UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CHEMATAR INC.,	)	Docket No. II-TSCA-IMP-13-86-0233
	)	
Respondent	)	

Toxic Substances Control Act, 15 U.S.C. § 2601, et seq. (TSCA). Respondent found in violation of Sections 13 and 15 of the TSCA, 15 U.S.C. §§ 2612, 2614, for failure to file certification, pursuant to 19 C.F.R. §§ 12.118-12.127, regarding importation of chemical substances.

INITIAL DECISION

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: June 12, 1987

APPEARANCES:

For Complainant:

Lois Murphy, Esquire
Miriam E. Vallani, Esquire
U. S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10278

For Respondent:

Harvey Barrison, Esquire
Russotti & Barrison
291 Broadway
New York, New York 10007

INTRODUCTION

This civil administrative proceeding is the result of a complaint brought by the U. S. Environmental Protection Agency (sometimes EPA or complainant), pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a), (TSCA). Complainant charges Chematar, Inc., (respondent) with violating Sections 13 and 15(3)(B) of TSCA and certain implementing regulations, 19 C.F.R. §§ 12.118-12.127. It is alleged that respondent imported a chemical substance and failed to certify to the District Director, U. S. Customs Service (Customs), at the port of entry that the shipment was subject to TSCA and that it complied with the appropriate regulations. The penalty proposed in the complaint for the purported violation is $6,000.

To be determined here is whether the violation alleged is supported by the preponderance of the evidence,* and if so whether the proposed penalty is justified. "Preponderance of evidence" is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. All issues have been considered by the

---

* The applicable section of the Consolidated Rules of Practice, 40 C.F.R. § 22.24 provides, in pertinent part, that: ". . . Each matter in controversy shall be determined by the Presiding Officer upon a preponderance of evidence."

Administrative Law Judge (ALJ). Those questions not specifically discussed are either rejected or viewed as not being of sufficient import for the resolution of the principal issues presented.

FINDINGS OF FACT

Respondent is an importer of chemical substances, in bulk or as part of a mixture, operating from a facility located at 30 West 61st Street, New York, New York, 10023. It imports chemicals subject to TSCA certifications and then resells them. There are two types of TSCA certifications (sometimes certification). Stated broadly, a "positive certification" is where the importer certifies that all chemicals in the shipment comply with the rules and orders under TSCA and it is not offering a chemical substance for entry in violation of TSCA or any applicable rule or order thereunder. A "negative certification" is where the importer certifies that all the chemicals in the shipment are exempt from TSCA regulations. (Tr. 50-51) The services of a Customs' House Broker (broker) are used to assist with importation. On May 22, 1984, respondent imported 1,102 pounds of Dispersed Red 4 and 11,023 pounds of Michlers Ketone at the port of New York with entry number 1001-84877047-9 and 1001-84877062-8, respectively, without the required certification. Regarding this violation, on September 14, 1984, a notice of noncompliance (NON) was sent by complainant to the broker and agent for Chematar. On or about January 2, 1986,

respondent imported a shipment of 80 drums of Michlers Ketone, a chemical substance, at the Port of New York bearing entry number 1001-86-889491-1. For this shipment Daniel F. Young, Inc., 17 Battery Place, New York, New York, was again the broker. (Jt. Ex. 1, C-3; Tr. 73-74)

One of the functions of a broker is to prepare an entry package, or entry folder (folder) on behalf of the importer for submission to Customs. When a shipment is entering the country the broker notifies the importer and asks him to send the documents necessary for Customs' entry, including several copies of Form 3461 (immediate delivery ticket), an entry form, a commercial invoice, packing list, bill of lading and, if dealing with a chemical, either a positive or negative certification. (Tr. 110-112) The broker then arranges the documents in a manila folder placing the bill of lading or consignee's authority on the left-hand side. The permanent documents, including a copy of the bill of lading, a commercial invoice, the certification, if applicable, and all other necessary forms and statements would be stapled securely to the right-hand side of the folder. When the folder is complete, a private messenger service delivers it to the inspection and control division of Customs. (Tr. 24)

Customs does not provide for a receipt concerning certification. However, there is a way for an importer or broker to make certain that the certification is not lost. The certification

does not have to appear on a separate piece of paper as here. The appropriate regulations, more of which will be said below under the Conclusions, provide that the certification may be typed or stamped on an appropriate entry document, for example, on the commercial invoice.* (Tr. 144)

The folder is due at Customs within five days of the merchandise's arrival within port limits. A Customs' inspector reviews the invoice, checks the tariff schedule written on it against the actual merchandise and generally makes sure the paperwork matches the merchandise. The inspector will sign and keep one copy of the Form 3461, which represents the date of entry for Customs' purposes. The merchandise is released and the folder is returned to the importer or his broker who has 10 working days to lodge an entry summary consisting of the originally submitted documents plus some additional papers including several copies of Customs' Form 7501. The part of the entry summary on the right-hand side of the folder is considered the permanent file and the documents on the left-hand side will be removed during the entry process. First, one copy of Form 7501 is marked with the stamp of the Area Director of Customs establishing the closing of the 10 day period. The duty check is removed and the broker and Bureau of Census are both given a copy of the Form 7501. (Tr. 25-27)

---

* Respondent's president testified that since the issuance of the present complaint their policy is to certify by stamping both the invoice and bill of lading. (Tr. 137-138)

Unless the merchandise is of such a low risk or low value, the folder is then sent to an import specialist based on its assigned tariff number. The import specialist reviews the folder to make sure the merchandise is properly classified based on the tariff schedule; that it is properly appraised and valued according to the 1979 transaction value laws; and that other agency requirements have been met. If all is proper, it is called a "no change entry" and the folder is sent to a clerical group where it is "liquidated," or entered into the computer. (Tr. 27-28)

EPA and Customs have dual enforcement authority under TSCA. Customs can detain shipments they have reason to believe are not in compliance with TSCA and once the shipment enters the country, EPA takes appropriate enforcement action. EPA has no authority to detain shipments until they have entered into the country and similarly, Customs' authority ends once the goods have entered commerce. Therefore, if an entry package reaches the Customs' import specialist, with either improper or missing certification, Customs' only recourse is to notify EPA. (Tr. 30-31, 47, 61-62)

Under ideal conditions, the inspector would be able to determine whether a given chemical importation required a positive or negative certification. In practice, the inspectors are generalists responsible for nine tariff schedules and are therefore often unfamiliar with the niceties of some tariff numbers or

are not sufficiently acquainted with the plethora of chemicals imported to recognize when a particular chemical import needs either type of certification. (Tr. 40-41) As a result, headquarters of EPA and Customs entered into a written agreement permitting the import specialists, who are knowledgeable of chemicals and pertinent tariff schedules, to set aside folders with missing or improper certification for EPA review. This was the procedure in January 1986 when the respondent's entry was made. (Tr. 30-33, 63-64)

In this case, the import specialist reviewing respondent's entry package determined that a certification was required. When he discovered that the package did not contain the proper certification, the folder was placed in the pile segregated for EPA review. (Tr. 54-55) Two EPA inspectors subsequently reviewed respondent's folder. EPA inspectors look at both sides of each page of every document in order to determine whether the proper certification was included. Upon discovering an improper certification or the lack of same, as here, the EPA inspector had copies made of the entire folder without removing the documents from same. (Tr. 8-9, 64-66)

The EPA policy at the time respondent allegedly failed to include the proper certification was to issue a NON for the first violation. The purpose of NON was to inform the broker that a shipment was found to be missing the proper certification and to

give warning that a second violation would result in the assessment of a penalty. (Tr. 69, 97-98) Upon discovering that respondent had been issued a notice of NON in 1984, a civil complaint was issued for the present alleged violation.

By way of background, notice was given the importing community concerning certification by a Federal Register Notice, 48 Fed. Reg. 34734 (August 1, 1983), codified 19 C.F.R. §§ 12.118-12.127. Additionally, in December of 1983, EPA published a two volume set of guidelines to importers, a large Customs' pipeline information was distributed to importers and brokers and there was a joint EPA-Customs seminar which reviewed all of the Customs' regulations pertaining to certification. (Tr. 102-04)

The activities of the broker are important to the resolution of the factual questions in this proceeding. Robert Armour, (Armour), respondent's President, testified that he prepared a TSCA certification for the present shipment and attached it to the documents sent to the broker. Armour did not know whether the broker sent the folder to Customs with the TSCA certification. (Tr. 139) Testifying as respondent's witness was Nicholas Muro (Muro), who is the assistant import manager for the broker. When an importer notifies the broker of an impending import, the latter instructs the importer to send all the documents necessary for entry, including a positive or negative TSCA certification when applicable. An entry clerk at the broker then prepares an

internal worksheet to determine if all the necessary forms are included in the folder. Once this is done, a private messenger service delivers the folder to the Customs' office at the pier. (Tr. 111-114) If the folder is not rejected, the broker assumes Customs accepted it as fully intact. When Customs completes its initial processing, the folder is returned to the broker, where it is finalized before resubmitting same to Customs. (Tr. 115-116) There have been cases where folders have returned from Customs at the piers completely empty, unstapled or with documents missing. (Tr. 118)

There is no convincing evidence which would show that the certification was delivered to Customs, however. Muro did not handle respondent's folder before it was first submitted to Customs and he did not conduct the follow-up review when it was returned. He did not know whether the certification was attached to respondent's package. (Tr. 123-124) At one point, Muro testified that the broker, not the importer, was responsible for compliance with the Customs' and TSCA certification regulations. (Tr. 125) Later, he was of a different mind, claiming that it was the importer, not the broker, who had to make sure the appropriate TSCA certification was included in the folder. (Tr. 127) The clerk who prepared respondent's folder did not testify. Significantly, no one from the broker provided any evidence that the certification was ever included in respondent's folder.

That Customs did not detain the shipment does not establish that certification was in the folder. The evidence would lead one to conclude that the inspector, unfamiliar with the myriad of chemical imports that require certification, reviewed respondent's folder without searching particularly for a TSCA certification. However, when the import specialist, who is conversant regarding chemical imports and certifications, reviewed respondent's folder, the required certification was found missing, and the folder set aside for EPA review. (Tr. 55-56)

DISCUSSION AND CONCLUSIONS OF LAW

Section 13 of TSCA, 15 U.S.C. § 2612, provides, in pertinent part, that the Secretary of the Treasury shall refuse entry of any chemical substance if such entry "fails to comply with any rule in effect under this chapter." This section is designed and intended to embrace the enforcement of all TSCA import regulations. The pertinent Customs' regulation, 19 C.F.R. §§ 12.118-12.127 (sometimes regulation), is a tool to enforce the aforementioned section of TSCA. The regulation was developed by Customs after consultation with EPA. 48 Fed. Reg. 34734, (August 1, 1983).

The regulation requires the importer of a chemical substance in bulk or as part of a mixture to certify to Customs at the port of entry that the chemical shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or is not subject

to TSCA. The importer or his authorized agent is directed to sign one of the following statements:

> I certify that all chemical substances in this shipment comply with all applicable rules or orders under TSCA and that I am not offering a chemical substance for entry in violation of TSCA or any applicable rule or order thereunder.
>
> or
>
> I certify that all chemicals in this shipment are not subject to TSCA.

The certification "shall be filed" with Customs before release of the shipment.* Among others, it may be typed or stamped on an appropriate entry document or commercial invoice, or on a preprinted attachment to such entry or invoice. 19 C.F.R. § 12.121(a)(1).

The pertinent Rules of Practice of EPA provide that the complainant has the burden of going forward with and proving that the violation occurred and that the proposed civil penalty is appropriate. Following the establishment of a prima facie case, respondent has the burden of presenting and going forward with any defense to the allegations. 40 C.F.R. § 22.24. Complainant established its prima facie case that the certification was not

---

* "Filing" means the delivery to Customs. 19 C.F.R. § 141.0(d).

filed with Customs and the burden then shifted to respondent to show that it had filed the document. The heart of the respondent's case is that the certification was sent by messenger and the document disappeared somewhere in Customs. Respondent failed to provide testimony from anyone at the broker's who actually prepared or handled respondent's folder, or saw the certification go into the folder. Exhibit C-1 contained copies of the entry documents stapled on the right-hand side of the folder, except the certification was missing. The preponderance of the evidence establishes that the certification was not filed with Customs.

It would set a questionable precedent to indulge in the presumption that government officials are careless with, or lose documents. In this and like future cases, a respondent would escape liability by merely claiming that a certification was prepared and inserted into a folder. There is a strong presumption that public officials, with particular reference to the Customs' employees here, act properly and do not mishandle folders so as to lose documents. U.S. v. Chemical Foundation, 272 U.S. 1, 13-14 (1926); United States v. Ahrens, 530 F. 2d 781, 785 (8th Cir. 1976). Respondent's evidence failed to rebut that presumption.

Respondent delegated the task of filing the certification to its broker. The respondent-principal is responsible for the acts of its broker-agent in not filing the certificate for the reason

that a principal is bound by the acts of its agent while the latter is operating within the scope of its authority. 3 Am Jur 2d, Agency § 270.

It is the legal responsibility of respondent to file the certification with Customs. This it did not do. This failure is a violation on the part of the respondent as it is unlawful for any person, to among other things, to "fail . . . to . . . submit reports, notices, or other information . . . ." Section 15(3)(B), 15 U.S.C. § 2614(3)(B). It is concluded that respondent violated Sections 13 and 15(3)(B) of TSCA, 15 U.S.C. §§ 2612, 2614(3)(B), for failure to comply with 19 C.F.R. §§ 12.118-12.127.

Appropriateness of Proposed Penalty

The complaint seeks a proposed penalty of $6,000. The pertinent provision of TSCA, Section 16(B), 15 U.S.C. § 2615(B), provides that:

> (B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

The elements mentioned in the statute are restated and amplified in EPA's Guidelines for the Assessment of Civil Penalties (general

guidelines), 45 Fed. Reg. 59770, September 10, 1980. (Ex. C 6) The purpose of the general guidelines is to assure that TSCA civil penalties are assessed in a fair, uniform and consistent manner; that the penalties are appropriate for the violation committed; that the economic incentives for violating TSCA are eliminated; and that persons will be deterred from committing TSCA violations. The general guidelines also provide that it will be supplemented by regulation-specific penalty assessment guidances. With regard to Section 13 of TSCA and regulations provided thereunder, EPA developed an Enforcement Response Policy for Recordkeeping and Reporting Rules regarding Sections 8, 12 and 13 of TSCA. (Exhibit C 7) The document explains how to use the general guidelines to arrive at an administrative penalty. With particular reference to the instant matter, EPA also uses Interim Final Amendments to the Enforcement Response Policy for Section 13 of TSCA. (Exhibit C 8) If the ALJ determines that a violation has occurred, he shall determine the dollar amount of the civil penalty to be assessed in accordance with the criteria set forth in TSCA, and he must consider any civil penalty guidelines issued under TSCA. If the ALJ assesses a penalty different from that proposed in the complaint, he shall set forth the specific reasons for any increase or decrease. 40 C.F.R. § 22.27(b).

The penalty policy provides that for the first failure to file a certification, a notice of noncompliance is used, as

here, with respondent's earlier violation. For failure to file a certification a second time, based on the TSCA penalty matrix, the extent of potential damage is determined to be significant, with the circumstances assessed at level 4 resulting in a $6,000 penalty. (Tr. 97-99)

Under Section 16(B) of TSCA, 15 U.S.C. § 2615(B), one of the additional factors to be considered in assessing a civil penalty is the respondent's culpability, or degree of control over the violation. The general guidelines provide that: "There may be situations where the violator may be less than fully responsible for the violation's occurrence. For example, another company may have had some role in creating the violative conditions . . . . Such situations would probably warrant some reduction in the penalties." (Ex. C 6 at 5) Here, the broker was partially responsible for the violation.

The ALJ is also permitted to consider "such other matters as justice may require" in determining the appropriate penalty. TSCA Section 16(B), 15 U.S.C. § 2615(B). This consideration is broad enough to embrace an evaluation of the total circumstances involving the violation. This is not a situation where a certification was never prepared. The evidence shows that respondent complied, in part, with the regulation in that Armour prepared a TSCA certification and remembers sending it to the broker. The

respondent's efforts to comply should be considered, and a downward adjustment in the penalty made. The downward adjustments to the proposed penalty in this matter should be as follows: Concerning culpability, the penalty should be reduced by $1,000. Under the adjustment factor concerning other matters that justice may require, the penalty should be reduced another $1,500, for a total reduction penalty of $2,500. The total appropriate penalty in this matter is $3,500.

ORDER*

Pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a), the following order is entered against Chematar Inc.:

a. A civil penalty of $3,500 is assessed against the respondent for violations of the Toxic Substances Control Act.

b. Payment of the civil penalty shall be made by submitting a cashier's or certified check payable to the Treasurer, United States of America, and mailed to:

EPA - Region II
(Regional Hearing Clerk)
P. O. Box 360188M
Pittsburgh, PA 15251

---

* Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. § 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).

c. Payment shall be made within sixty days (60) days after receipt of the final order unless prior thereto, upon application from respondent, the Regional Administrator approves a delayed payment schedule or an installment plan, with interest, in which case payment shall be made according to said schedule or installment plan.

Frank W. Vanderheyden
Administrative Law Judge

Dated: June 12, 1987