held in other cases under section 14(a) that "gravity of the violation" should be considered from two aspects -- gravity of harm and gravity of misconduct.

> As to gravity of harm there should be considered the actual or potential harm or damage, including severity, that resulted or could result from the particular violation . . . .
>
> As to gravity of misconduct, matters which may be properly considered include such elements as intention and attitude of respondent; knowledge of statutory and regulatory requirements; whether there was negligence and if so the degree thereof; position and degree of responsibility of those who performed the offending acts; mitigating and aggravating circumstances; history of compliance with the Act; and good faith or lack thereof. 3/

The Respondent company has been in business for about 28 years. It has 17 pesticides registered of which 11 are currently being produced. It is well aware of the requirements for registering pesticides.

The failure to register the pesticide in question was not a deliberate or intentional violation. It appears that it was the intention of

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3/ Quoted from Initial Decision of ALJ In re Amvac Chemical Corporation, I.F.&R. Docket No. IX-4C, July 11, 1974.

Respondent to market this product as a cleanser without any pesticide claims. The preparation of the label in question with pesticide claims was due to the negligence or lack of qualifications of one of Respondent's employees for which Respondent is legally responsible. However, the distribution of an unregistered pesticide may be considered to be one of the more serious violations under the Act. It is obvious that when an unregistered pesticide is distributed the enforcement and protective purposes of registration are defeated. Where a pesticide is not registered, the regulatory officials do not have the opportunity to eliminate unwarranted claims, to require such precautionary warnings as may be necessary, and to keep the channels of commerce free of products that may have unreasonable risks to man or the environment.

The Respondent has a history of citations and warning letters for violations of the Act.[4/] Between 1968 and April 1973, 55 samples of Respondent's products were collected resulting in 25 citations and 13 warning letters. Between June 10, 1938 and December 28, 1971, two warning letters and four citations were issued to Respondent for non-registration of chlorinated cleaners or chlorinated dishwashing compounds. The citation of December 28, 1971 resulted in a criminal prosecution in the U.S. District Court for the Northern District of Illinois, Eastern Division on which the Respondent, on September 9, 1974, was found guilty on four counts and was fined $3000.

4/ A citation was issued for a serious violation and indicated that criminal action was contemplated. A warning letter was sent for a violation not considered serious enough to warrant criminal action but required corrective action by the recipient.

Under the Guidelines the penalty to be assessed on a firm of this size for a non-registration violation -- "Knowledge/No Application Submitted" -- is $3200. The Respondent, through the individual who had ultimate responsibility for marketing the product in question, had knowledge that such a product with pesticide claims was required to be registered.

The preparation of the label with pesticide claims was not a deliberate or intentional violation. The product was of a low order of toxicity and could properly have been marketed without pesticide claims and registration as a pesticide would not have been required. Further, the Respondent upon learning of the violation acted promptly to prevent further shipments of the product by its customer and it furnished the customer with new labels and paid for relabeling. These may be considered as mitigating factors. On the other hand we have as an aggravating factor the history of warning letters and citations and the criminal conviction in September 1974 for similar violations.

I am of the view that the mitigating and aggravating factors balance each other and that the assessment of a civil penalty of $3200 according to the schedule in the Guidelines was appropriate.

It is noted that no penalty was assessed for failure of the label to bear the signal word "Caution" or the statement "Keep out of reach of children". While such warnings are required even on the least dangerous pesticides, the decision not to assess a penalty for this mode of misbranding

was undoubtedly prompted because of the low order of toxicity of the product. I do not disturb the decision of the enforcement officials in this regard.

I conclude that a civil penalty of $3200 is appropriate for the violations set forth in the Complaint of April 14, 1975 and recommend that a civil penalty in said amount be assessed against Respondent.

Proposed Final Order[1/]

1. Pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, a civil penalty of $3200 is hereby assessed against Respondent, Time Chemical, Inc., for the violations of the Act set forth in the Complaint dated April 14, 1975.

2. Payment of the full amount of the civil penalty assessed shall be made within 60 days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's or certified check payable to the United States of America.

Bernard D. Levinson
Administrative Law Judge

October 16, 1975

1/ Unless appeal is taken by the filing of exceptions pursuant to section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. (See section 168.46(c)).

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, AS AMENDED (FIFRA)

Parallel Citations

FIFRA, 86 Stat. 973 P.L. 92-516	7 U.S.C.
Section 2	Section 136
3	136a
4	136b
5	136c
6	136d
7	136e
8	136f
9	136g
10	136h
11	136i
12	136j
13	136k
14	136l
15	136m
16	136n
17	136o
18	136p
19	136q
20	136r
21	136s
22	136t
23	136u
24	136v
25	136w
26	136x
27	136y