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UNITED STATES ENVIROMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
CONTINENTAL PLASTIC CONTAINERS, INC.	)	Docket No. TSCA-PCB-84-0014
	)	
	)	
Respondent	)	
	)	

Toxic Substances Control Act:

Under the circumstances of this record, the appropriate penalty for violations of 40 CFR §761.30(e), 40 CFR §761.40(a)(7), and 40 CFR §761.60(a) is $5000, considering respondent's effort to comply, the quantity of material involved, and other factors of record.

Appearances:

Margaret Thompson, Esquire, Office of Regional Counsel, U. S. Environmental Protection Agency, Region II, 26 Federal Plaza, New York, New York, for the complainant;

Walter E. Mugdan, Esquire, Office of Regional Counsel, U. S. Environmental Protection Agency, Region II, 26 Federal Plaza, New York, New York, for the complainant;

Paul Shapiro, Esquire, Associate General Counsel, Continental Can Company, Inc., 51 Harbor Plaza, P. O. Box 10004, Stamford, Connecticut, for the respondent.

BEFORE: J. F. Greene, Administrative Law Judge

Dated: September 30, 1987

INITIAL DECISION

This civil complaint was brought against respondent Continental Plastic Containers, Inc., Milltown, New Jersey, for three alleged failures to conform to regulations governing the marking and disposal of materials having a concentration of polychlorinated biphenyls (PCB's) higher than 50 ppm, in violation of §15(1)(C) of the Toxic Substances Control Act ("TSCA"), herein referred to as "the Act," 15 U.S.C. §2615(a)(1). 1/ Specifically, the complaint charges that respondent failed to test its hydraulic Unit No. 2 for PCB-containing material, as required by 40 CFR §761.30(e); 2/ that Unit No. 2 contained fluid having PCBs in excess of 50 ppm (parts per million) but was not marked with the "PCB Mark," as required by 40 CFR §761.40 (a)(7); 3/ and that respondent improperly disposed of PCB-containing fluid in a facility not approved for such disposal, in violation of 40 CFR §761.60(a). 4/

Respondent denies, based upon what it termed "diligent inquiry," 5/ that it has been using, or ever did use or dispose of materials containing PCBs in excess of 50 ppm. (It is not disputed that the fluid being used by respondent in the hydraulic units on May 15, 1984, the date of the EPA inspection, was Pydraul 50E or another supposedly PCB-free fluid). Respondent asserts that complainant's tests, which show PCB levels in excess of 50 ppm, are defective and do not establish that the fluid contained PCBs in excess of 50 ppm, TR 5-6, 9-13.

Complainant's allegations respecting all of the counts of the complaint rest upon an inference derived from its tests upon the sample of hyraulic fluid taken from Hydraulic Unit No. 2 at respondent's facility during an

inspection on May 16, 1984, TR 46, 42. It is complainant's position that because its tests on the hydraulic fluid taken from Hydraulic Unit No. 2 show 63.5 ppm PCBs, this unit must at some previous time have contained PCBs; therefore, respondent was obligated [40 CFR §761.30(e)] to test for PCBs. Complainant believes that respondent had at one time used Pydraul 312 or 312A 6/, which could have continued to contaminate the supposedly PCB-free fluid being used in recent years, TR 48-54. Moreover, complainant had decided to inspect respondent's facility because it had a list of customers for Pydraul 312 and 312A that included the respondent, CX 1.

Respondent had tests performed on a part of the same fluid taken from Hydraulic Unit No. 2 on the day of the inspection. Its tests, performed by a commercial laboratory, show less than 50 ppm PCBs. Respondent points out that for many years only PCB-free fluid had been used in the units, and that the units were drained, flushed, and overhauled periodically over the years as part of its rigorous maintenance program, therefore making it impossible for PCBs to be found found there at a level of 63.5 ppm. Further, respondent had tests performed on waste oils previously drained from the units. No detectable level of PBC's were found. (Stipulation 22, Court Exhibit 1). Respondent asserts that these results further demonstrate that the units could not have contained PCBs in excess of 50 ppm. Complainant concedes that it has no explanation (other than possible contamination, either in the current fluid or from past use of PCB oil, TR 53-54) for 63.5 ppm PCBs in supposedly PCB-free hydraulic fluid, but believes that enforcement, not explanations is its business in this instance. The issue,

therefore, is the validity of the tests performed on the split sample taken from Hydraulic Unit No. 2 on the date of the inspection, May 16, 1984. For reasons stated below, it is concluded that the EPA tests are accurate, and that the fluid did in fact, for whatever reason, contain PCB's in excess of 50 ppm, thereby subjecting respondent to the regulations cited.

The record discloses that the EPA tests were carried out by EPA personnel in an EPA laboratory in accordance with specified test procedures used in Region II, known as the Standard Operating Procedure for the Determination of Polychlorinated Biphenyls in Transformer Fluid and Waste Oils (March, 1983), CX 8. The tests were also in conformance with the "EPA Test Method - the Determination of Polychlorinated Bipheynls in Transformer Fluid and Waste Oils," RX G. Moreover, the tests were repeated by another chemist on the same oil, with the same results. The highly credible and persuasive testimony of both the first chemist and the second, who was the supervisor of the first, shows that the test procedures were rigorously and scrupulously followed, and that many confirmatory procedures were carried out in order to be certain that there was, among other things, no "interference" in the test results. The tests performed by the supervisor were made in November, 1984, after the results of the first tests had been made known to, and disputed by, the respondent. Tests on three samples of fluid taken from three other hydraulic units on May 15, 1984, at the time of the inspection, showed no detectable levels of PCB's, Stipulation 20 (Court Exhibit 1).

The tests performed on behalf of the respondent were arguably deficient in some respects. Several possibilities for error are apparent from the record 7/ and it is therefore concluded that these test results cannot be relied upon in

the face of the elaborately careful tests -- that conformed to two lengthy testing metnods (CX 8, RX G) -- described by the EPA chemist and supervising chemist. 8/

Respondent has made a credible case that it did not know or suspect that the fluid in Hydraulic Unit No. 2 contained PCB's in excess of 50 ppm, and that changes of personnel may have contributed to this lack of knowledge. While these factors may justify a reduction in penalty, and while it is true that no evidence of previous violations has been shown, they do not constitute a defense to charges of violations of these regulations. 9/ Moreover, the statutory purpose of the legislation being enforced makes it clear that, in the face of toxic substances such as PCB's, the regulated community must be alert to every possible opportunity to minimize exposure, particularly as those opportunities that are set forth in regulations issued pursuant to the Act.

Findings of Fact and Conclusions of Law

1. Respondent is a "person", as defined at 40 CFR §761.3, and is subject to the Act and regulations issued pursuant thereto.

2. Respondent operates a facility that at all relevant times was engaged in the manufacture of plastic bottles; in the manufacturing process, high speed extrusion and blow molding machines were used, each of which is governed by a device which includes a hydraulic system. At the time of the inspection, May 16, 1984, ten independent closed loop hydraulic systems were in use, one with each of the extrusion/blow molding machines. Each of the hydraulic systems is provided with a reservoir containing about fifteen (TR 28-29, RX 1) gallons of hydraulic fluid. (Stipulations 4-8, Court Exhibit 1)

3. On May 16, 1984, Hydraulic Unit No. 2 contained hydraulic fluid that exceeded 50 ppm PCBs; the unit was not marked with the "PCB Mark" required by 40 CFR §761.40(a)(7); respondent had not tested Hydraulic Unit No. 2, as required by 40 CFR §761.30(e)(1). In disposing of the fluid in Hydraulic Unit No. 2, respondent did not dispose of the material in a facility approved for such disposal, as required by 40 CFR §761.60(a). Therefore, despite its inquiry of the manufacturer of the hydraulic fluid, and despite other measures taken, respondent was in violation of the three regulations set forth herein, and, consequently, in violation of the Act, as alleged in the complaint that initiated this proceeding.

4. Complainant's tests carefully and thoroughly conformed to the appropriate test procedures, CX 8 and RX G, TR 83, 93-94. They set forth accurately and reliably the result that the fluid taken from respondent's Hydraulic Unit No. 2 contained in excess of 50 ppm (an average of 63.5, based upon an average of test results of 56.2, 72.3, and 62.1, CX 9) as of May 16, 1984. Tests conducted for the respondent were carried out with reference to the EPA Test Method (RX G). Despite Stipulation 21, Court Exhibit 1, there is doubt that the tests conformed strictly to that method, TR 64-80, 128, 163-65, 172-173, RX O, P, and Q.

5. Based upon this record, and taking into account the effort respondent made to comply, based upon the lack of previous history of violations, based further upon the relatively small quantity of material in question and that PCBs were found in only one of the three samples, it is concluded that the appropriate penalty to be assessed is $5000.

ORDER

Accordingly, it is ORDERED, pursuant to Section 16(a)(1) of the Toxic substances Control Act, 15 U.S.C. §2615(a)(1), and based upon consideration of the entire record herein, after evaluating the gravity of the violations and the appropriateness of the penalty proposed by the complainant, that a civil penalty of $5000 is hereby assessed against respondent Continental Plastic Containers, Inc., for violations of the Act found herein.

Payment shall be made by certified check or cashier's check, within thirty (30) days of the effective date of this Order, payable to the Treasurer, United States of America, and transmitted to the United States Environmental Protection Agency, Region II (Regional Hearing Clerk), Post Office Box 360188M, Pittsburgh, Pennsylvania 15251.

J. F. Greene
Administrative Law Judge

Washington, D. C.

September 30, 1987

FOOTNOTES

1/ Violations of the regulations promulgated pursuant to authority of the Act, §6(e)(1), 1e USC §2601(e)(1), are violations of §15(1)(c) of the Act.

2/ 40 CFR 761.30(e) provides as follows, in pertinent part:

> Use in hydraulic systems. After July 1, 1984, intentionally manufactured PCBs may be used in hydraulic systems in a manner other than a totally enclosed manner at a concentration level of less than 50 ppm provided that the requirements in paragraphs (e)(1) through (7) of this section are met.
>
> (1) Each person who owns a hydraulic system that ever contained PCBs at concentrations above 50 ppm must test for the concentration of PCBs in the hydraulic fluid of each system no later than November 1, 1979, and at least annually thereafter. All test sampling must be performed at least three months after the most recent fluid refilling. When a test shows that the PCB concentration is less than 50 ppm, testing under this paragraph is no longer required. . . .
>
> (5) Data obtained as a result of paragraph (e)(1) of this section must be retained for five years after the hydraulic system reaches 50 ppm.

3/ 40 CFR §761.40(a)(7) provides in pertinent part:

> Marking requirements: (a) Each of the following items in existence on or after July 1, 1978, shall be marked as illustrated in Figure 1 in §761.44(a). . .
>
> (7) Hydraulic systems using PCB hydraulic fluid. (See also paragraph (e) of this section).
>
> (e) As of October 1, 1979, applicable PCB Items in paragraph (a)(1)(6), (7), and (8) of this section containing PCBs in concentrations of 50-100 ppm . . . shall be marked with mark M/L, as described in §761.45(a).

4/ 40 CFR §761.60(a) provides in pertinent part:

> Disposal requirements: PCBs. (1) . . . PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with §761.70.

5/ Answer to the Complaint, pp. 1-3. This inquiry included a survey of the plant, draining and flushing of all the hydraulic units including Hydraulic Unit No. 2, and inquiries to Monsanto, manufacturer of the fluid being used in the units. Monsanto's Director, Enviromental Relations, W. B. Papageorge, replied (RXB) that "Pydraul® 50E is a phosphate ester based fluid. No PCBs were used as ingredients in its formulation."

6/ TR 21. Complainant had obtained a list of Monsanto's customers, which included the respondent, for Pydraul 312A during the early 1970's before production of the fluid ceased.

7/ See generally TR 64-79, 93-106, 127-128; RX G through S. The three aroclors in the test standard used by the respondent were not differentiated; consequently the resulting calculation of PCBs was a combination of the three. Respondent did not use a test standard that was certified, as required by the EPA Test Method, G, §5.5; TR 71-74, 100-105. Further, whether the electron capture detector had been calibrated, as required by the EPA Test Method, §9, 11. could not be confirmed, TR 163-168

8/ See generally TR 70-124, CX 9, first page; CX 13-16. For example, the test was repeated three times by the first EPA chemist, and the resulting calculations averaged at 63.5. The supervising chemist repeated the test twice, with calculations of 65.8 and 70.4 averaged at 68.1. Respondent's argument that the use of field blanks is required is not supported by the EPA Test Method.

9/ It is noted that intent is not a factor in any consideration of violations of the regulations. See definition of PCB Items, 40 CFR Part 761.3.