UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Transformer Service (Ohio), Inc.,	)	Docket No. TSCA-IX-84-0013
	)	
	)	
Respondent	)	

Toxic Substances Control Act - Rules of Practice - Accelerated Decisions - Evidence - Where affidavits and documentary evidence clearly established that Respondent had stored PCBs for disposal in February 1979 and failed to remove and properly dispose of the PCBs prior to January 1, 1984, as required by 40 CFR 761.65(a), an accelerated decision finding Respondent in violation of the cited regulation would be issued as there was no issue of material fact relating to said violation which required a hearing.

Toxic Substances Control Act - Rules of Practice - Accelerated Decisions - Determination of Penalty - Where appropriateness of proposed penalty for violation of the Act was in issue, Respondent was entitled to a hearing as to the amount of the penalty, notwithstanding Complainant's contention penalty had been determined in accordance with PCB Penalty Policy (45 FR 59770, September 10, 1980).

Counsel for Respondent: Jeffrey J. Casto, Esq.
Akron, Ohio

Counsel for Complainant: David M. Jones, Esq.
Office of Regional Counsel
U.S. EPA, Region IX
San Francisco, California

Accelerated Decision

The captioned proceeding was commenced by the issuance on April 16, 1984, of a complaint by the Director, Toxics and Waste Management Division, U.S. EPA, Region IX, charging Respondent, Transformer Service, Inc., with a violation of the Toxic Substances Control Act (15 U.S.C. 2601 et seq.) and 40 CFR 761.65(a) in that PCBs stored for disposal at the BKK site, Beatty, Nevada, prior to January 1, 1983, had not been removed and disposed of prior to January 1, 1984. It was proposed to assess Respondent a penalty of $10,000 for this violation.

Respondent answered, denying that it presently or had ever maintained any PCB containers at the mentioned BKK site. Respondent alleged, inter alia, that the PCB containers stored at the BKK facility in Beatty, Nevada, were under the constructive control of Transformer Service (Ohio), Incorporated (TSO), an Ohio corporation, separate and distinct from Transformer Service, Incorporated (TSI), a New Hampshire corporation. It was further alleged that, but for the intentional and tortious interference by BKK, TSO would have removed and disposed of the PCB containers stored in Beatty, Nevada, prior to January 1, 1984.

In the prehearing exchange directed by the ALJ, Respondent furnished copies of certificates from the Secretaries of State of Ohio and New Hampshire certifying that TSI was a corporation of the State of New Hampshire in good standing as of September 27, 1983, and that TSO was a corporation of the State of Ohio in good standing as of August 6, 1984.

It was alleged that the corporations have no common officers, directors or shareholders. Included in the documents supplied was a copy of a purchase order, dated February 2, 1979, to BKK Company of Nevada whereby Transformer Service, Inc., 680 East Market Street, Akron, Ohio, called for the transportation from Hayward, California and the storage at the BKK facility, Beatty, Nevada, of approximately 125 gallons of PCB liquid waste. Also included was a copy of TSO Hazardous Waste Manifest No. 0463 reflecting the shipment on March 24, 1984, from the BKK facility in Beatty, Nevada, of 100 gallons of PCBs in two 55-gallon drums, two 55-gallon drums containing an unstated quantity of hazardous waste (apparently a combustible liquid), three empty 55-gallon drums, and five empty 5-gallon cans, which were apparently PCB contaminated. The manifest stated that the liquids were to be incinerated at Rollins, Deer Park, Texas,1/ while the solids were to be buried at SCA or other EPA approved landfill.

Respondent alleged that in December 1983, TSO had made arrangements with Rollins Environmental Services, Inc. to pick up all PCB materials it had generated, which were located at the BKK site in Beatty, Nevada, and that, notwithstanding the fact Respondent was current with all payments for storage, it was informed for the first time that the material could not be released without a payment in advance of $1,629.00 by certified check. Respondent stated that it had never agreed to this requirement and that it was not a part of any contract between the parties. Respondent further alleged that even if the material had been released, it would have

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1/ This is one of the few EPA approved sites for the incineration of PCBs and indicates that all liquids were or contained PCBs. The California Liquid Waste Hauler Record (enclosure to Complainant's proposed Exh 4), reflecting shipment of the material to the BKK Nevada site on February 12, 1979, indicates that the drums contain PCB waste in liquid and sludge form.

been impossible to properly dispose of the material prior to January 1, 1984, because all EPA approved incinerators were [operating] at full capacity.

Under date of September 28, 1984, Respondent filed a motion to dismiss upon the ground that Complainant had instituted action against the wrong party in that TSI, a New Hampshire entity, and TSO were separate corporations, that TSI did not engage in any activity or generate any wastes in Hayward, California or in Region IX which are the subject of this action, did not issue or direct the issuance of a purchase order from TSO to BKK for pick-up and storage of the PCB containers, did not pay for the storage of said containers nor have any role in the pick-up and disposal of said materials from BKK on March 24, 1984. Supporting the motion were the affidavits of Richard Casarano, operations manager for TSI and Marion O'Hear, office manager for TSO from April of 1982 through May of 1984.

Mr. Casarano's affidavit states that TSI is a New Hampshire corporation formed on November 20, 1952 and is currently in good standing and that TSI has never owned or controlled any PCB containers at the BKK site in Beatty, Nevada. The affidavit of Ms. O'Hear is to the effect that as office manager of TSO she had care, custody and control of corporate books and records, that in a review of such records she had found Purchase Order No. 3097, dated February 2, 1979, from TSO to BKK for the transfer of PCB items for storage, that these PCB items were from jobs performed by TSO and that TSI had no authority or control over the work which generated any of the PCB items, that all payments to BKK for storage charges were made by TSO, that attempts on December 29, 1983, to have

the PCB items picked up from BKK by Rollins Environmental Services were unsuccessful, because BKK demanded a certified check in the amount of $1,629.00 prior to release of the items and because BKK had no personnel on the site to release the items and that on March 24, 1984, TSO arranged for and effectuated the removal of the PCB items from the BKK site and their subsequent disposal in accordance with all applicable federal, state and local regulations.

Accompanying the motion to dismiss was a motion by Respondent to prohibit Complainant from introducing evidence not provided in the prehearing exchange report. The motion alleged that Complainant had not complied with the ALJ's directive that Complainant furnish names of expected witnesses and summaries of expected testimony to support the allegations in Paragraphs 1, 2 and 4 of the complaint, but had merely provided a group of documents without summarizing their relevance to the action or which paragraphs of the complaint they were deemed to support.

Complainant's response to the motion included a motion for an accelerated decision and a motion to amend the complaint to substitute TSO as the respondent in lieu of TSI. Supporting the motion for an accelerated decision was an affidavit of H. Laverne Rosse, of the Department of Conservation and Natural Resources, State of Nevada, whose inspection of the BKK facility on January 24, 1984, led to the institution of the present proceeding. Mr. Rosse states that on the above date he met at the BKK facility near Beatty, Nevada with Mr. Clarence Gieck, Technical Manager for BKK, for the purpose of inspecting the facility for compliance with the Toxic Substances Control Act. Mr. Rosse further states that BKK's storage inventory record which was made available to him, showed three entities storing

PCB liquid waste beyond the regulatory deadline and that one of these was identified as Transformer Service, Inc., P. O. Box 1077, Concord, New Hampshire.2/ A BKK customer list, attached to the affidavit, identifies a fourth entity as Transformer Service, 680 E. Market Street, Akron, Ohio. A notation on this list indicates that the last mentioned firm had seven drums and five empty 5-gallon cans in storage as of December 27, 1983.

Also attached to Mr. Rosse's affidavit is a copy of a letter, dated November 3, 1983, from BKK to Transformer Service, Inc., P. O. Box 1077, Concord, New Hampshire, Attention: Stephen Booth, General Manager, concerning the PCB containers and drums in storage at the BKK facility. The letter pointed out that it was very important that the addressee read the enclosed notice regarding the requirement for the removal and disposal of all PCB articles and containers placed in storage prior to January 1, 1984. The notice referenced EPA's regulations implementing the Toxic Substances Control Act, 40 CFR Part 761, and stated in pertinent part: "You, as generator and title holder of the PCBs which have been in our storage facility before January 1, 1983, must have them removed from storage and disposed of prior to January 1, 1984."

In further support of the motion for an accelerated decision, Complainant submitted the affidavit of Clarence W. Gieck, Technical Manager of BKK Corporation, mentioned previously. Mr. Gieck says that records at the BKK facility, Beatty, Nevada, reflect that PCB waste owned by Transformer Service, Inc. was placed in storage in February 1979, and removed from storage on March 24, 1984. Mr. Gieck also says that the

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2/ A notation under the name Transformer Service, Inc. indicates that Stephen Booth is General Manager and that Marian [Booth], Greg Booth and Jeff Casto, all with Akron, Ohio phone numbers are contact people.

BKK letter addressed to Transformer Service, Inc., Concord, New Hampshire, dated November 3, 1983, signed by him, was sent certified mail, return receipt requested and was sent to and acknowledged by the company known to BKK Corporation as the owner of the PCB items identified in the letter.

Without ruling on the motion for an accelerated decision or on Respondent's motion to prohibit Complainant from introducing evidence not provided pursuant to the prehearing exchange, the ALJ by an order, dated October 23, 1984, granted Complainant's motion to amend the complaint and allowed Respondent 20 days in which to file an answer. As indicated previously, the amended complaint substituted TSO as Respondent in lieu of TSI. The factual allegations, including the amount of the proposed penalty, were identical with the original complaint.

TSO answered under date of October 31, 1984, admitting that it was a corporation of the State of Ohio, whose principal place of business was formerly 680 E. Market Street, Akron, Ohio, and that it did own PCB containers at the BKK of Nevada site near Beatty, Nevada. TSO also admitted that it stored PCB containers at the mentioned BKK site on or about January 24, 1984, but denied that the containers were placed in storage for disposal and denied that the containers were subject to the requirements of 40 CFR 761.65(a). Respondent alleged that compliance with 40 CFR 761.65(a) was impossible, because the demand for disposal before January 1, 1984, exceeded the capacity for disposal at approved sites in an approved manner. TSO repeated its previous allegations concerning BKK's intentional and tortious inference with its efforts to remove the containers prior to January 1, 1984, but for whose actions the containers allegedly would have been removed and disposed of prior to said date.

Under date of November 7, 1984, Complainant filed a motion for a ruling on Respondent's motion to dismiss complaint. TSO has not responded to the motion. A fair reading of the motion indicates that it is a reiteration of Complainant's motion for an accelerated decision and it will be so treated.

The basic thrust of the motion is that TSO's denial in the answer to the amended complaint that the PCB items were placed in storage for disposal at the BKK site is contradicted by the affidavit of Marion O'Hear furnished in support of Respondent's motion to dismiss upon the ground Complainant had sued the wrong party. Emphasis is placed upon Paragraph 3 of Ms. O'Hear's affidavit which states that she had located PO No. 3097, dated February 2, 1979, which was forwarded to BKK for transfer of PCB items for storage. Complainant also emphasizes Paragraph 9 of Ms. O'Hear's affidavit which states, inter alia, that TSO has disposed of all of said items [PCB items in storage at BKK] in accordance with all applicable federal, state and local regulations. Complainant says this necessarily means the items were stored for disposal, that TSO's present denial is lacking in credibility and should be given no effect and that Respondent's answer raises no material issues of fact which require a hearing.

If the requested relief is granted, Complainant asks that the amount of the penalty be reviewed in accordance with § 22.27(b) of the Rules of Practice. Complainant says that the proposed penalty of $10,000 was based upon the PCB Penalty Policy (45 FR 59770 et seq., September 10, 1980) and that potential damage was based upon a quantity of 385 gallons of PCB

fluid (seven 55-gallon drums). In determining the amount of the penalty, Complainant says that the ALJ should consider the dilatory tactics engaged in by Respondent as to the identity of the responsible party and the contradictory statements referred to above in the answer to the amended complaint, which Complainant asserts were knowingly false. Complainant says that representations have been made that TSO is without funds to pay any penalty and that it has learned that Walter H. Booth is Treasurer of both TSI and TSO and that Stephen W. Booth, President of TSI, and Gregory A. Booth, President of TSO, are believed to be brothers. Complainant also notes that Jeffrey J. Casto, Respondent's attorney, is agent for both corporations in the State of Ohio. Complainant appears to be taking the position that this is a case warranting piercing of the corporate veil, so that any penalty levied against TSO may also be assessed against TSI.

Conclusions

1. The affidavits and documentary evidence referred to above, establish that Respondent, Transformer Service (Ohio), Inc., placed PCBs and PCB containers in storage for disposal at the BKK of Nevada, Inc. facility near Beatty, Nevada, in February 1979 and that these items were not removed from storage and disposed of prior to January 1, 1984.

2. Respondent has thus violated § 15 of the Toxic Substances Control Act (15 U.S.C. 2614)3/ and 40 CFR 761.65(a) and is liable for a civil penalty in accordance with § 16 of the Act.4/

3. Notwithstanding Complainant's assertion that the proposed penalty was determined in accordance with the PCB Penalty Policy (45 FR 59770 et seq.), Respondent, in accordance with § 22.15 of the Rules of Practice (40 CFR Part 22), is entitled to a hearing as to the amount of the penalty.

Discussion

The fact that TSO placed PCBs and PCB containers in storage for disposal in February 1979 and failed to remove and properly dispose of said PCBs prior to January 1, 1984, thus violating the Act and regulations, is considered to be clearly established and no further discussion in that regard is warranted.

Section 22.15(a) (40 CFR 22.15(a)) of the Rules of Practice provides in pertinent part: "Where respondent (1) contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty

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3/ Section 15 entitled "Prohibited Acts" (15 U.S.C. 2614) provides in pertinent part: "It shall be unlawful for any person to (1) fail or refuse to comply with (A) any rule promulgated or order issued under section 4, (B) any requirement prescribed by section 5 or 6 or (C) any rule promulgated or order issued under section 5 or 6."

The rule involved here (40 CFR 761.65) was promulgated under § 6 of the Act.

4/ This necessarily disposes of Respondent's motion that Complainant be prohibited from introducing evidence allegedly not furnished in its prehearing report.

proposed in the complaint * * * is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Regional Hearing Clerk." While Respondent has not specifically contended that the amount of the proposed penalty is inappropriate, it has alleged that EPA's enforcement of the Act and regulations, under the circumstances present here is arbitrary and capricious. Accordingly, it is concluded that the appropriateness of the penalty has been placed in issue.

Complainant says that it has information that TSO is without funds to pay the penalty and it is noted that ability to pay is among the factors the Administrator is required to consider in determining the amount of the penalty (§ 16(a)(2)(B)). Moreover, while the alleged tortious inference by BKK with Respondent's efforts to remove the PCBs from storage and the unavailability of approved sites for disposal of PCBs may not be legal excuses for the violation here determined, they may, nevertheless, qualify as "other matters as justice may require" within the meaning of § 16(a)(2)(B) of the Act, and thus warrant a lower penalty. Of course, the alleged dilatory tactics engaged in by Respondent as to the identity of the responsible party and its alleged intentional falsification as to whether the PCBs were stored for disposal may also be matters for consideration in this respect. This merely buttresses the conclusion that determining the amount of a penalty on what is in effect a motion for summary judgment is seldom, if ever, appropriate.

Complainant's suggestion that the penalty assessed against TSO may also be levied against TSI depends upon a showing that the two corporations are in effect operated as one and for example, have common books, records, officers, offices and stockholders. If Complainant intends to press this position, it is clearly an additional reason why summary judgment as to the penalty is not appropriate.

Order

Respondent, Transformer Service (Ohio), Inc. having violated § 15 of the Toxic Substances Control Act (15 U.S.C. 2614) and 40 CFR 761.65 is liable for a civil penalty in accordance with § 16 of the Act (15 U.S.C. 2615). Complainant's motion for an accelerated decision as to the amount of the penalty is denied. The parties shall report on or before March 1, 1985, as to whether this matter has been or will be settled.

Dated this 16th day of January 1985.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this Accelerated Decision, dated January 16, 1985, in re: Transformer Service (Ohio), Inc., was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to each party in the proceeding as follows:

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Helen F. Handon

January 16, 1985

Helen F. Handon
Secretary