2/27/75

UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

Environmental Protection Agency Complainant v. Chemola Corporation Respondent	)	I.F. & R. Docket No. VI-21C INITIAL DECISION

Preliminary Statement

1. By complaint filed March 14, 1974, the Director, Enforcement Division, Environmental Protection Agency (EPA), Region VI, alleged that on September 14, 1973, Chemola Corporation (Chemola) held for sale the product "Desco Weed Killer," and that analysis of a sample of that product taken on that date, contained 4.13 percent Sodium Chlorate and 2.43 percent Sodium Metaborate, instead of the 18.5 percent and 10 percent respectively, of those chemicals as claimed on its label. Consequently, adulteration of the product, prohibited by Section 12(a)(1)(E), of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (86 Stat. 973; 7 U.S.C. 136j(a)(1)(E) was alleged. A civil penalty of $1500.00 was proposed to be assessed.

2. By Answer, filed April 1, 1974, Chemola denied the allegations and requested a hearing. Hearing was held in Houston, Texas on

October 11, 1974, at which Complainant (EPA) was represented by Stan Curry and Harless Benthul, of the EPA Regional Staff, and Respondent, by Russell T. Van Keuren, of Houston. Proposed Findings and Briefs were filed January 13, 1975, and a reply was filed by complainant on January 29, 1975.

3. Respondent markets a product known as "Desco Weed Killer." It is a pesticide within the meaning of FIFRA and its label is registered with EPA as No. 546-1. According to its registered label its active ingredients are 18.5 percent Sodium Chlorate and 10.0 percent Sodium Metaborate (or expressed as elemental boron, 1.644 percent). Samples of the product taken in the course of an EPA inspection on September 14, 1973, were analyzed and found to contain an average of 4.13 percent of Sodium Chlorate and 2.43 percent of Sodium Metaborate. It is Respondents' contention that inadvertently it had supplied samples of its product ordinarily sold in concentrated form, with a dilution ready for application.

Findings of Fact

1. Ralph Jones and James Halliday, EPA employees inspected Respondents' place of business in Houston, Texas, on September 14, 1973. Jones identified himself to the secretary or receptionist who directed him to Herman Kressee, Jr., the Technical Director of Respondent, as the one in charge.

2. Kressee arranged for an employee to bring a one-gallon can of the product to the front of the building; Kressee then gave the sample to Jones, who had Halleday compare the label on the can with a copy of the registered label. Prior to that review a Notice of Inspection form was filled out by Halliday and given to Mr. Kressee.

3. Because Jones ordinarily collects samples from the parent stock himself, he asked to see the lot from which the sample was taken. Kressee took Jones to the rear and asked an employee named Dean where the sample had originated. Dean indicated a 55 gallon drum and said the material was from it. The drum was the only one having a label on it, although there were five or six drums in close proximity. A hurried inspection indicated the label on the drum was the same as on the sample delivered to Jones in the office.

4. Jones then returned to the reception area where a Receipt for Samples form was issued to Kressee which read " 1/1 gal metal can of Desco Weed Killer, Reg. No. 546-1. No Batch Numbers." Further, a Notice of Inspection was issued to Kressee, which stated the reason for the Inspection was "For the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment, and samples of any containers or labeling for such pesticides or devices." The sample taken was identified, sealed, and transmitted to the Bay St. Louis laboratory.

5. The analysis, the results of which are unquestioned, indicated only 4.13 percent Sodium Chlorate (77.7 percent deficient) and 2.43 percent Sodium Metaborate (75.7 percent deficient).

6. Prior to the inspection visit on September 14, 1973, EPA had received no reports of deficiency in the product nor had it had been reported as a danger to the environment, and the EPA inspectors made no check of the history of the product. The prior practice of the predecessor agency, Department of Agriculture, had been to get a list of customers and to check samples at destination.

7. Jones could not recall whether the drum he was shown bore indications that it had been sealed. He indicated, however, that the drum was stacked over another drum and that it was the only drum with the Desco label.

8. Prior to July, 1973, inspections of the type here were made only at dealers or distributors after movement had been made in interstate commerce, but on that date inspections of manufacturing plants were commenced. In this case, no follow-up inspections were made of consumers or of the efficacy of the product.

9. The Report of Analysis showing the deficiencies in ingredients in the samples, dated December 18, 1973, was supplied to Chemola Corp., but nothing was heard from it by EPA until March 19, 1974, after the formal complaint initiating this proceeding was filed. Normally, a prompt response is received from the recipients of unsatisfactory reports.

10. The civil penalty proposed is $1,500.00. This was determined by the application of an assessment schedule distributed by EPA to the Regions on October 2, 1973, intended to give account to the standards set out in Section 14(a)(3) of FIFRA, and to insure uniform assessments. These standards include size of business and ability to continue in business, and the gravity of the violation. In applying these schedules, EPA considered the company as falling in a size II firm, with sales between $200,000.00 to $1,000,000.00 gross sales a year; and the analytical text results, as being in the category "chemical deficiency -- B. Partially ineffective," for which a range of assessment of $1,500.00 to $1,900.00 is provided. The penalty proposed is the minimum of that range.

11. About two years prior to the inspection in this case, inspectors from the U.S. Department of Agriculture inspected Respondents place of business and checked its label but did not take samples indicating, rather, that samples would be taken at its customers of recent months.

12. The barrel from which the sample was taken was in an inconvenient location in the manufacturing area due to the fact that a fire had required file cabinets and other paraphernalia to be stored in space ordinarily used for manufacturing purposes. The drum was not moved from the pile in the presence of Kressee and

Jones, but Dean presented Kressee with an unlabeled 1 gallon can which he said had come from the drum. After Jones inspected the label on the drum, Kressee instructed Dean to put a label on the sample and bring it to the office. Dean then went into the print shop, obtained a label and affixed it to the can. Dean had also gone into the shipping department where all kinds of samples are kept; Kressee contends he saw Dean take the sample can from those shelves.

13. Chemola sells the product in concentrated form which is recommended for dilution of one gallon of concentrate to four gallons of water. Kressee had personally observed that such properly diluted Desco used around the plant had been efficacious.

14. According to Kressee, some Chemola salesmen, for convenience, carry the product in already diluted form. Accordingly, if the sample was diluted four to one, and was then diluted again in accordance with the label instructions, it would be at sixteen to one, at which it would not kill weeds. Kressee did not originally assume the sample had been diluted because not all of the salesmen used the diluted form; however, he considered it entirely possible and even probable "it was a diluted sample and that it could well be" the diluted variety.

15. While Kressee was concerned when he received the Report of Analysis of the sample in late December, 1973, or January, 1974, he

discussed it only with the Chemola Chief Chemist and requested the latter to determine whether any understrength products had been manufactured or shipped in order that a full explanation might be given later to EPA. He did not, however, discuss it with Mr. Shaw the President of Chemola, nor did he think it necessary to take the matter up with EPA, as he did not know what EPA would do and the Report did not say to respond to it.

16. Chemola was merged into Hi-Port Industries of Highland, Texas, as of April, 1974, and Chemola does not now exist as a separate corporation. The President of Chemola, Herman Shaw, is now President of the successor Hi-Port Industries. Chemola's total sales were $620,000, and net profit of $5,700 in 1972, and $905,000, with net profit of $18,839 in 1973. Sales of Desco Weed Killer in 1973 were $25,074, on which net sales were $18,021.68, involving six customers. With the merger, Desco Weed Killer has been eliminated from its line and sales discontinued.

17. None of Chemola's regular six customers for Desco Weed Killer has ever complained of the product. Shaw considers the product would be ineffective if diluted 16 to 1 and he would expect to have heard complaints from its customers.

18. Julian Dean, the individual who supplied the sample to Kressee is no longer with Chemola, his services having been involuntarily terminated in February, 1974, and his present whereabouts are not known to Shaw.

Conclusions

The essential facts are undisputed. Chemola's representative, Kressee, gave the EPA inspectors what was represented by Kressee to be a sample held for sale of DESCO Weed Killer. Analysis of that sample indicated it was substantially deficient in chemical content. Chemola contends, however, that the sample delivered was a diluted sample intended for salesmen's demonstrations, and not a product held for sale. The record does not, however, support this contention.

Chemola makes much of the fact that in a prior inspection by EPA's predecessor, no samples were taken and they were advised such would be done at the customers place of business. The EPA Inspector, Jones, stated, however, that since July, 1973, inspection had been made at points of production. Accordingly, the prior practice is of no significance.

Chemola also contends that because Mr. Kressee was in a hurry, the "sloppy method of this inspection" is explainable. While it would undoubtedly have been better practice for Jones to have drawn the sample himself under these circumstances, there is no absolute requirement that this be done. Kressee directed the obtaining of the sample and delivered it to Jones labeled and with the representation and intent that it was their product held for sale.

Moreover, Chemola would fault the EPA chemist who analyzed the sample for not requiring an efficacy test which it contends would have indicated its effectiveness. As pointed out in Complainant's Reply Brief, the chemist was only to chemically analyze the sample submitted which was done, and the accuracy of his results were stipulated by Chemola.

Of the five proposed findings by Respondent, three deal with alleged failures of Complainant to test for efficacy, to verify the results by obtaining further samples from Chemola's customers, and to alert its analytical chemist as to the directions for use. All three proposed findings are rejected as irrelevant to the issues in the complaint and not required under the statute. Accordingly, proposed findings No. 2, 3 and 4 are rejected. Its proposed finding No. 1 that the sample was not "packaged, labeled, and ready for shipment" as defined in Section 9(a) of FIFRA, is not supported by the record and is refuted by the specific statement of witness Kressee that "I fully expected to give them and did feel assured I had given them a sample of the material that represented what was sold" (Tr. p. 94). In any event, the prohibited acts are defined in Section 12 of the Act. Proposed Finding No. 1, accordingly, is also rejected. Finally, Finding No. 5, would fault the inspectors for failing to provide a sample that "they knew" had actually come from a previously unopened drum. This finding must also be rejected in the light of the specific representations of witness Kressee.

The Proposed Finding of Fact submitted by Complainant Respondent have essentially been accepted in their entirety herein.

Accordingly, it is concluded that Chemola Corporation, on September 14, 1973, held for sale the product Desco Weed Killer. EPA Registration No. 546-1, as alleged in the complaint, in violation of Section 12(a)(1)(E) of the Federal Insecticide, Fungicide and Rodenticide Act [86 Stat. 973; 7 U.S.C. 136j(a)(1)(E)].

Proposed Penalty: Respondent has not questioned the size of the proposed $1,500.00 assessment, which was established by reference to an agencywide schedule which takes into account the size of the business and the nature of the violation. There is no question that Chemola (or its successor) can continue in business after payment of the assessment. With regard to the gravity of the violation, it is apparent that, while economic harm would result from the sale of the adulterated product, no health hazard was created by the violation. Moreover, there are no known instances of violations by this company and no complaints have been registered by customers. Accordingly, the proposed assessment of $1,500.00, is appropriate.

Proposed Final Order[1/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 186 Stat. 973; 7 U.S.C.

1/ Unless appeal is taken by the filing of exceptions pursuant to 40 C.F.R. 168.51, or the Regional Administrator elects to review the initial decision on his own motion, the order may become the final order of the Regional Administrator.

136 1(a)(1), a civil penalty of $1,500.00 is assessed against Chemola Corporation, for violations of the said Act which have been established on the basis of the complaint herein filed March 14, 1974.

Frederick W. Denniston
Administrative Law Judge

February 27, 1975