10-5-92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
New Waterbury, Ltd., A California Limited Partnership,	)	Docket No. TSCA-I-88-1069
	)	
	)	
Respondent	)	

ORDER GRANTING MOTION TO REOPEN HEARING

The Initial Decision in this matter, issued July 8, 1992, found that Respondent, New Waterbury, Ltd., A California Limited Partnership (New Waterbury), had violated the Toxic Substances Control Act and the PCB Rule, 40 CFR Part 761, in specified particulars and assessed New Waterbury a penalty totaling $35,750. The decision specifically found that New Waterbury had not shown that the mentioned penalty should be reduced or eliminated, because of its inability to pay.

Under date of August 3, 1992, within the 20-day period specified by Rule 22.28 (40 CFR Part 22), New Waterbury filed a Motion to Reopen Hearing. Relief requested was for the purpose of introducing additional evidence regarding (1) the financial status of Vanta, Inc., the general partner of New Waterbury, and (2) a post-hearing civil enforcement action initiated by the U.S. EPA against New Waterbury in the U.S. District Court for the District of Connecticut on November 25, 1991, which alleges additional violations of the PCB Rule and which will impact New Waterbury's

ability to pay the penalty assessed in the Initial Decision. The civil action involves a number of PCB Items abandoned on New Waterbury's property by the former owner, Century Brass Products and/or Pan Metals Corporation, which is alleged to have purchased the items. New Waterbury points out that the mentioned civil action raises issues regarding the public interest in the best allocation of its limited assets and/or whether a "Settlement with Conditions" would be appropriate, referring to the PCB Penalty Policy (April 9, 1990) at 19.

New Waterbury argues that the evidence it seeks to introduce is clearly not cumulative, because no evidence of the financial condition of Vanta, Inc. was introduced at the hearing and the action in federal district court was not filed until November 25, 1991, which was long after the hearing concluded and briefs were filed (Motion at 2). New Waterbury asserts that no evidence was introduced at the hearing regarding the financial condition of Vanta, Inc. for two reasons: firstly, Vanta, Inc., for whatever reason, was not named as a party to the action and secondly, the Agency via its publications and the nature of the lengthy pre-hearing negotiations which were conducted, misled Respondent concerning the specific financial data which were relevant to an ability to pay inquiry. Because the Agency never argued or even suggested that Vanta, Inc. was in violation of TSCA, New Waterbury says that no evidence was sought from Vanta regarding its financial condition. It points out that the PCB Penalty Policy, 45 Fed. Reg. 59775 (September 10, 1980) provides that a firm raising the issue

of inability to pay in its answer should be asked to provide documentation of its sales such as income tax returns, financial statements, etc. New Waterbury emphasizes that it raised ability to pay in its answer and amended answer and that, while the Agency asked for data relating to Mr. Trevor C. Roberts' financial condition during settlement negotiations,[1/] it never requested any such information relating to the general partner, Vanta, Inc. (Motion at 4).

New Waterbury states that it elected not to present evidence relating to Mr. Roberts' financial status and says that it has not been prejudiced by that decision. According to New Waterbury, it has, however, been prejudiced by the failure to present evidence as to the financial status of Vanta, Inc.--information concerning a separate and distinct corporate entity, which is not a party to the action, and which the Agency neither sought nor suggested was relevant during extensive pre-hearing negotiations. Because of alleged confusion regarding the issue and the merely supplemental nature of the evidence sought to be introduced, New Waterbury argues that it would be highly prejudicial not to allow a full and complete record to be made on the issue of its ability to pay (Motion at 5).

New Waterbury states that evidence regarding subsequent enforcement actions and the related impact on its ability to pay

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[1/] In the Second Amendment To Restated Agreement by which New Waterbury acquired the Century Brass Products Company property, Trevor C. Roberts and New Waterbury were each referred to as "Buyer."

was, obviously, not available at the time of the hearing and contends that an opportunity to present limited evidence regarding its ability to pay is both necessary and appropriate to a fair and just adjudication of this matter.[2/]

New Waterbury argues that evidence regarding the financial burden resulting from the abandonment by others of PCB Items on its property is critical to any determination of Respondent's ability to pay. It points out that the Government elected to name Vanta, Inc. as a defendant in the civil enforcement action and asserts that it would be particularly unfair not to consider that information. Moreover, it alleges that the "new evidence" is in a large part readily available through responses to discovery requests or in deposition transcripts resulting from the pending civil action and thus, may not require any live testimony.[3/] For all of these reasons, New Waterbury urges that the hearing be reopened for the purpose of taking further testimony.

[2/] Respondent says that EPA, the Department of Justice, New Waterbury, Vanta, Inc., Trevor C. Roberts, Pan Metals Corporation and the bankruptcy Estate of Century Brass Products, Inc. are currently involved in joint negotiations aimed at resolving all PCB enforcement matters, civil and administrative, concerning Respondent's Waterbury, Connecticut property (Motion at 6, note 2).

[3/] Exhibit C to the motion is a Department of Justice form, Financial Statement of Corporate Debtor, Vanta, Inc. executed by Trevor C. Roberts who is listed as President, Vice President, Secretary and Treasurer and the sole director. The form reflects that Vanta, Inc. is a wholly owned subsidiary of Winston Management. A balance sheet attached to the form indicates that Vanta had a negative net worth as of October 31, 1991.

Complainant's Opposition

Under date of August 18, 1992, Complainant filed an Opposition to the Motion To Reopen Hearing, contending that the evidence New Waterbury now seeks to introduce would be cumulative and that good cause does not exist for its failure to introduce the evidence at the hearing in April 1991.

Complainant points out that, as noted in the initial decision, the burden of producing evidence that a proposed penalty is beyond a respondent's ability to pay is on the Respondent. Notwithstanding this rule and the well established principle that a general partner is liable for the debts of a partnership, Complainant emphasizes New Waterbury's failure to offer any evidence of Vanta, Inc.'s financial status. Complainant argues that a respondent, represented by experienced counsel, should not rely on Complainant to specify evidence which should be presented (Opposition at 2). Moreover, because of the limits on discovery in the Consolidated Rules of Practice, Complainant contends that only New Waterbury and its counsel were in a position to know of the financial condition and relationships between Vanta, Inc., of Vanta's President, Trevor C. Roberts and of Vanta's parent corporation, Winston Management and Investment, Inc.[4/]

[4/] It is not clear whether "Winston Management" (supra note 3) is an abbreviated manner of referring to "Winston Management and Investment, Inc." or whether these are separate entities or corporations.

Complainant points out that New Waterbury was aware, no later than receipt of Complainant's Memorandum In Support Of Proposed Findings Of Fact and Conclusions of Law, served on June 17, 1991, that Complainant was relying in part on the absence of evidence as to the financial condition of the general partner, Vanta, Inc., to support the contention that New Waterbury hadn't demonstrated an inability to pay. Instead of moving to reopen the hearing at that time, Complainant avers that New Waterbury chose to wait 14 months or until after the initial decision was issued to file the present motion. Complainant cites In re Boliden Metech, Inc., Docket No. TSCA-I-1098 (Decision and Order Denying Motion to Reopen Hearing, November 15, 1989) to the effect that a party which, following the hearing and prior to issuance of the initial decision, comes upon evidence which, in its view, will substantially alter or increase the likelihood of a decision in its favor, has an obligation to make its motion forthwith.[5/]

Complainant points out that New Waterbury's sole witness, Mr. Louis Hardin, was asked on cross-examination if he knew the amount of tax liability the general partner was able to avoid, because of New Waterbury's operating losses during the years 1987 through 1989 and that Mr. Hardin's answers were negative

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[5/] To hold otherwise allows a party in possession of "new evidence" to in effect "gamble" on the outcome and move to reopen, if the decision is adverse. An additional reason for promptness is that a motion to reopen prior to issuance of an initial decision is addressed to the sound discretion of the ALJ, while such a motion after the decision is issued must comply with the stringent requirements of Consolidated Rule 22.28.

(Opposition at 4). Emphasizing that New Waterbury did not object to this line of inquiry, Complainant says that New Waterbury had ample opportunity to pursue the relationship between New Waterbury and Vanta, Inc. [as well as the financial status of the latter] on redirect of Mr. Hardin. Replying to New Waterbury's apparent position that it was not on notice of the relevance of the financial status of Vanta, Inc., because Vanta was not named as a party, Complainant asserts without elaboration that Vanta was not named due to evidentiary considerations.

Turning to the civil enforcement action in federal district court, Complainant says that this action merely seeks an injunction requiring the defendants to remove and properly dispose of all PCBs, PCB equipment and PCB drums in storage at the facility (Opposition at 5). Complainant emphasizes that these PCBs and PCB items are separate and distinct from the PCB transformers involved in the instant action. Complainant also points out that New Waterbury was well aware that it might eventually be responsible for disposal of these PCBs and PCB items, because $600,000 of the purchase price was withheld for transformer removal. In view thereof, Complainant argues that further evidence on the cost of removing abandoned PCBs and PCB transformers and New Waterbury's ability to accomplish such removal would be cumulative (Opposition at 7). Moreover, Complainant says that New Waterbury had been informed prior to the hearing in this proceeding that EPA was contemplating additional enforcement actions with respect to the abandoned PCB transformers and notes that New Waterbury and Vanta

have denied liability for removal and disposal of the transformers in their answer to the judicial complaint. If defendants are successful, their only expense assertedly will be expense of litigation. Complainant argues that the financial impact of the judicial action cannot be determined at this time and that the instant proceeding should not be reopened in order to guess or speculate as to Respondent's future financial fortunes.

In conclusion, Complainant asserts that rehearings fly against the sound public policy that there be an end to litigation and urges that the motion be denied (Opposition at 8).

D I S C U S S I O N

Under Rule 22.28(a) a motion to reopen a hearing to take further evidence shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence sought to be adduced, (3) show that the evidence is not cumulative and (4) show good cause why such evidence was not adduced at the hearing. Because it is concluded that the instant motion complies with the listed requirements the motion will be granted.

The specific grounds upon which relief is sought is that the Initial Decision accepted Complainant's argument that New Waterbury hadn't shown an inability to pay because evidence of the financial status of the general partner, Vanta, Inc., was lacking. Because the action in federal district court was filed after the hearing and final briefing in the instant matter there is, of course, no

evidence in the record as to the financial impact of such action on New Waterbury's ability to pay. It is concluded that the motion complies with Rule 22.28(a)(1) for reopening a hearing.

The motion refers to the evidence sought to be introduced as evidence relating to the financial condition of the general partner, Vanta, Inc., and as evidence relating to the financial burden imposed on New Waterbury by the transformers which were abandoned on its property (see Initial Decision at 26, note 15). It is concluded that the motion complies with Rule 22.28(a)(2) for reopening a hearing.

As New Waterbury contends, the evidence sought to be introduced is not cumulative, because there is no evidence in the record as to the financial condition of Vanta, Inc. and, of course, no evidence as to the costs of removal and disposal of abandoned PCBs and PCB items.[6/] The motion complies with Rule 22.28(a)(3).

The only matter of any difficulty then is whether good cause has been shown for failing to introduce such evidence at the hearing. Complainant's contention that evidence as to the cost of PCB removal would be cumulative has been rejected and the mere fact that New Waterbury was informed of contemplated further enforcement proceedings concerning the abandoned PCB transformers at issue in

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[6/] Complainant's argument that such evidence would be cumulative because New Waterbury made provisions for the cost of PCB removal in the purchase agreement with Century Brass Products is rejected, because that provision did not concern the present actual cost of removal. Moreover, because the funds set aside for PCB removal no longer exist, such sum is not relevant to New Waterbury's present ability to pay a penalty.

the subsequently filed federal district court action was not sufficient to place New Waterbury on notice that evidence of the cost of PCB removal should be proffered herein. It is concluded that New Waterbury has shown good cause for the failure to adduce such evidence at the hearing.

Turning to the financial condition of Vanta, Inc., Complainant has not disputed New Waterbury's assertion that Vanta's financial status was never raised during the lengthy pre-hearing settlement negotiations. Moreover, Complainant has stated without elaboration that Vanta was not named as a party for evidentiary reasons. Accordingly, there appears to be substantial basis for New Waterbury's assertion that it was misled as to the need and relevance of data as to Vanta's financial condition. While it is considered to be hornbook law that a partner is liable for the debts of a partnership and that a general partner is liable for the debts of a limited partnership and New Waterbury is represented by experienced and competent counsel, Complainant, intending to rely on assets of the general partner or the absence of evidence as to the extent of those assets to refute a claimed inability to pay, is obligated to name the general partner as a respondent or to otherwise apprise Respondent of that fact.[7/] New Waterbury raised inability to pay in its answer and Complainant's obligation to make

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[7/] The Consolidated Rules of Practice are not intended to be used to set a trap for the unwary. See, e.g., Rule 22.19(b), requiring the pre-hearing exchange of witness lists, summaries of expected testimony and proposed exhibits and to Rule 22.04(c), which, inter alia, requires the ALJ to assure that the facts are fully elicited.

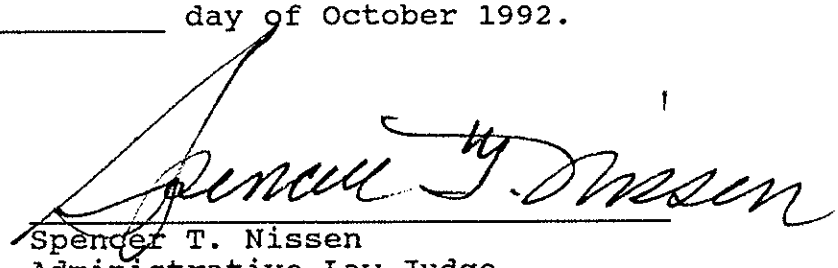
a prima facie case as to the appropriateness of the penalty includes an obligation to make some showing as to ability to pay. See Initial Decision at 49. Under all the circumstances and because it has been concluded that New Waterbury has met the requirements of Rule 22.28 for reopening the hearing so as to permit the introduction of evidence of the cost of PCB removal, the motion will be granted in its entirety to also permit the introduction of evidence as to Vanta's financial status.

O R D E R

New Waterbury's motion to reopen the hearing is granted for the limited purpose of permitting the introduction of evidence as to the cost of PCB removal and the impact of such costs on New Waterbury's ability to pay the penalty assessed in the Initial Decision and the financial condition of the general partner, Vanta, Inc. On or before October 23, 1992, New Waterbury will submit verified cost estimates, financial statements, deposition transcript references and any other evidence it intends to introduce concerning the matters upon which the motion to reopen has been granted. Within 15 days thereafter, Complainant will present a summary of any countervailing evidence upon which it

intends to rely and a statement of how it wishes to proceed, i.e., whether a further oral hearing is considered to be necessary.

Dated this 8th day of October 1992.



Spencer T. Nissen
Administrative Law Judge