

2/7/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
Nemacolin Mines Corporation,)	DOCKET NO. TSCA-III-426
LTV Steel Company, Inc. and)	
Atlas Services Corporation,)	
)	
Respondents)	

ORDER DENYING MOTION FOR PARTIAL ACCELERATED DECISION

This proceeding under Section 16(a) of the Toxic Substances Control Act (15 U.S.C. § 2615(a)) was commenced on September 22, 1992, by the issuance of a complaint charging Respondents, Nemacolin Mines Corporation (Nemacolin), LTV Steel Company, Inc. (LTV), and Atlas Services Corporation (Atlas) with violations of the Act and applicable regulations, i.e., the PCB Rule found at 40 CFR Part 761. Specifically, the complaint alleged (Counts 1-3) that Nemacolin, which was a wholly owned subsidiary of LTV, owned and/or operated a coal preparation plant and mine in Nemacolin, Pennsylvania, that Nemacolin contracted with Atlas to perform various activities at the facility, including demolition of buildings, removal of debris, regrading areas of demolition, and identification and removal of PCB equipment and that, during these activities, at least two PCB transformer carcasses and one large PCB capacitor were disposed of in a skip shaft in violation of 40

CFR §§ 761.60(b)(1) and 761.60(b)(2).^{1/} Count 4 alleged that at the time of an EPA inspection on October 25, 1988, Respondents, Nemacolin and Atlas, were storing for disposal 88 large PCB capacitors in 14 drums in a building without continuous curbing and one PCB transformer and one PCB filled switch gear unit in a second building without continuous curbing in violation of 40 CFR § 761.65 (b)(1). Count 5 alleged that at the time of the EPA inspection on October 25, 1988, the PCB items referred to in Count 4 had been in storage for disposal approximately 55 days and were not marked with the date the items were placed in storage in violation of 40 CFR § 761.65(b)(8). Counts 6-9 alleged that at the time of the October 25, 1988, EPA inspection, Respondents, LTV and Nemacolin, had failed to maintain annual documents recording the disposition of PCBs and PCB items for the years 1978 through 1987 in violation of 40 CFR § 761.180(a). For these alleged violations, Complainant proposed to assess Respondents a penalty of \$15,000 for Counts 1-3, \$13,000 for Count 4, \$6,000 for Count 5, and LTV and Nemacolin \$5,200 for Counts 6-9 for a total of \$39,200.

Respondents, Nemacolin and LTV, filed a consolidated answer denying the violations and, with respect to Counts 1-3, alleging that no improper disposal of PCBs occurred. With respect to Counts 4 through 9, the answer alleged that no act or failures to act by Respondents resulted in the violation of any regulation addressed by the complaint. Respondents requested a hearing.

^{1/} A "skip shaft" is the shaft by which coal is elevated to the surface of an underground mine.

Respondent, Atlas, answered, specifically denying that it disposed of two PCB transformer carcasses and one large PCB capacitor in an unlawful manner and denying for lack of information sufficient to form a belief the allegations in Counts 4 and 5. Atlas alleged that it contracted with Petroclean, Inc. to perform services relating to the removal and clean-up of PCB transformers, that it was informed by Petroclean that all contaminated material was accounted for and properly disposed of, and that allegations of missing or improperly disposed of transformers were made by disgruntled employees. Atlas asserted that these allegations have never been proven. Atlas requested a hearing.

The parties have exchanged prehearing information in accordance with an order of the ALJ. Complainant's prehearing information includes a report of inspection, dated February 1, 1989, of the Nemaquin facility conducted on October 25, 1988 (C's Preh. Exh. 1). Attachments to this report indicate that this proceeding originated in complaints, received by EPA in early June 1988, to the effect that PCB transformers were dumped in a mine shaft and at least one capacitor contaminated with PCBs was dumped in another mine shaft during demolition and clean-up activities at the site. The inspection report states that Nemaquin had two PCB capacitors at the No. 2 Airshaft at the site [prior to the demolition], but could account for only one. While the report states the alleged disposal of two transformers in another mine shaft near the Monongahela River could not be confirmed, it indicates that Nemaquin could not account for two PCB transformer

cases, Serial Nos. 7430058 and 7461683, but was continuing its attempts to determine the disposition of these cases.

The inspection report states that 88 large PCB capacitors were on site in 14 drums. Although the drums displayed the M₁ label, the date the drums were placed in storage was not marked thereon. Additionally, although the drums were inside a building having a roof and a concrete floor, the storage area did not have continuous curbing. These capacitors were shipped for disposal on the day of the inspection. The inspector reported that one PCB transformer and one PCB switch gear unit and other oil-filled electrical equipment were being loaded from another building onto a truck for disposal. These items and the PCB capacitors had allegedly been in storage for disposal for approximately 55 days and were not marked with the date the items were placed in storage. An addendum to the inspection report, Exh. 1 to Complainant's Motion for Partial Accelerated Decision, states that drums of PCB large capacitors, one PCB transformer and a PCB switch gear unit [were in storage in areas] which did not have adequate diking. Atlas admitted this fact in its response to Complainant's motion for partial accelerated decision.^{2/} The inspection report states that Nemaclin had not prepared annual documents covering the use

^{2/} Reply of Atlas Services Corporation To Motion For Partial Accelerated Decision Filed By Environmental Protection Agency, dated May 9, 1995, at 3.

[disposition] of large PCB capacitors for the years 1978 through 1987.^{3/}

Excerpts of testimony in a proceeding before the Mine Safety and Health Administration, which apparently originated from allegations by a former employee or employees of Nemacon or Atlas that he/they were fired for complaining of the improper disposition of PCBs and safety concerns at the Nemacon facility, have been submitted as a proposed exhibit.^{4/} Neither of the two witnesses, whose testimony is excerpted, saw the alleged dumping, however, Mr. James Vavrek merely testified he "heard" employees on the job talk about transformers being dumped down a shaft, while Mr. Homer W. Nicholson testified that he assisted in loading two transformers on a truck and saw the truck proceed to the mine shaft, but did not actually see the dumping.^{5/}

Excerpts from the findings of ALJ Koutras in the mentioned MSHA proceeding have been included in the record (Atlas Preh. Exh. 11). There was testimony that UMW members had picketed the site, because they considered they rather than Atlas should

^{3/} By a Partial Consent Agreement and Consent Order, approved on June 12, 1995, LTV agreed to pay \$4,420 to settle Counts 6-9 of the complaint, which concerned failure to prepare annual documents.

^{4/} C's Preh. Exh. 8. Although Complainant's motion does not include Counts 1-3, evidence relating thereto is summarized, because it provides the setting for the initiation of this action and background for considering Complainant's motion.

^{5/} According to Mr. Nicholson, the transformers were not drained. This is contrary to other evidence submitted for the record and is difficult to credit.

have been given the work, that there was concern that the Steelworkers Union rather than the UMW would represent employees on the job, and it appeared that certain "disgruntled" employees complained of the dumping of PCBs only after they were fired.

Judge Koutras concluded, inter alia, that MSHA had investigated and found no evidence of illegal dumping, and that the testimony of certain complaining witnesses was not credible. Atlas points out that Judge Koutras found that former Atlas employees complained of illegal dumping only after being terminated and argues that, if their testimony as to the reason for their termination is not credible, there is ample ground for questioning their credibility as to the alleged dumping. An Offense Report of the Cumberland Township Police Department, Carmichaels, PA, dated September 15, 1988, reveals that Mr. Jay McDowell of Atlas Services Corporation reported the theft of two PCB contaminated transformers, Serial Nos. 7430058 and 7461683, having an estimated scrap value of \$100 each (Atlas Preh. Exh. 1). The transformers were reportedly taken between Monday and Thursday--September 15, 1988, was a Thursday.

Under date of April 27, 1995, Complainant filed the Motion For Partial Accelerated Decision, which is the subject of this order. The motion alleged that there was no dispute of material fact that Respondents were liable for the violations alleged in Counts 4-9 and that Complainant was entitled to judgment on these counts as a matter of law. The motion further alleged that the proposed penalties were computed in accordance with the

PCB Penalty Policy and argued that judgment should be entered for the amount of the penalty sought on these counts.

Atlas submitted a reply, opposing the motion on May 9, 1995. Atlas pointed out that it was not charged with the violations alleged in Counts 6-9. Atlas acknowledged that there was no question that technically there was a violation by it of Count 4, which requires [alleges failure to comply with the requirement] that [PCBs] be stored in an area having specified curbing. Atlas argued, however, that the question of whether leniency should be accorded in determining the penalty and the amount of any penalty were genuine issues [of material fact] precluding the grant of Complainant's motion for summary judgment. According to Atlas, Count 5 deals essentially with the date certain items were placed in storage. Atlas denied this violation, alleged that there was no probative evidence to support the charge that certain items were not properly dated and argued that genuine issues of material fact did exist and that summary judgment was not appropriate.

LTV responded to the motion on May 5, 1995, stating that it was in the process of settling Counts 6-9 and arguing that, because Nemaquin had contracted with Atlas to perform services in connection with shutting down the mine and Atlas was specifically responsible for the proper removal, storage and disposal of PCB containing material, the violations alleged in Counts 4 and 5 did not result from any acts or failures to act by LTV or Nemaquin and were solely the responsibility of Atlas.

Complainant filed a reply to the responses of Atlas and LTV to its motion on May 23, 1995. Complainant pointed out that Atlas had admitted the violation alleged in Count 4, storage of PCBs in an area without specified curbing, and that, contrary to Atlas, the failure to mark PCBs with the date placed in storage as alleged in Count 5 was based upon observations of the EPA inspector, rather than alleged admissions by an Atlas employee. As to LTV and Nemaquin, Complainant asserts that as owners their responsibility to comply with PCB regulations may not be contracted away. Complainant repeats its contention that the penalties were appropriately computed, that no dispute of material fact in relation thereto has been shown and that its motion for accelerated decision should be granted.

DISCUSSION

Atlas has acknowledged that the PCB articles identified in Count 4 were stored in areas lacking continuous curbing. Atlas has, however, characterized Count 5, which alleges failure to mark or label PCB articles with the date placed in storage, as dealing in essence with the date certain units were placed in storage, and it is not clear Atlas's acknowledgment was made with the 30-day storage exemption or grace period provided by 40 CFR § 761.65 (c)(1) in mind. The 30-day temporary storage exemption provided by 40 CFR § 761.65(c)(1) is conditioned upon the PCB items having been tagged with the date of removal from service and there is no

evidence that this condition was satisfied.^{6/} Nevertheless, the length of time the articles were in storage and the conditions under which the articles were stored are relevant to the risk of the alleged violation. The complaint alleges that the PCB capacitors, transformer and switch gear unit had been in storage for disposal approximately 55 days and the inspection report states that the capacitors were in use until late August or early September. Although the date the capacitors were removed from service and the date the articles were placed in storage for disposal are not necessarily the same, information in the foregoing respects was almost certainly obtained from Nemaocolin or Atlas personnel, rather than observations of the EPA inspector. In view thereof, and because, as indicated below, Respondents are entitled to a hearing as to the amount of the penalty in any event, Complainant's motion for an accelerated decision as to Count 4 will be denied.

Count 5 alleges that the PCB articles and containers identified in Count 4 were not marked with the date placed in storage. Atlas has denied this allegation. Complainant's motion is based upon an alleged lack of evidence to contradict this allegation, which is assertedly based upon observations of the EPA inspector at the time of an inspection of the Nemaocolin facility on October 25, 1988. It has been held, however, that, because

^{6/} Another condition of the exemption is that PCB articles and PCB equipment be non-leaking (40 CFR § 761.(c)(1)(i)). There is no evidence or allegation that any of the equipment or containers at issue were leaking.

complainant has the burden of proving the violation alleged in the complaint (40 CFR § 22.24), respondent's denial of the factual basis for a violation is sufficient under some circumstance to create a genuine issue of material fact. In re Jimelco, Inc., TSCA Docket No. VI-478C (Ruling on Complainant's Motion for Accelerated Decision, etc., April 28, 1995). The cited ruling held that complainant had failed to carry its burden of demonstrating the absence of such an issue and that an accelerated decision was inappropriate. This reasoning and ruling is applicable here and Complainant's motion for an accelerated decision as to Count 5 will be denied.

As indicated previously, LTV's defense of the violations with which it is charged in Counts 1-5 is based upon the fact that Nemacolin contracted with Atlas to perform demolition and regrading activities at the mine, including removal and proper disposal of PCBs and PCB materials, and that, accordingly, violations in the mentioned counts are attributable to actions, or failures to act, of Atlas. In response, Complainant cites decisions to the effect that PCB disposal regulations apply to persons who caused the discharge or owned the source of the PCBs and that an owner and operator may not escape liability for marking violations by entering into a private contract.^{1/} See, however, Suburban Station, TSCA-III-40 (Initial Decision, September 4, 1984)

^{1/} See, e.g., In re City of Detroit, TSCA Appeal No. 89-5 (CJO, February 6, 1991) and In re Virginia Department of Emergency Services, TSCA-III-579 (Order Granting in Part and Denying in Part Motion for an Accelerated Decision, March 2, 1993).

(where property owner licensed city to make improvements as part of a project constructed by city and owner was not involved in any way in clean-up activities which included PCBs, owner was not jointly and severally liable with city for violations of PCB storage regulations). If LTV and Nemaçolin be regarded as one and the same entity, Suburban Station is not, of course, applicable here. The relationship between LTV and Nemaçolin is, nevertheless, an object of legitimate inquiry and a factor militating against granting Complainant's motion.


Inasmuch as the motion for accelerated decision as to liability will be denied, there is no basis for granting the motion as to the amount of the proposed penalty. A brief discussion is, however, in order. Firstly, the statute, TSCA § 16, provides essentially that a penalty may be assessed only after the person charged has been given notice and opportunity for a hearing. This right is reinforced by the Rules of Practice, 40 CFR § 22.15, which provide, inter alia, that a person contesting the amount of a proposed penalty shall file an answer and that a hearing on the issues raised by the complaint and answer shall be held at the request of the respondent. Secondly, it is well settled that determining the amount of a penalty on an accelerated decision, no less than determining damages on summary judgment, is seldom, if ever, appropriate. See, e.g., In re Agri-Fine Corporation, Docket No. EPCRA-V-019-92 (Order Granting In Part Motion For Accelerated Decision, August 31, 1995). Because a respondent is entitled to contest the basis upon which the proposed penalty was calculated

and to offer evidence in mitigation, neither of these propositions are affected in any way by the fact that the penalty was allegedly calculated in accordance with an applicable penalty policy.^{8/}

ORDER

Complainant's motion for a partial accelerated decision is denied.^{9/}

Dated this 7th day of February 1996.


Spencer T. Nissen
Administrative Law Judge

^{8/} See, e.g., In re Employers Insurance Company of Wausau and Group Eight Technology, Inc., Docket Nos. TSCA-V-C-62-90 and TSCA-V-C-66-90 (Initial Decision, September 29, 1995) (assumptions, findings and conclusions upon which penalty policy rests must be supported by evidence), presently on appeal to the EAB.

^{9/} In the near future, I will be in telephonic contact with counsel for the purpose of scheduling a hearing on this matter which will be held in Pittsburgh, Pennsylvania.

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER DENYING MOTION FOR PARTIAL ACCELERATED DECISION, dated February 7, 1996, in re: Nemacolin Mines Corp., LTV Steel Co., Inc. & Atlas Services Corp., Dkt. No. TSCA-III-426, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondents and Complainant (see list of addressees).

Helen F. Handon
Helen F. Handon
Legal Staff Assistant

DATE: February 7, 1996

ADDRESSEES:

Melissa H. Weresh, Esq.
Buckingham, Doolittle & Burroughs
50 Main Street
P.O. Box 1500
Akron, OH 44309-1500

Robert L. Ceisler, Esq.
Ceisler Fichman Smith Law Firm
200 Washington Trust Building
Washington, PA 15301-6820

William C. Smith, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region III
841 Chestnut Building
Philadelphia, PA 19107

Ms. Lydia A. Guy
Regional Hearing Clerk
U.S. EPA, Region III
841 Chestnut Building
Philadelphia, PA 19107