UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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HEARING CLERK

IN THE MATTER OF: SAMSONITE CORPORATION, RESPONDENT	TSCA Docket Number PCB-VIII-86-036

TOXIC SUBSTANCES CONTROL ACT:

1. Leaks from Pyranol transformers, found at time of EPA inspection, constituted disposal other than as provided by 40 C.F.R. §761.60(a) and were violations of PCB regulations and the Act, for which an appropriate civil penalty is assessed.

TOXIC SUBSTANCES CONTROL ACT:

2. A showing by Complainant that Respondent placed cardboard fuse boxes on top of one operating transformer and within five meters of another, made out a prima facie case that Respondent violated 40 C.F.R. §761.30(a)(1)(viii) for which violation an appropriate civil penalty is assessed, absent evidence by Respondent that said cardboard, a form of paper, was not combustible.

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APPEARANCES

For Complainant: Teresa N. Lukas, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VIII
999 18th Street
One Denver Place, Suite #1300
Denver, Colorado 80202-2413;

For Respondent: D. Michael Clayton, Esquire
Legal Counsel
Samsonite Corporation
11200 East 45th Avenue
Denver, Colorado 80239.

INITIAL DECISION

Marvin E. Jones, Administrative Law Judge, U.S. EPA

By Complaint filed on September 30, 1986, the Complainant, the United States Environmental Protection Agency (hereinafter "EPA" or "the Agency"), Region VIII, charges the Respondent, Samsonite Corporation (hereinafter "Samsonite" or "Respondent") in three counts, with violations of the Toxic Substances Control Act (hereinafter "TSCA" or "the Act").

Count I of subject Complaint charges that Respondent failed to properly dispose of polychlorinated biphenyls (hereinafter "PCB" or "PCBs") in three Pyranol PCB transformers in violation of 40 CFR 761.60(a) and Section 15 of TSCA, 15 U.S.C. §2614.

Count II charges that Respondent failed to properly dispose of the dielectric fluid in a mineral oil transformer in violation of 40 C.F.R. 761.60(a) and Section 15 of TSCA, 15 U.S.C. §2614.

Count III charges that Respondent violated 40 C.F.R. 761.30(a)(1)(viii) and said Section 15 of TSCA in that it stored combustible materials in close proximity to several PCB transformers. For said violations, Complainant proposes the assessment of penalties totaling $18,000: $5,000 for the violations charged in Counts I and II combined, and $13,000 for the violations charged in Count III. By Answer filed October 14, 1986, Respondent generally denies all of said allegations.

On May 4, 1987, the parties entered into a Stipulation of Facts (Complainant [hereinafter "C"] Exhibit [hereinafter "Ex"] 3) which stated that:

"1. The Respondent, Samsonite, is a corporation previously organized under the laws of the state of Colorado, and as of May 1, 1987, by merger, organized under the laws of the state of Delaware.

"2. On September 30, 1986, EPA issued to Samsonite a Complaint alleging certain violations of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 et seq.

"3. On the day of the EPA inspection, May 22, 1986 (inspection date), three cardboard boxes were stored on top of a PCB Transformer bearing the serial number F962630 and within five meters of another PCB Transformer bearing the serial number F964499 in a transformer vault at Samsonite's facility. The boxes, which were approximately four by four by 12 inches in size, contained electric fuses for use in the transformers. Otherwise, the vault was clean, there being nothing else in the vault except transformers.

"4. No samples of the cardboard boxes were taken and no tests were conducted on the cardboard boxes to determine whether or not they were combustible.

"5. Combustible means 'capable of being readily ignited and thereafter sustaining combustion.'

"6. The other materials described in Paragraph 19 of the Complaint -- alleged to be combustible and consisting of rags, cardboard, and paper -- were located in a second transformer vault at the Samsonite facility. These materials were not being stored in that vault, but had been brought in for use in connection with repair work in the vault on the inspection date, and were removed at the end of the work day. EPA Region VIII considers these materials not to have been stored within a PCB Transformer enclosure in violation of 40 C.F.R. 761.30(a)(1)(viii).

"7. The three transformers described in Count I, bearing serial nos. F964507, F958834A, and F686486, contain Pyranol, a dielectric fluid containing high concentrations of PCBs -- well over 500 parts per million (ppm) PCBs.

"8. A sample of the dielectric fluid in the mineral oil transformer described in Count II, serial number F958835, was taken after the EPA inspection and tested and found to contain more than 1700 ppm PCBs.

"9. No samples of substances alleged to have been on the external surfaces of the transformers described in the Complaint, were taken and no tests were performed on such substances to determine what they comprised.

"10. On the date of the inspection, no substances had run off nor were about to run off the external surface of any of the transformers described in the Counts I and II of the Complaint.

"11. Respondent is not charged with having failed to comply with 40 C.F.R. 761.30(a)(1)(x)."

At the hearing (TR 7), the parties entered into three additional stipulations, viz.:

12. Mineral oil transformer serial number F958835 was (situated) outside the power plant at the Samsonite facility and was exposed to the elements. Rain and windy conditions had occurred prior to the inspection.

13. Samsonite has gross annual sales well in excess of one million dollars.

14. Some cardboard and some paper are not combustible, as defined in the previous stipulation (Stipulation #5, supra).

Further, on May 4, 1987, Complainant, by Motion, amended subject Complaint, deleting paragraph 19 from Count III, thereby admitting that "rags, cardboard and paper" were not stored by Respondent within five meters of a PCB transformer bearing serial number F958834B, as said materials were being used to "clean up" and were removed the same day.

Subsequent to the above, each party filed its Motion for an Accelerated Decision. Both Motions were denied and a hearing was held in Denver, Colorado, on August 20, 1987.

Upon the basis of the parties' stipulations, testimony taken at the hearing and the record, including exhibits and the post-hearing submissions, I make the following

FINDINGS OF FACT

1. Pyranol is a trade name for dielectric fluid containing 60%, or more, of PCBs (Transcript [hereinafter "TR"] 13; Stipulation #9).

2. On May 22, 1986, an EPA inspection of Respondent's facility was properly conducted to assess compliance with TSCA, 15 U.S.C. §2601 et seq., and EPA's PCB regulations, including the new PCB Transformer fire rule requirements, 40 C.F.R. Part 761 (TR pp. 17-18; C Ex 3).

3. The name plate on a transformer, serial number F964507, located in the basement of Samsonite's corporate office building, indicated that it had a capacity of 205 gallons of Pyranol, and also stated its serial number, voltage and other electrical information (TR 27, 84, 119; C Ex 4; Stipulation #7).

4. Said transformer had leaked and was leaking dielectric fluid (viscous, dark and sticky) from a temperature gauge affixed thereto and said discharge was visible over a surface of several square inches (TR 16, 28-30, 32; C Ex 3).

5. A temperature gauge is a device affixed to a transformer to measure the temperature of the dielectric fluid inside and is connected to the interior of the transformer via a probe (TR pp. 30-31).

6. The name plate on a second transformer, serial number F686486, observed during subject inspection by EPA and located in Samsonite's assembly building, indicated that it contained 280 gallons of Pyranol (TR 33 and 85; C Exs 3 and 4; Stipulation #7).

7. Said second transformer was observed to have leaked and was leaking dielectric fluid from test stop cock, a device affixed to the exterior of said transformer; said leak was visible over an area of about five square inches and dried runs or rivulets, a few feet in length, emanated from the base of said "small weep" area (TR 33-35; 85; C Exs 3 and 4; Stipulation #7).

8. A third transformer, serial number F958834A, located in Samsonite's hardware plant and which contained 190 gallons of Pyranol, was leaking dielectric fluid from the stop cock drain valve which is located on the side of said transformer and used to drain said dielectric fluid from the transformer. Said leaking fluid was visible over an area of approximately eight square inches (TR 35-36; 85; C Exs 3 and 4; Stipulation #7).

9. A fourth transformer, serial number F958835, located outside Samsonite's power plant, which contained 190 gallons of mineral oil found by Samsonite's test to contain approximately 1700 ppm PCBs, had leaked and was leaking dielectric fluid from its stop cock drain valve; said leak was visible over an area of 2 1/2 square feet down to the concrete pad on which said transformer was situated; the size of the leak and the accumulation of dirt and debris indicated that the leak was not fresh, but had persisted for some length of time (TR 36-42; C Exs 3 and 7; Stipulation #8).

10. Two transformers, serial numbers F962630 and F964499, in service and located in a transformer vault in Samsonite's assembly plant, were PCB transformers, each of which contained 110 gallons of Pyranol (TR 44-46; C Ex 4; Stipulation #3).

11. Samsonite stored three cardboard boxes (having dimensions of approximately four inches in height and depth and 12 inches in length) on top of said transformer no. F962630 and within five meters of said transformer no. F964499 (C Ex 8; Stipulation #3).

12. Said boxes were constructed of corrugated cardboard, a form of paper (TR 45-46; C Ex 8).

13. Samsonite's facility appeared to be very clean and orderly (TR 36).

14. Respondent is a corporation which has gross annual sales well in excess of one million dollars.

CONCLUSIONS OF LAW

1. EPA has jurisdiction over this matter under Sections 15 and 16 of TSCA, 15 U.S.C. §§ 2614 and 2615.

2. Respondent, Samsonite Corporation, is a "person" within the meaning of 40 C.F.R. §761.3.

3. At all times relevant to this proceeding, Samsonite used PCBs, which were components of the dielectric fluid in transformers at its Montbello facility, and thus was subject to EPA's PCB regulations at 40 C.F.R. Part 761 (see 40 C.F.R. §761.1(b)).

4. Pyranol-filled transformers are PCB transformers within the meaning of 40 C.F.R. §761.3.

5. Subject transformers, described in Findings 3, 6, 8 and 9, supra, were "leaking", as that term is defined in 40 C.F.R. §761.3 (see also 40 C.F.R. §761.60(d)(1), as amended August 25, 1982, 47 FR 37359). Said leaks constitute "disposal" other than that provided by 40 C.F.R. §761.60(a) and each said leak was and is a violation of PCB regulations and Section 15 of TSCA, for which an appropriate civil penalty should and will be assessed.

6. At all times relevant to this proceeding, Respondent's mineral oil transformer, serial number F958835, located outside the power plant, was a PCB transformer within the meaning of 40 C.F.R. §761.3. Said leak constitutes "disposal" other than that provided by regulation and is a violation of PCB regulations and the Act, for which an appropriate civil penalty should and will be assessed.

7. A leaking transformer is not totally enclosed and is subject to regulation.

8. Findings that the premises on which subject transformers were situated were clean and orderly and that a cleanup of PCBs, on the exterior of said transformer, was promptly and efficiently executed by Respondent should and will be considered as factors in mitigation of the violations found.

9. Evidence that some paper is not combustible did not rebut EPA's prima facie case that corrugated cardboard, a form of paper, was a combustible material stored on and within five meters of PCB transformers.

10. A remedial statute will be construed and interpreted to effectuate its regulatory purpose of striking down the mischef aimed at.

DISCUSSION

The Toxic Substances Control Act (TSCA) is a remedial statute which should and will be construed broadly and liberally interpreted to effectuate its purpose of striking down the mischief aimed at (see Benas v. Maher, 128 F2d 247, 252(3) (1942); Tcherepin v. Knight, 389 U.S. 332, 88 S.Ct. 548 (1967); Cattlemen's Inv. Co. v. Fears, 343 F.S. 1248, 1251 (1972)).

On this record, the subject four PCB transformers, considered in Counts I and II, were leaking. Three of said transformers (considered in Count I) were Pyranol-filled. Pyranol is a trade name for PCB dielectric fluid generally containing at least 600,000 ppm, or 60 percent, PCBs. A transformer filled with Pyranol contains greater than 500 ppm PCBs and thus is a PCB transformer (C Ex 1, paragraph 7). This fact was obvious and, therefore, sampling of said fluid by EPA was unnecessary because of the information on the nameplates indicating that subject transformers contained Pyranol. Respondent sampled the fourth leaking (mineral oil-filled) transformer subsequent to subject inspection and found it to have a PCB concentration of 1700 ppm.

Respondent is subject to the regulation because it is a "person" who used and disposed of PCB (40 C.F.R. Sections 761.1 and 761.3; see also Stipulation of Facts, paragraph 1). It is clear on this record that said four transformers were leaking (Findings 4, 7, 8 and 9, supra, pp. 6-7) during subject inspection (Finding 2, supra). A leak is defined (Section 761.3) as any instance in which

PCB equipment (including PCB transformer) "has any PCBs on any portion of its external surface". The leaks described above constitute "disposal of PCBs other than that provided by 40 C.F.R. 761.60(a)", since "disposal" includes spills, leaks and other uncontrolled discharges of PCBs (§761.3). The leaking of dielectric fluid containing greater than 500 ppm PCBs from subject transformers onto the external surface thereof, constituted improper disposal of PCBs in violation of 40 C.F.R. 761.60 and Section 15 of the Act, for which an appropriate penalty should and will be assessed.

Respondent, at page 12 of its brief, cites a statement in 47 FR 37342, at page 37354, as authority for its contention that said leaks were not violative of of pertinent regulations because said leaks, first discovered at the time of subject EPA inspection, were cleaned up without delay. Said statement reads as follows:

> " . . . A number of comments stated that it was unfair to charge a party with unauthorized disposal when PCBs are spilled or leaked during authorized use of electrical equipment but prompt cleanup is initiated. It is not the Agency's intention that §761.3(h) and §761.60(d) should be applied in this way. Where the responsible party shows that : (1) The spill, leak or uncontrolled discharge occurred during authorized use of electrical equipment and (2) adequate cleanup measures were initiated within 48 hours, the Agency will not charge the party with a disposal violation."

The instant record is at variance with said comments. Each of the leaks sighted by the EPA inspector were not discovered by Respondent until the time of the subject EPA inspection (TR 96). Mr. Jacobson, an engineer and Respondent's Manager of Facilities and Maintenance, testified he was responsible for maintenance and operation of utility systems, including subject transformers; that the actual inspection is done by another company employee(TR 88) whose observations from visual inspection appears in a monthly log sheet for each transformer (TR 89).

He further stated that if there had been anything on the external surface it would have been noted on the inspection reports (TR 92). At the time of the inspection, Jacobson noted a "great deal of dust present" where a leak was noted by the EPA inspector. Immediately after the inspection, he had a contractor come in to do cleanup at the various points where leaks were noted (TR 94).

Said testimony does not substantiate that the previous monthly inspections were adequate and that the cleanup was initiated within 48 hours from the time the leak should have been apparent. Without such showing, Respondent has failed to sustain its burden of proof (40 C.F.R. 22.24). The cleanup immediately following the inspection, while commendable and mitigative, does not establish that it was accomplished within the time contemplated by the statement cited, but is warranted remedial action taken subsequent to and in light of the violations found. Other conjecture, including the similar appearance of pipe thread sealants to PCB, is also rejected.

Respondent also argues that said transformers were "totally enclosed" and not subject to regulation. It should be sufficient to note the Court's observation in EDF v. EPA, 636 (F.2d) 1267, l.c. 1285 (USCA, D.C. 1980) that if a transformer is leaking, it is not totally enclosed and therefore is not exempt from the Act or regulations. In that case, it was found that no substantial evidence supported EPA's classification of certain PCB uses as "totally enclosed" and the regulation providing such categorization was set aside. Subsequently, EPA decided that no electrical equipment uses should be categorized as use in a "totally closed manner", observing that data submitted in response to said rulemaking shows that all types of electrical equipment leak during normal operation. Since this leakage could result in some detectable exposure to PCBs of humans and the environment, it was concluded that classifying such equipment as "use in a totally enclosed

manner" was not appropriate (47 FR at 37344, Aug. 25, 1982). Said determination referenced the provisions of Section 6(e)(2)(C) of the Act which defines "totally enclosed" to mean "any manner which will ensure that any exposure . . . to PCBs will be insignificant as determined by the Administrator by rule" (emphasis supplied).

In the May 31, 1979, rule (40 C.F.R. 761.20), EPA defined "insignificant exposure" as "not measurable or detectable by any scientifically acceptable analytical method." It is clear that the Respondent's contention that its transformers were totally enclosed should be and it is hereby rejected as being unsupported by the facts or the law.

As to Count III, I have found that Respondent's transformers, serial numbers F962630 and F964499 each contained 110 gallons of Pyranol and that Respondent stored three cardboard boxes on top of the first-mentioned, and within five meters of the other, transformer (Findings 10, 11 and 12), thus violating 40 C.F.R. Section 761.30(a)(1)(viii). I find that said transformers (containing Pyranol) belong to the class of transformers which EPA has determined to have the potential for causing significant exposure to humans and the environment to PCBs. By showing that said boxes were constructed of corrugated cardboard - paper -, EPA submitted a prima facie case. Respondent's evidence that "some paper" is not combustible, does not refute the prima facie showing that subject boxes were combustible. Respondent failed to rebut the presumption raised by EPA's prima facie case.

All other Motions, arguments and contentions not hereinabove specifically discussed are hereby overruled and denied.

CIVIL PENALTY

The statutory criteria for assessing penalties under TSCA, Section 16(a), are listed in Section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B), which provides as follows:

> 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.

To provide guidance to the assessment of penalties under Section 16, the EPA enforcement staff issued guidelines for assessing penalties for violations relating to PCBs and other toxic substances. 1/ The procedural rules for these proceedings require that I consider the guidelines and PCB penalty policy in determining the appropriate penalty, and that if I assess a penalty different in amount from that proposed in the Complaint, I must give my reasons therefore. 2/

The PCB penalty policy uses a matrix to establish an initial penalty based upon the nature, extent, circumstances and gravity of the violation. The initial penalty can then be adjusted upwards or downwards depending upon consideration of the other statutory factors, i.e., culpability, history of such violations, ability to pay, ability to continue in business and such other matters as justice may require. 3/

The matrix consists of a horizontal axis signifying "Extent of Potential Damage", whether Major, Significant or Minor; and a vertical axis labeled "Circumstances (probability of damages)" providing six levels of probability of damage representing two levels for each range: high range, medium range and low range. On Count I, I found three violations, as alleged (Findings 3-8, supra),

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1/ See 45 Federal Register 59770-59783 (September 10, 1980), referred to herein as the PCB penalty policy.

2/ 40 C.F.R. 22.27(b).

3/ 45 Federal Register 59777 (September 10, 1980), Table 1.

in that three PCB transformers, at the time of EPA inspection, were found to be leaking. The leak from the first transformer, serial number F964507, in the basement of subject corporate office building, was visible as it covered an area of "several square inches" in the area of a temperature gauge whose function was to measure the temperature of the fluid inside the transformer; the leak from the second transformer, serial number F686486, in Samsonite's assembly building, was observed in a "small weep" area of about five square inches about the test stop cock, a device affixed to the exterior of said transformer; the leak from the third transformer, serial number F958834A, was visible over an area of about eight square inches in the vicinity of the stop cock drain valve, located on the side of said transformer. The parties stipulated (C Ex 3, Stipulation #10) that, on the date of the EPA inspection, no substances had run off nor were about to run off the external surface of any of the transformers described in Counts I and II. I have further considered the evidence that Respondent had, before the subject EPA inspection, instituted a monthly inspection plan. The premises are clean and orderly and great effort is apparently exerted to conform to applicable regulation as a means of keeping Respondent's plan in operation. On this record, I attribute Respondent's failure to discover the subject leaks to the small amount of dielectric fluid observed.

Further, it is important to note that cleanup and maintenance procedures were instituted by Respondent immediately following the inspection which noted the subject leaks.

In determining the Extent of Potential Damage, I have considered the "amount" and the "concentration" of the PCB material involved in each incident. The amount involved is very low and the concentration is high. The guidelines further classify violations in eight categories to determine "Circumstances (Probability for Damage)" with "Disposal" occupying "high range - level one". Realistically, we are here considering Respondent's failure to make an adequate inspection sufficient to

discover subject leaks. Further, Respondent has demonstrated that had said leaks been discovered, prompt cleanup would follow. It is important as well to note that §761.60(d) was amended, on August 25, 1982, to include "leaks" as "disposal of PCBs", along with spills and other controlled discharges. On the record here presented, I find that the Circumstances (Probability for Damage) is in the Low Range and the Extent of Potential Damage to be Minor. Because of Samsonite's housekeeping and cleanup efficiencies, I select the matrix's lower level of Low Range/Minor and assess a civil penalty in the sum of $200 for each violation charged, or a total penalty for the violations in Count I of $600.

On Count II, I find the violation charged to warrant assessment of a penalty in the sum of $500. The mineral oil-filled transformer had a PCB concentration of about 1700 ppm PCBs. The leak was discoverable as visible over an area, on the exterior of the transformer, of 2 1/2 square feet down to the concrete pad on which said transformer was situated. Cleanup and repair was, by Respondent, undertaken and completed immediately.

On Count III, the original charge was reduced to storing three cardboard fuse boxes on top of one PCB transformer and within five meters of a second PCB transformer. Each transformer contained 110 gallons of Pyranol. While the extent of potential damage is significant, I find the probability of damage was very low. On this record, there was nothing in the vault except the transformers and the three fuse boxes (constructed of cardboard); the transformers were heavily insulated and the subject of inspection by Samsonite's Engineering and Maintenance Department. An appropriate penalty is determined to be $1300 for the violation so found as charged in said Count III.

In the premises, upon consideration of the statute, the said guidelines for the assessment of civil penalties and the further factors hereinabove set forth, I find that a total penalty of $2400, on said three Counts, should be assessed

against Samsonite Corporation. I do not find that any adjustment to said amount is warranted. No claim of inability to pay is made and there is no evidence that Respondent's history of compliance is unfavorable. Intent or lack thereof is not a factor to be considered (cf. 15 U.S.C. 2615(a) with 2615(b)); "culpability" or lack thereof should be and has been considered in fixing the penalties hereinabove arrived at and no adjustment to the said penalty amount is here warranted on that account.

On the basis of the record, including the prehearing and post-hearing submissions of Counsel, I recommend the following

FINAL ORDER 5/

Pursuant to Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615, a civil penalty in the total sum of $2400.00 is hereby assessed against Respondent, Samsonite Corporation.

Payment of the full amount of the civil penalty assessed shall be made within 60 days of Service of the Final Order upon Respondent, by forwarding a Certified or Cashiers Check payable to Treasurer, United States of America, to:

EPA - Region 8
(Regional Hearing Clerk)
P.O. Box 360859M
Pittsburgh, PA 15251.

IT IS SO ORDERED.

DATED: November 16, 1987

Marvin E. Jones
Administrative Law Judge

5/ 40 C.F.R. §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 an appeal from this Initial Decision within 20 days.