6/3/76

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

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| In re | ) | |
| | ) | |
| Cantor Brothers, Inc., | ) | I. F. & R. Docket No. II-93C |
| | ) | |
| Respondent | ) | INITIAL DECISION |

## Preliminary Statement

On October 16, 1975, the Director, Environmental Programs Division, EPA, Region II, issued a complaint against the above Respondent charging a violation of section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135 et seq. (FIFRA)[1/] by delivering for shipment, the product Nankee Kerosene Water White (Nankee Kerosene). It is alleged that the product was shipped from Farmingdale, New York, to Riverton, New Jersey, and that said product was not in compliance with FIFRA in that said product was an economic poison within the meaning of section 2(a) of FIFRA and was not registered under section 4 of FIFRA at the time it was shipped in interstate commerce. The date of shipment alleged in the complaint was August 27, 1975. Complainant's motion to

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1/ The Federal Insecticide, Fungicide, and Rodenticide Act was enacted in 1947 and appears in 7 U.S.C. 135 et seq., herein referred to as FIFRA or FIFRA 1947. This Act was extensively amended on October 21, 1972. The legislative mechanism used to amend FIFRA 1947 was designated Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973, Public Law 92-516, hereinafter referred to as FEPCA. Section 2 of FEPCA contains the entire Act as amended and appears in 7 U.S.C. 136 et seq. and will hereinafter be referred to as FIFRA 1972. A table of parallel citations showing Statutes at Large and 7 U.S.C. 136 is annexed as Attachment A.

change the date of shipment from August 27, 1975, to August 27, 1974, was allowed on February 18, 1976. A penalty of $2,200 was proposed to be assessed under section 14(a) of FIFRA 1972.

The Respondent, through counsel, filed an answer which was in effect a general denial and also alleged certain affirmative defenses. Respondent requested a hearing.

The affirmative defenses in substance are as follows: (1) the product Nankee Kerosene is not an economic poison within the meaning of section 2(a) of FIFRA and is not required to be registered under section 4 of FIFRA; (2) this proceeding is unwarranted under law and a Notice of Warning should have been issued before this proceeding was commenced; (3) the proposed penalty is unduly harsh and to compel Respondent to pay same would be unconstitutional and a violation of due process of law; (4) the Respondent is entitled to judgment as matter of law under the principles set forth in Stearns Electric Paste Company v. EPA, 461 F.2d 293 (7th Cir. 1972); (5) the complaint was not personally served and Complainant lacks jurisdiction over Respondent.

The proceedings were conducted pursuant to the applicable Rules of Practice (Rules), 40 CFR 168.01 et seq., 39 F.R. 27658 et seq., July 31, 1974. At my request the parties, pursuant to section 168.36(e) of the Rules corresponded with me for the purpose of accomplishing some of the purposes of a prehearing conference (see section 168.36(a) of the Rules).

A prehearing conference and a hearing were held in New York City on March 5, 1976. The Complainant was represented by Susan Levine, Esq., of the legal staff of EPA, Region II, and the Respondent was represented by Jerold W. Dorfman, Esq. and David A. Beale, Esq.

At the prehearing conference the Respondent moved to amend its answer by adding a sixth affirmative defense. This defense in substance is that the Respondent is charged with a violation of FIFRA 1947 and that a penalty is sought to be imposed under FIFRA 1972 and that a civil penalty can only be assessed for a violation of FIFRA 1972.[2/] The Respondent moved to dismiss the complaint. Although this motion was made on the very day of hearing, I granted the motion in order to afford the Respondent the opportunity to raise all defenses that it considered appropriate. The motion to dismiss the complaint was not granted.

The parties have filed proposed Findings of Fact, briefs, and reply briefs which I have carefully considered.

## Findings of Fact

1. The Respondent is a corporation with a place of business in Farmingdale, New York.

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2/ In submitting the motion Respondent's counsel stated that the motion was being made so close to the date of hearing "because counsel recently untangled the very convoluted statutes upon which this proceeding is purportedly based." It should be noted that in the prehearing letter issued to the parties by the undersigned on December 18, 1975, reference was made to FIFRA 1972 and its effect on certain aspects dealing with registration under FIFRA 1947. This should have alerted Respondent's counsel to the matter they raised in this defense.

2. On or about August 27, 1974, the Respondent shipped in interstate commerce from Farmingdale, New York, to Riverton, New Jersey, a quantity of the product called Nankee Kerosene Water White. The product consisted of kerosene.

3. A sample of the product shipped by Respondent on August 27, 1974 was properly collected by an employee of the Environmental Protection Agency on April 23, 1975.

4. The product was labelled in part "Uses . . . Insecticide Spray-Delouser". The product was an economic poison within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135 et seq.

5. The product was not registered as required by section 4 of FIFRA, 7 U.S.C. 135b, at the time it was shipped in interstate commerce.

6. The shipment of the unregistered economic poison in interstate commerce on or about August 27, 1974, was a violation of section 3a(a)(1) of FIFRA, 7 U.S.C. 135a(a)(1).

7. For the above mentioned violation, the Respondent is subject to a civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 l(a).

8. Taking into consideration the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation it is determined that a penalty of $1800 is appropriate.

## Discussions and Conclusions

Affirmative defenses numbered 2, 3, 4 and 5 are completely devoid of merit and can be disposed of with brief comments.

Defense number 2 asserts that the proceeding is unwarranted and a Notice of Warning should have been issued before this proceeding was commenced.

Apparently Respondent relies on section 9(c)(3) of FIFRA 1972. This section provides as follows:

> Nothing in this Act shall be construed as requiring the Administrator to institute proceedings for prosecution of minor violations of this Act whenever he believes that the public interest will be adequately served by a suitable written notice of warning.

Under this section the Administrator or his authorized delegate has broad discretion in deciding whether a violation is minor and to be disposed of by a warning notice or whether prosecution is warranted. It is obvious that the proper authorities were of the view that because of the nature of the violation in question, prosecution by way of civil penalty proceedings was appropriate. The Respondent has offered no authorities to suggest that there has been an abuse of discretion.

Defense number 3 asserts that the proposed penalty is unduly harsh and to compel Respondent to pay same would be unconstitutional and a violation of due process.

The proposed penalty set forth in the complaint is $2,200. This amount, as is stated, is a proposed penalty. In the complaint the Respondent was advised of its right to request a hearing on any material fact contained in the complaint and on the appropriateness of the proposed penalty. The Respondent exercised this right and the appropriateness of the penalty was one of the matters considered by me before issuing this decision. Neither the ALJ nor the Regional Administrator (the final administrative authority) is bound by the amount of the proposed penalty in the complaint. See Rules, sections 168.46(b) and 168.60(b)(3).

Defense number 4 asserts that Respondent is entitled to judgment as matter of law under the principles set forth in Stearns Electric Paste Co.v. EPA, 461 F.2d 293 (7th Cir. 1972).

In relying on the Stearns case, the Respondent has acknowledged that "this case is not exactly on point." Indeed, it is not at all in point. The Stearns case was on appeal from an action by the Administrator of EPA cancelling the registration of an economic poison. The question, as the court stated, was whether the product was too poisonous to be permitted in homes. The court held, in substance, that a product of the composition in question (which contained phosphorous paste) with adequate warnings and statements on the label could not be banned from home use and concluded that the cancellation order must be set aside.

The Respondent in its brief does not argue that under the Stearns case it is entitled to judgment as a matter of law. The Respondent has taken phrases from the Stearns case out of context and argues that such phrases should be used in interpreting the provisions of the statute we are here concerned with. We are not here concerned with any of the provisions of the statute that the court considered in the Stearns case.

Defense number 5 asserts that the Complainant lacks jurisdiction over the Respondent because the complaint was not personally served.

Personal service of the complaint on Respondent was not required. It was held in Wise v. Herzog, 114 F.2d 486 (D.C. Cir. 1940), with citation of numerous cases, that service of process by registered mail is well recognized as sufficient to satisfy the requirements of due process. Later cases have affirmed this holding. Section 168.05(c) of the Rules authorizes service of the complaint by registered mail. The Respondent makes no claim of non-receipt of the complaint.

. . .

It is undisputed that the product in question was kerosene and that it was not registered. It is also undisputed that the label of the product, in part, was as follows:

Nankee Kerosene Water White

Uses

Stove fuel - Lanterns - Outdoor Fire Starter -

Degreaser - Insecticide Spray - Delouser -

Cleaning bed springs

Having disposed of certain of the defenses raised by Respondent, the case is reduced to three questions: (1) whether the product in question is an economic poison; (2) whether a civil penalty can be assessed under section 14(a)(3) of FIFRA 1972 for a non-registration violation under FIFRA 1947; and (3) whether the Complainant has introduced satisfactory proof to establish interstate shipment of the product in question. As will hereinafter appear, each of these questions is answered in the affirmative.

The Product In Question Is An Economic Poison

I cannot understand why the Respondent persists in arguing that Nankee Kerosene Water White is not an economic poison.

Section 2(a) of FIFRA [7 U.S.C. 135(a)], in pertinent part, defines "economic poison" to mean "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects . . ."[3/].

The label of the product in question includes in the list of uses "Insecticide Spray - Delouser". It is not disputed that a louse is an insect. The product, therefore, is represented as a substance to be

3/ In FIFRA 1972 "The term 'pesticide' replaces 'economic poison' and has the same coverage." Quoted from Report of House Committee on Agriculture, H.R. 92-511, 92d Cong. 1st Sess., p. 13. In section 2(u) of FIFRA 1972 "pesticide" is defined, in pertinent part, to mean "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest . . . ."

used as an insecticide spray for destroying or mitigating this insect. This is an intended use of the product.

The regulations issued pursuant to FIFRA include an interpretation of the term "economic poison." 40 CFR 162.101(b) in pertinent part is as follows:

> (b) Status of products as economic poisons.
>
> (1) A substance or mixture of substances is or is not an economic poison depending upon the purposes for which it is intended. Determination of intent in the marketing or distribution of these products is therefore of major importance. This determination will depend upon the facts in the particular case which tend to show the intended use of the product. In general, if a product is marketed in a manner that results in its being used as an economic poison, it is considered to be the intended result. Such intentions may be either expressed or implied. It is assumed that the distributor is aware of the purposes for which his product will be used.
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> (i) A product will be considered to be an economic poison if:
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> (a) the label or labeling of the product bears claims for use as an economic poison;
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> . . .
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> (3) Economic poisons include, but are not limited to:
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> . . .
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> (ii) Products intended for use both as economic poisons and for other purposes. (Such products are subject to all provisions of the Act including section 2z(1) under which a product is misbranded if its labeling bears any statement which is false or misleading concerning any of its uses or in any other particular.)

It has long been held and it is well settled that intended use of a product may be determined by the representations for use of the product. In United States v. 681 Cases ... Kitchen Klenzer, 63 F. Supp. 286 (E.D. Mo. 1945) a case under the Insecticide Act of 1910 (predecessor of FIFRA) the term "fungicide" was defined to include "any substance intended to be used for preventing, destroying, repelling or mitigating any and all fungi ...." The court held that Congress "employed the words 'intended to be used' in reference to objective intent as evidenced by what the product holds itself out to be." The court continued:

> Any other construction of this Statute would lead to the absurd result that a manufacturer could actually label his product a fungicide and yet avoid the application of the Act by reservations and his own knowledge of its inefficacy.

This construction has consistently been applied in cases arising under the Federal Food, Drug, and Cosmetic Act where "intended" or "intended for use" is used in defining "drug". In United States v. Article Labeled in Part . . . Sudden Change, 409 F.2d 734, 739 (2d Cir. 1969) the court cited numerous cases and said:

> It is well settled that the intended use of a product may be determined from its label, accompanying labeling, promotional material, advertising and any other relevant source. (Cases omitted).

The label of Nankee Kerosene, in part, holds itself out to be an "insecticide spray - delouser", i.e., a product that destroys or mitigates insects. The product is clearly an economic poison within the meaning of the statute.

The Respondent urges that the intended use and primary purpose of the product is as a paint solvent and this is the purpose for which Respondent's customers purchase the product. It is to be observed that this is not one of the uses represented on the label. It may well be that the product can be used as a paint solvent. However, one of its intended uses, as stated on its label, is as an economic poison.

If further support were necessary to show that this product is an economic poison, mention could be made of the testimony at the hearing of Dr. Elton Hansens, Research Professor, Department of Entomology, Rutgers University. Dr. Hansens has done research on pesticides against human lice and testified that kerosene can be used as a delouser and repeatedly in the literature it is referred to and has been used as a material by itself and in combination with others for delousing.

I have considered other arguments by Respondent urging that the product is not an economic poison and find them to be entirely without merit.

Section 14(a) of FIFRA 1972 Is Properly Invoked to Prosecute This Non-registration Violation of FIFRA, 7 U.S.C. 135 et seq.

The Respondent argues, in substance, that section 14(a) of FIFRA 1972 (the civil penalty provision) is applicable only to violations set forth in 7 U.S.C. 136 and since a violation of FIFRA 1947 is charged the complaint fails to state a violation for which a civil penalty may

be assessed.[4/]

The same defense was raised in an earlier civil penalty case and was considered at length by me in a ruling holding that the defense was not applicable. The ruling, on March 6, 1974, in the case of Southern Mill Creek Products, Inc. is published in Notices of Judgment under FIFRA, No. 1479, issue of June 1975.[5/]

I consider it unnecessary in this decision to go into detailed discussion of the reasons for the ruling in the Southern Mill case. The ruling was based on the construction and application of certain provisions of section 4 of FEPCA (see footnote 1) which is entitled "Effective Dates of Provisions of Act." The pertinent portions of section 4 provide as follows:

> (a) Except as otherwise provided in the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by this Act, and as otherwise provided by this section, the amendments made by this Act shall take effect at the close of the date of the enactment of this Act, provided if regulations are necessary for the implementation of any provision that becomes effective on the date of enactment, such regulations shall be promulgated and shall become effective within 90 days from the date of enactment of this Act.

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4/ The Respondent argues that the codification, 7 U.S.C. 136 l(a), refers to one who violates "any provision of this subchapter" and the subchapter is codified in 7 U.S.C. 136 et seq. and does not cover violations under 7 U.S.C. 135 et seq. The statute as enacted refers to "this Act" and not "this subchapter". It is to be observed that a note to 7 U.S.C. 136 sets out in full section 4 of FEPCA, which provides for the effective dates of FIFRA, as amended, including the savings clause of section 4(b). In any event, if there is a conflict between the statute as enacted and the codification (and I see no conflict) the underlying statute will prevail over the codification. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 379-80 (1958).

5/ At the hearing Respondent's counsel was furnished with a copy of the ruling.

(b) The provisions of the Federal Insecticide, Fungicide, and Rodenticide Act and the regulations thereunder as such existed prior to the enactment of this Act shall remain in effect until superseded by the amendments made by this Act and regulations thereunder: Provided, That all provisions made by these amendments and all regulations thereunder shall be effective within four years after the enactment of this Act.

(c)(1) Two years after the enactment of this Act the Administrator shall have promulgated regulations providing for the registration and classification of pesticides under the provisions of this Act and thereafter shall register all new applications under such provisions.

It was held in Southern Mill that under section 4(a) of FEPCA regulations were not necessary for the implementation of section 14(a)(1) of FIFRA 1972 and that said section took effect at the close of date of enactment of FEPCA, namely October 21, 1972. It was further held in Southern Mill that under section 4(b) of FEPCA the registration requirements of FIFRA 1947 and regulations thereunder remained in effect until superseded by registration regulations which were to be promulgated under FIFRA 1972. Under section 4(c)(1) of FEPCA, the Administrator was granted two years within which to promulgate regulations under the Act as amended. The violation in question occurred on August 27, 1974, which was within the two year period allowed for the promulgation of new regulations and new regulations had not been promulgated at that time. Thus, the prohibition against shipping an unregistered pesticide, as set forth in FIFRA 1947, and registration requirements of FIFRA 1947 and regulations thereunder were in effect on August 27, 1974. It was concluded in Southern Mill that section 14(a) of FIFRA 1972 could be invoked to

prosecute a non-registration violation under FIFRA 1947, 7 U.S.C. 135a and 135b. This conclusion is hereby affirmed.

The Respondent argues that the reasoning in Southern Mill is not applicable to the present proceeding because "the old Act and its regulations had become superceded (sic) by the issuance of new regulations which become effective on July 31, 1974 (39 F.R. 27656) . . ."[6/].

The Respondent misconstrues the purpose of what it calls "regulations" of July 31, 1974. The document referred to, published in the Federal Register on July 31, 1974, did not promulgate regulations that were necessary to implement any provisions of FIFRA 1972.[7/] This document, as its title states, is "Rules of Practice Governing Proceedings Conducted in the Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended."[8/] The regulations for the registration, reregistration and classification of pesticides under FIFRA 1972 appeared in the Federal Register on July 3, 1975, 40 F.R. 28267 and became effective on August 4, 1975.[9/]

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6/ These Rules of Practice appear in 40 CFR, Part 168.

7/ As above noted, it was held in the Southern Mill case that regulations were not necessary to implement section 14(a)(1) of FIFRA 1972.

8/ These Rules of Practice superseded Interim Rules of Practice published on September 20, 1973, 38 F.R. 26360.

9/ The failure of the Administrator to issue new registration regulations within two years after the enactment of FEPCA does not affect this case.

There Is Substantial Evidence of Interstate Shipment Of The Product In Question

In defense of the case and as ground for urging a finding in its favor, the Respondent asserts that the Complainant has failed to establish interstate shipment of the sample of Nankee Kerosene that is the subject matter of the case. I find no merit to this defense.

On April 23, 1975, Rodney D. Turpin, a Consumer Safety Officer employed by EPA, made a market-place survey of the store of J. M. Fields, Inc. (Fields) Riverton, New Jersey, to check pesticide products. He collected a one-gallon can of Nankee Kerosene because the label included "insecticide spray-delouser" as one of the uses.

At the time he collected the sample, he obtained a sworn statement (Comp. Ex. 5) from Jerold J. Brown, the manager of the store, that the sample collected was from a shipment received from Cantor Brothers, Inc. (the Respondent) and covered by invoice number 101845[10/] and receiving slip of J. M. Fields, No. 1628-59076[11/] dated August 27, 1974. Mr. Brown furnished copies of these documents. The purchase order No. 101845, dated August 6, 1974, shows the ordering by Fields of a number of items from Cantor Brothers, Inc., Farmingdale, New York, including 6 one-gallon

10/ This in fact was the purchase order number and the error was corrected in the sworn statement of Mr. Brown dated February 25, 1976 (Comp. Ex. 8).

11/ The receiving slip is in fact numbered 1628-596076. This error was also corrected in Comp. Ex. 8.

containers of Nankee Kerosene. (Comp. Ex. 7, 7a). The receiving slip (Comp. Ex. 6) refers to order number 101845 and shows receipt of 47 pieces on August 27, from the carrier, Jersey Coast.[12/]

In further support of interstate shipment, the Complainant introduced a second sworn statement of Mr. Brown, dated February 25, 1976 (Comp. Ex. 8). Three pages of the 14 page purchase order, including page number one, were submitted with this statement (Comp. Ex. 9). Page number one had already been received in evidence as Comp. Ex. 7a. The first page of Comp. Ex. 9 contained an entry showing that 6 cans of Nankee Kerosene had been received by Fields.[13/] Also furnished at this time was a copy of Respondent's invoice to Fields dated August 8, 1974, which included one case of 6 one-gallon units of Nankee Kerosene (Comp. Ex. 10). Also furnished was a copy of memorandum of bill of lading dated August 26, 1974, showing shipment by Cantor Brothers, Farmingdale, N.Y., to Fields, Riverton, New Jersey of 47 packages "paint." This document refers to P.O. 101845 (marked Comp. Exs. 7 and 7a). This memorandum of bill of lading was received into evidence as Comp. Ex. 11. Also furnished at the time was a copy of Jersey Coast Freight lines consignee's memo dated August 27, 1974, showing shipment received by Fields, Riverton, New Jersey,

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12/ Comp. Ex. 13 shows the name of this carrier as Jersey Coast Freight Lines.

13/ In the photo copying of Comp. Ex. 7a, this entry had not been reproduced.

of 47 pieces "paint".[14/] This was marked as Comp. Ex. 13.

The Complainant introduced the sworn statement of D. E. McKelvey, Traffic Manager of Jersey Coast Freight Lines, Inc., in which he identified the above-mentioned documents received into evidence as Comp. Exs. 11, 13. This statement is Comp. Ex. 14. These documents (Comp. Exs. 11, 13 and 14)were obtained by Robert Smith, an EPA Consumer Safety Inspector, from Mr. McKelvey on February 25, 1976.

The Respondent argues that the affidavits of Brown and McKelvey (Comp. Exs. 5, 8, and 14) were improperly admitted over its objections and the said documents are blatant hearsay.

It is well established that hearsay evidence is admissible in administrative hearings. In Jacobwitz v. United States, 424 F.2d 555 (Ct. Cl. 1970) the court said (p. 559):

> Regardless of the rules of practice as to the admissibility of hearsay evidence in the courts of the various jurisdictions, they do not govern or control the admissibility of such evidence in administrative hearings. It has been held that hearsay evidence is admissible in administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value. Morelli v. United States, 177 Ct. Cl. 848, 853-854 (1966); Montana Power Co. v. Federal

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14/ The Respondent appears to argue that the kerosene in question could not have been included because kerosene is not paint. The memorandum of bill of lading (Comp. Ex. 11) refers to P.O. 101845. This purchase order shows many items that were not paint, including wood handle, squeegee, cement, steel wool, putty, patching plaster etc. I find that the articles shipped under the bill of lading included the product in question and other articles listed in P.O. 101845, both paint and non-paint products.

Power Commission, 185 F.2d 491, 497 (1950), cert. denied, 340 U.S. 947 (1951); and Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 690 (9th Cir. 1949), cert. denied, 338 U.S. 860.

In Mackatunas v. Finch, 301 F. Supp. 1289, 1291 (E.D. Pa. 1969) it was said, with citation of supporting cases:

> Administrative agencies are not restricted by rigid rules of evidence . . . Use of statements not subjected to cross-examination is permissible before such bodies and does not constitute a denial of due process. (Emphasis added).

As early as 1938 Judge Learned Hand in N.L.R.B. v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938) recognized the admissibility of hearsay evidence in administrative proceedings and said that such evidence will serve to support a finding "if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." (Emphasis added).

The essential purpose of the affidavits of Brown (Comp. Exs. 5 and 8) and McKelvey (Comp. Ex. 14) was to identify business documents. Brown identified Fields' purchase order (Comp. Ex. 7, 7a, 9, 9a, 9b); the invoice from Respondent to Fields (Comp. Ex. 10, 10a, 10b); memorandum of bill of lading (Comp. Ex. 11); and the receiving slip (Comp. Ex. 6). McKelvey identified the memorandum of bill of lading No. 8144 (which he called Cantor Brothers shipping order), (Comp. Ex. 11); and the signed delivery receipt (Comp. Ex. 13).

True, persons who prepared and signed the documents were not called as witnesses. However, these were documents prepared and executed in the

regular course of business and in the possession of those who would be expected to have them. It is the kind of evidence on which responsible persons are accustomed to rely in serious affairs. The evidence was reliable, relevant, competent, material and substantial.

Section 168.41(a) of the Rules of Practice permits evidence of this nature. This section provides, in part:

> The Administrative Law Judge shall admit all evidence which is relevant, competent and material, and is not unduly repetitious. Relevant, competent and material evidence may be received at the hearing although such evidence may be inadmissible under the rules of evidence applicable to judicial proceedings. The weight to be given all evidence shall be determined by its reliability and probative value.

A prima facie case having been established by the Complainant, the Respondent was at liberty to refute it.

The Respondent failed to offer any evidence to refute interstate shipment of the product in question. The Supreme Court held in United States ex rel. Vajtauer v. Commissioner, 273 U.S. 103, 111-112 (1927) that the necessary substantiation of the reliability of hearsay evidence may arise from the failure of respondent to controvert the hearsay when the proof is readily available to him.

Further, an unfavorable inference may be drawn against the Respondent because of its failure to refute the Complainant's evidence of interstate shipment. It was said in United States v. Roberson, 233 F.2d 517, 519 (5th Cir. 1956):

> Unquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered as a circumstance against him and may raise a presumption that the evidence would not be favorable to his position. (Cases cited)

See also Savard v. Marine Contracting Inc., 471 F.2d 536, 541 (2d Cir. 1972); Tupman Thurlaw Co., Inc., v. S. S. Cap Castillo, 490 F.2d 302, 308 (2d Cir. 1974).

The Respondent also argues that the receipt into evidence of the affidavits of Brown and McKelvey was contrary to section 168.41(c) of the Rules of Practice since no cross-examination was available. This section was not designed to exclude the receipt of reliable and probative hearsay evidence. The purpose of this section was to permit the receipt into evidence of a verified statement of a witness in lieu of the oral testimony of the witness on direct examination. Section 168.41(b) provides for cross-examination of a witness who appears at the hearing. Hearsay was admitted within the scope permitted by the Rules and court decisions. Obviously, there could have been no cross-examination. As noted above, use of statements not subjected to cross-examination is permissible before administrative bodies.

The Amount of the Penalty

Section 14(a)(3) of FIFRA 1972 provides, in part, as follows:

> In determining the amount of the penalty the Administrator shall consider the appropriateness of such

> penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation.

The penalty proposed to be assessed in the complaint was $2200. This was based on the guidelines for assessment of civil penalties under section 14(a) of FIFRA 1972, which appear in 39 F.R. 27711 et seq., July 31, 1974. For a non-registration violation of a firm whose annual gross sales are one million dollars or over and where the violation was committed without knowledge of the registration requirements the guidelines show a penalty of $2200. As above stated the ALJ is not bound by the penalty assessment schedule of the guidelines.

The Respondent presented no evidence at the hearing. It does not argue that its annual gross sales are not substantial (one million dollars or more) or that the imposition of a penalty in the proposed amount will effect its ability to continue in business. The Respondent argues that if there was a violation it was minor and that no penalty should be imposed.

The consideration that remains in determining the appropriateness of the penalty is "the gravity of the violation." The undersigned in the case of Amvac Chemical Corporation, Notices of Judgment under FIFRA, No. 1499, issue of June 1975, expressed his views and reasons therefor, that "gravity of the violation" should be considered from two aspects - gravity of harm and gravity of misconduct.[15/]

15/ These views have been adopted by other Administrative Law Judges.

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.

Dr. Hansen testified that although kerosene has been used for lice, usually head lice, there are references in the literature that kerosene should not be used for this purpose because of the possible toxic effects and that it is potentially harmful as an irritant (Tr. 132). Counsel for Respondent did not deny that kerosene is toxic (Tr. 143). The Merck Index, used by Respondent's counsel to cross-examine Dr. Hansen shows that kerosene has defatting action on the skin and can lead to irritation, infection (Tr. 143). Thus it is apparent that there is potential harm from the use of kerosene as a delouser.

One of the purposes of registration is to prevent the marketing of pesticides that have the potential of causing harm or injury and proof of actual harm or injury is not necessary in considering gravity of harm.

As to gravity of misconduct one of the factors to be considered is whether Respondent had knowledge of the registration requirements.

The Respondent in its prehearing exchange[16/] has acknowledged that it was aware of registration requirements of pesticides, and that it

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16/ Respondent's Reply Points to Information and Points Raised by Complainant, submitted February 12, 1976. These are statements by Respondent's counsel and are included in the record (Rules, section 168. 36(e)). Though this document does not contain evidence introduced at the hearing the ALJ in this instance, and without setting a precedent, is willing to accept these statements.

had registered a product in 1959 and reregistered that product in 1973. With respect to two other products that the Respondent was producing it was notified by the registration authorities that registrations were required. With respect to one product the Respondent in 1971 discontinued the use of one ingredient which avoided the necessity of registration. With respect to the other product the Respondent in 1972 obtained a registration.

The Respondent may not have had any intention to violate the registration requirements of the statute in this instance, but intent to violate is not an element of the offense of non-registration in a civil penalty proceeding. Cf. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922).

As a mitigating circumstance and to show good faith the Respondent appears to urge that it changed the label (by removing the offending statement) immediately after being notified by EPA in the present case. Removal of the pesticidal claim from the label was not a mitigating factor for this violation. Such action was in the interest of Respondent and served its purpose of avoiding further prosecutions for similar violations.

I have taken into account all of the factors that are required to be considered in determining the appropriateness of the penalty. I am of the view that the proposed penalty of $2200 is a bit on the high

side and am of the further view that an appropriate penalty for the violation charged is $1800.

The proposed Findings of Fact and Conclusions submitted by the parties have been considered. To the extent that they are consistent with Findings of Fact, and Discussion and Conclusions herein, they are granted, otherwise they are denied.

Having considered the entire record and based on the Findings of Fact, and Discussion and Conclusions herein, it is proposed that the following order be issued.

## Final Order[17/]

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)(1)), a civil penalty of $1800 is assessed against Respondent, Cantor Brothers, Inc., for the violation which has been established on the basis of the complaint issued on October 16, 1975.

Bernard D. Levinson
Administrative Law Judge

June 3, 1976

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17/ 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)).

ATTACHMENT A

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, AS AMENDED

ON OCTOBER 21, 1972[1/] (FIFRA)

86 Stat. 973, Public Law 92-516

Parallel Citations

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

1/ The Act was further amended on November 28, 1975, 89 Stat. 751, P.L. 94-140