UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY 86 JUN 27 A9:47

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Farmers Cooperative Elevator Company,	)	Docket No. VII-632C-85P
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act. EPA Notice in "Federal Register" of Intent To Cancel certain uses of product was violated when Respondent failed to take affirmative action to return product to supplier for disposition, mark product as "Not For Sale," segregate product from saleable products, or request advice from EPA.

Appearances:

Mr. Douglas D. Derscheid
Farmers Cooperative Elevator Company
P. O. Box 66
East Main Street
Plymouth, Nebraska 68424

For Respondent

Rupert G. Thomas, Esquire
Office of Regional Counsel
U. S. EPA, Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

Counsel For Complainant

INITIAL DECISION

of

Honorable Edward B. Finch
Chief Administrative Law Judge

This is an administrative action for the assessment of civil penalties instituted pursuant to §14 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. §136l, hereinafter FIFRA. This Complaint served as notice that the U. S. Environmental Protection Agency (hereinafter EPA) had reason to believe that Farmers Cooperative Elevator Company; Plymouth, Nebraska, has violated §12 of FIFRA, 7 U.S.C. §136j. The Complainant, by delegation from the Administrator of the U. S. EPA, is the Regional Administrator, EPA, Region VII. The Respondent is Farmers Cooperative Elevator Company; 501 East Main; Plymouth, Nebraska 68424, which is, and at all times referred to in this Complaint was, a business incorporated under the laws of the State of Nebraska.

The Complaint alleges that Respondent has violated FIFRA, as follows:

On or about January 31, 1985, Respondent held for sale at its establishment in Plymouth, Nebraska, 12 one-gallon containers of CORNBELT TOXAPHENE E-6, EPA Registration No. 10107-11, a pesticide which was packaged, labeled, and allegedly available for sale.

On or about Januray 31, 1985, a representative of the EPA obtained from Respondent a documentary sample of CORNBELT TOXAPHENE E-6 and identified it as Sample No. 013185 3000 0401.

The label of CORNBELT TOXAPHENE E-6 stated, in part:

" * * *

CORNBELT
TOXAPHENE E-6

* * *

Directions
Cotton. . .Ornamentals. . .Corn Sorghum. . .Seed Alfalfa. . .
Sheep and Goats. . .

* * *

EPA Reg. No. 10107-11

* * *"

On November 29, 1982, under the authority of §6(b) of FIFRA [7 U.S.C. §136(b)], the EPA published in the "Federal Register" its Notice of Intent to Cancel within 30 days all uses of toxaphene with the following exceptions: (1) dipping of beef cattle and sheep to control scabies, (2) use of cotton, corn, or small grains to control army worms, cutworms or grasshoppers, all under approved emergency exemptions only, (3) use on pineapple to control mealy bug and pineapple gummosis moth and use on bananas for weevil control in the Virgin Islands and Puerto Rico only, and (4) manufacturing use only for formulating to products listed above. Additional uses were permitted until December 31, 1986, provided registrants amended their registrations to incorporate modifications specified in the order. Uses on the labels of CORNBELT TOXAPHENE E-6 referred to in paragraphs 6 through 8 were cancelled effective March 2, 1983. The Notice of Intent to Cancel permitted existing

stocks of cancelled products already in channels of trade to be sold, shipped or distributed for use in accordance with labeling accompanying the product until December 31, 1983.

The Complaint alleges that Respondent's holding for sale on January 31, 1985 of CORNBELT TOXAPHENE E-6, beyond the December 31, 1983 deadline for existing stocks, was in violation of the cancellation order.

According to §12(a)(2)(K) of FIFRA, 7 U.S.C. §136j(a)(2)(K), it is unlawful for any person to violate any cancellation of a registration of a pesticide under §6 of FIFRA, 7 U.S.C. §136d.

Complainant has proposed that a civil penalty of One Thousand Dollars ($1,000) be assessed against Respondent.

Respondent filed a brief Answer in which it was stated that it had not offered the product for sale, nor had it offered the product for sale since before December 31, 1983. And further, that it was well aware the product was not to be sold and had not been. Respondent also states that Mr. Scheele was misled by the inspector to sign the inspector's statement that the product was for sale. He understood he was signing for the inspector for photographs and that we did indeed have the product in our warehouse. Not that it was offered for sale.

We are not contesting the civil penalty amount or our ability to pay if the penalty is imposed, but we feel the Complaint is unjustified.

An adjudicatory hearing was held in Lincoln, Nebraska on April 8, 1986. Complainant filed a brief. Respondent chose not to file a brief.

Findings Of Fact

1. Respondent is a corporation incorporated under the laws of the State of Nebraska. Respondent's business address is 501 East Main; Plymouth, Nebraska 68424.

2. On or about January 31, 1985, Diane K. Moline, a representative of the EPA, conducted an inspection of Respondent's business. Tr. 8.

3. Diane K. Moline asked Allen Scheele, Crop Protection Manager, whether or not everything in Respondent's storage area was for sale, and Mr. Scheele replied that it was. Tr. 9, 20.

4. Diane K. Moline observed three cases of CORNBELT TOXAPHENE E-6 in Respondent's warehouse. Tr. 9. Said Toxaphene was not segregated from other products in the storage area. Tr. 10.

5. At the conclusion of the inspection of Respondent's business, Diane K. Moline presented a statement to Allen Scheele to read and for his signature. Mr. Scheele read and signed the aforementioned statement. Tr. 10, 40. (C. Ex. 2)

6. Allen Scheele did not protest, nor inform Diane K. Moline that the CORNBELT TOXAPHENE E-6 was not for sale. Tr. 11.

7. The gross sales of Respondent's business is $13,000,000.00. Tr. 16.

8. Respondent was aware of the EPA cancellation order for toxaphene products. Tr. 33.

9. Allen Scheele has been an employee of Respondent for 25 years (Tr. 30), the last ten years as a crop production manager. Tr. 36.

10. Respondent employed approximately 45 people. Tr. 36. Most of the 45 people sometimes worked in the warehouse. Tr. 37.

11. The CORNBELT TOXAPHENE E-6 in Respondent's warehouse was not marked by Respondent to denote that it was not for sale. Tr. 53.

12. The EPA proposed civil penalty of $1,000 against Respondent is based on the lower level of gravity for the violation alleged. If the higher level of gravity was assessed against Respondent, the proposed penalty would be $5,000. Tr. 24-25.

Discussion And Conclusion

Mr. Sheele's testimony revolved around his written statement signed for EPA Consumer Safety Officer Diane K. Moline. The net result was that he did not at any time inform Diane Moline that the CORNBELT TOXAPHENE E-6 was not for sale by either this signed statement or during his oral testimony at the hearing. He did state that none of the product had been sold for two (2) years.

Respondent's next witness, Donald Wiseman, who was General Manager of Respondent at the time of the alleged violation, had quite a different version as to whether or not the product was for sale. His sworn testimony was to the effect that the product was not for sale and most of the employees knew this.

Mr. Wiseman's pertinent testimony is, as follows:

"THE WITNESS: Okay. At the time of the inspection, I was not on the premise and I received a copy of the inspection by Ms. Moline after the following day or I believe it was.

I looked at the inspection and I guess I never really felt there was a major problem with it until I received a letter from the company -- or from the EPA.

Then I reviewed that information with Mr. Scheele, concerning the Stop Sale, because I knew of his awareness that the Cornbelt Toxaphene had been off sale. We had not sold the product for at least two years prior to that time.

He was fully aware of that. I was fully aware of that information.

The office people were fully aware of it. It had been taken off of our price list.

So a ticket could not be made out on the product. . .the product wasn't even listed on the price sheets anymore, to know that that product was off sale.

* * *

. . .to blanketly say when you walk in a warehouse or any person's business that everything there is for sale, yes it's for sale, however we have this product that we can't offer for sale.

* * *

THE WITNESS: My point of contention, and I understand that the minimum -- that the minimum fine was assessed the company. I am not contesting that we were assessed a minimum fine.

What I am contesting, and in the letter that I sent, of which you have a copy of, was that for a lack of a better word, I feel that Mr. Scheele, as the crop production manager, was mislead when he signed the affidavit.

He understood that they were stating that the product had not been sold and Ms. Moline was stating that, yes the product was offered for sale as a saleable product.

It is my opinion a $1,000.00 fine for not having an off sale label on the product is out of order.

BY MR. DERSCHEID:

Q. Mr. Wiseman, how often have you had employee meetings in the past as you were general manager?

A. We had employee meetings on a monthly basis and these type of things are mentioned in brief.

But, we only -- the only people that we are concerned with these products are the people that work directly in that area.

* * *

Q. Mr. Wiseman, were all the employees that had knowledge of the chemical operation in the company aware that the Toxaphene was not for sale?

A. Mr. Scheele was aware, I know. And the people that issue the receipts in the office, were also aware of that.

They are not allowed to pick up chemical from a warehouse without a receipt."

Upon cross-examination by Mr. Thomas, Mr. Wiseman further testified:

"BY MR. THOMAS:

Q. Mr. Wiseman, how long were you employed by Respondent, you perhaps stated it, I --

A. No, I didn't. It was six and a half years.

Q. Six and a half years. And your capacity was what?

A. Was General Manager.

Q. Did you issue written notices to the employees?

A. Concerning this product?

Q. Yes.

A. No, sir.

Q. You did not. Have you ever written -- issued written notices to the employees regarding any product or any activity within the warehouse?

A. Not a written notice; no, sir."

It is quite obvious that the testimony of Mr. Wiseman, who reviewed Mr. Scheele's signed statement a day or so after the inspection, conflicts with Mr. Scheele's in that Mr. Wiseman attempts to convince the Court that Mr. Scheele misunderstood what he was signing. Mr. Wiseman testified that meetings were held to inform the employees, price lists eliminated the product which, in effect, prevented any sale of the toxaphene. However, no substantial evidence was introduced in the form of written documents to support Mr. Wiseman's testimony. Therefore, Mr. Wiseman's testimony must

be disregarded in favor of the best evidence which is the signed written statement and direct testimony of Mr. Scheele to the effect that the product could be purchased.

And further, it was incumbent upon Respondent to take an affirmative and direct action in either having the supplier take the product back, mark the product as not being for sale, and segregate it from other saleable products until proper advice was forthcoming as to its proper disposition.

It is therefore concluded that the Respondent was in violation and a civil penalty of $1,000.00 is hereby assessed against it.

FINAL ORDER */

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $1,000.00 is assessed against Respondent Farmers Cooperative Elevator Company for the violations which have been established on the basis of the Complaint.

Payment of $1,000.00, the civil penalty assessed, shall be made within sixty (60) days after receipt of the Final Order by cashier's or certified check made payable to Treasurer, Unites States of America, and forwarded to:

U. S. EPA, Region VII
(Regional Hearing Clerk)
P. O. Box 360748M
Pittsburgh, PA 15251

*/ 40 CFR 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. Section 22.30(a) provides for appeal herefrom within 20 days.

IT IS SO ORDERED.

Edward B. Finch
Chief Administrative Law Judge

Dated: June 27, 1986

CERTIFICATE OF SERVICE

I hereby certify that the original of this Initial Decision was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and that three copies were sent by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region VII, for distribution in accordance with 40 CFR 22.27(a).

Leanne B. Boisvert
Legal Staff Assistant

Dated: June 27, 1986