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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION IX

FILED
MAR 18 1976
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
HEARING CLERK

IN RE:	)	
	)	I.F.&R. Docket No. IX-78C
CUTTING DIVISION OF HARVEST	)	
INDUSTRIES, INC.,	)	
	)	
Respondent	)	

Respondent admitted that violations of the governing statute occurred as alleged in the complaint. Proceeding submitted for decision based on written exchanges between the parties. Lesser penalty than proposed in the complaint found proper. Order entered assessing such penalty.

Theo. A. Bruinsma for respondent.
Matthew S. Walker and Jan E. Taradash for complainant.

INITIAL DECISION BY WILLIAM J. SWEENEY,
ADMINISTRATIVE LAW JUDGE

By complaint filed on April 30, 1975, the United States Environmental Protection Agency, Region IX, alleged that the respondent had violated Section 12(a)(1)(A) and 12(a)(1)(E) of the Federal Insecticide, Fungicide, and Rodenticide Act, as specified in such complaint. The respondent requested a hearing. Judge Bernard D. Levinson was designated to preside. At his direction the parties submitted written statements concerning the alleged violations. Subsequently, due to the unavailability of Judge Levinson, the undersigned was designated to preside. The hearing requested by respondent was scheduled to commence on March 24, 1976 but was canceled upon receipt of a letter from respondent, dated March 1, 1976, stating a willingness to submit the proceeding for decision based on the written exchanges between the parties; it was noted that the facts are not in dispute.

The violations specified in the complaint are that: on or about May 2, 1974 the respondent distributed a pesticide, Mapco Neo Sheep Dip, by causing it to be shipped from Sacramento, California, to Reno, Nevada; the pesticide was not registered under the Act; the pesticide was misbranded

in that the label did not bear on the front panel or the part of the label displayed under customary conditions of purchase the warning or caution statement "Keep out of reach of children" in a type size which was large enough, nor a signal word such as "Caution"; and the pesticide was misbranded in that the precautionary labeling on the front panel was not prominently placed thereon with such conspicuousness as to render it likely to be read under customary conditions of purchase. The penalty proposed for the violations is $5,200, consisting of $3,200 for the failure to register the pesticide and $2,000 for the first labeling violation specified above. These amounts are those specified for the respective violations under the Guidelines for the Assessment of Civil Penalties (39 FR 2711, July 31, 1974), for violators with annual gross sales as large as those of the respondent.

As indicated, the respondent does not dispute nor contest the occurrence of the violations alleged in the complaint. The amount of the penalty proposed is regarded as too severe and respondent's submission of facts is offered as a basis for mitigating such penalty.

Evidence submitted by complainant. - In view of the admission of violations by the respondent it is not necessary to recite in detail the data submitted by complainant. It is clearly shown that the pesticide was toxic and unregistered. With respect to the labeling violation for which a penalty is proposed, it appears that the required words "Keep out of reach of children" was type size 8 point rather than 10 point as specified in the regulations, and that no signal warning word, such as danger or caution, appeared on the same label front panel. On a side label panel are the words Caution and Warning, each followed by instructions, and a skull and crossbones followed by the word Poison in large size capital letters.

It is contended by complainant that the penalty proposed, particularly that portion thereof proposed for the failure to register the pesticide, is warranted in view of respondent's history and the possible damage which misuse of the sheep dip could cause. The record shows that in 1972 the President of Cutting Division was the Vice President and General Manager of Harvest Brand Division of Harvest Industries, Inc. The latter division manufactures products subject to registration under the governing statute. In 1972 the Harvest Brand Division was charged with having made an interstate shipment of an unregistered product, in violation

of the Act. The Vice President - General Manager replied to this charge. Also in 1972 two other failures to register products were charged and replies were made by the Assistant General Manager of Harvest Brand Division. As to possible damage due to product misuse, tests made by complainant established that the subject product is a severe ocular and dermal irritant; such tests were made subsequent to filing the complaint herein.

Facts and argument submitted by respondent. - It is respondent's ultimate contention that the facts and circumstances surrounding the admitted violations warrant a substantial mitigation of the proposed penalty. There is, however, no question as to respondent's ability to pay the penalty proposed and remain in business, nor that its annual gross sales exceed $1-million.

Mapco Neo Sheep Dip has been produced and sold by the manufacturer since 1922. The manufacturer knows of no instance of harm resulting from use of this product, and has never had a claim filed against it due to use of the product. This sheep dip has been registered in California and, at least to the time of the violations under consideration, could be and was lawfully sold and distributed within California.

Respondent received notice (in some manner which is not specified of record) during September 1974 that the interstate distribution of Mapco Neo Sheep Dip in May 1974 was a violation of the Act; the amount distributed was six gallons valued at $17.82. Sales personnel were immediately sent to all of respondent's customers in Nevada and they recovered all of the subject pesticide in stock whether or not it had been sold by respondent. As stated earlier, the complaint was filed on April 30, 1975.

In regard to the labeling violation for which a penalty is proposed the respondent admits the deficiency but notes that the label did publish cautionary words, although not the prescribed words, nor the correct type size and location on the label.

Discussion. - The sole matter for decision is the appropriate penalty to be assessed. In evaluating the penalty the only criterion applicable to finding an amount less than proposed is the gravity of the violation. The amount proposed is not inappropriate to the size of respondent's business nor to the effect on respondent's ability to continue

in business. Section 168.45 of the governing rules and regulations provides that in determining the appropriate penalty to be assessed the Administrative Law Judge may consult and rely upon the Guidelines for Assessment of Civil Penalties. Section IC(1)(a) of the guidelines provides as follows:

Gravity of violation. One determinant of the amount of a proposed civil penalty is the gravity of the violation. The gravity of any violation is a function of (1) the potential that the act committed has to injure man or the environment; (2) the severity of such potential injury; (3) the scale and type of use anticipated; (4) the identity of the persons exposed to a risk of injury; (5) the extent to which the applicable provisions of the Act were in fact violated: (6) the particular person's history of compliance and actual knowledge of the Act; and (7) evidence of good faith in the instant circumstance.

The elements quoted above will be discussed in order of presentation. (1) The failure to register the pesticide resulted in the interstate distribution of a toxic product, with potential severe skin or eye irritation to the handler, and which might have been refused registration under the Act. The fact that the California manufacturer has never had a claim made against it does not indicate a lack of potential for injury to man. A negligent user of the product would have no grounds for such a claim. No possible injury to the environment is indicated from the facts of record. The labeling violation presented no potential for injury to man. Caution and warning notices were on the label in addition to the attention attracting skull and crossbones, and the capitalized word Poison. (2) It is not possible on this record to find that the product sold by respondent would have a greater or less potential for severe injury than some other product used for the same purposes which has been qualified for registration under the Act. The labeling violation could not have increased the severity of any potential injury. (3) The type of use of Mapco Neo Sheep Dip sent to Nevada was probably for vermin control in raising sheep. For such purpose, injury to man is not indicated in the absence of gross negligence. (4) The identity of persons exposed to risk or injury from the subject product if used in Nevada would most likely be sheep herders or handlers who normally would be experienced in using the product carefully so as to prevent personal or animal injuries. (5) The extent to which the Act was in fact violated was complete

with respect to the failure to register the product. The record shows that respondent was familiar with the statute requiring registration. The failure is not indicated to be a flouting of the law, however. Rather, it appears that the respondent was complacent in the matter because it was not the manufacturer of the product. The labeling violation was technical in nature. In fact the skull and crossbones, and the large printed Poison, tends to attract attention more forcefully than a signal word on the front panel of the label. (6) As stated earlier, respondent knew of the Act. There is no history of noncompliance with the Act by the Cutting Division. However, respondent's Harvest Brand Division had not complied with the Act in three instances shown of record. (7) The respondent showed good faith in the instant circumstances not only by discontinuing interstate sales of the pesticide but by recovering stocks of the pesticide from Nevada dealers no matter whether such pesticide had been sold by respondent or by a California competitor. The violations resulted from negligence rather than a deliberate act of omission.

Findings and conclusions. - The respondent violated the Act as alleged in the complaint by distributing in interstate commerce a pesticide subject to the Act which was unregistered and improperly labeled. The failure to register the pesticide is a grave violation. Other facts of record, as detailed hereinbefore under the heading discussion, are of a mitigating nature and warrant a reduction in the maximum penalty of $3,200 proposed for such violation. It is found that a penalty of $1,600 is adequate, fair and reasonable in the circumstances. The labeling violation is of a technical nature, and indeed the label used might be considered more forceful as a warning than one meeting statutory prescription. A nominal penalty only is warranted. It is found that the proposed penalty of $2,000 should be reduced to $100.

Based on the foregoing findings and conclusions the following order is entered.

ORDER

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [86 Stat. 973; 7 USC 136 l(a)], a civil penalty of $1,700 is hereby assessed against Cutting Division of Harvest Industries, Inc.

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

Dated: March 18, 1976

William J. Sweeney

William J. Sweeney
Administrative Law Judge

SERVICE LIST

I hereby certify that a copy of the foregoing Initial Decision, addressed to each of the following, was mailed Certified Mail, Return Receipt Requested, postage prepaid, in a United States Postal mail abox, or hand-delivered, at San Francisco, California, on the 19th day of March 1976.

Theo. A. Bruinsma, President
Harvest Industries, Inc.
9841 Airport Boulevard
Los Angeles, CA 90045

Matthew S. Walker
Senior Attorney
U.S. Environmental Protection Agency
Region IX
100 California Street
San Francisco, CA 94111

Dated at San Francisco, California, this 19th day of March 1976.

Lorraine Pearson

Lorraine Pearson
Regional Hearing Clerk
Region IX

No. 936639

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PS Form 3811, Jan. 1975

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SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- [X] Show to whom and date delivered..... 15¢
- [ ] Show to whom, date, & address of delivery.. 35¢
- [ ] RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- [ ] RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
Theo. A. Bruinsma, President
Harvest Industries, Inc.
9841 Airport Boulevard
Los Angeles, CA 90045

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. 936639 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE [X] Addressee [ ] Authorized agent

4. DATE OF DELIVERY 3-23-76 POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

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