8/29

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
LUVERNE FIRE APPARATUS CO., LTD.	)	**Docket No. CWA-VIII-94-19-PII**
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION

For the reasons stated in its motion filed August 2, 1995, respondent seeks to dismiss the complaint in this proceeding in its entirety, with prejudice, or in the alternative to strike and dismiss the complaint for refiling as a Class I action. Complainant (sometimes EPA or Agency) filed its response in opposition to motion on August 10, 1995. A reply was filed on August 15, 1995.[1] The respective arguments of the parties are well-known to them; they will not be repeated here except to the extent deemed necessary by the undersigned Administrative Law Judge (ALJ).

The significant sequence of events concerning the motion are as follows: The complaint in this matter was filed May 5, 1994. It was sent by certified mail, return receipt requested, to Mr. Jim Copley (Copley), Production Manager of the respondent. It is alleged in the motion that the complaint, or the issuance of same, first came to respondent's attention through the news media on May 12, 1994. Prior to that date, events and correspondence

[1] Respondent's attention is invited to paragraph 13 on page 5 of the Notice and Order issued August 9, 1994.

between EPA and respondent, over the period of April 22, 1993 to October 28, 1993, were between Copley and the Agency. The motion states further that correspondence had been stuffed into the desk drawer of the production manager; that after the news media came to the attention of officers of respondent inquiries were made and the production manager delivered up the complaint. Shortly thereafter, the respondent terminated the production manager's services (Mot. at 1-3).

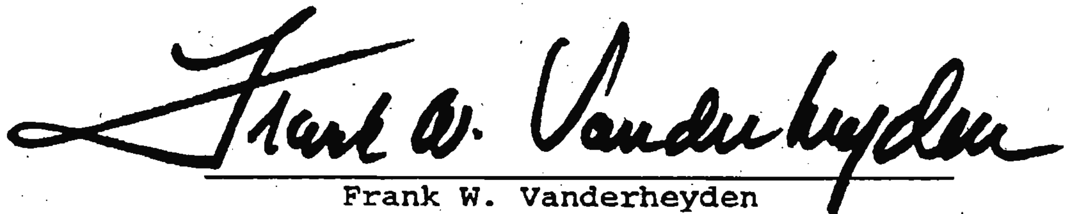
Stripped of its surplusage, respondent contends that the officers of the respondent were unaware that the facility was subject to pretreatment and that the production manager concealed from the officers of respondent his dealings with EPA. Respondent refers to section 309(a)(4), 33 U.S.C. § 1319(a)(4), which states, in significant part, that where an order has been issued to a corporation, "a copy of such order . . . shall be served on any appropriate corporate officers." (Emphasis supplied.) It is argued that Copley, the production manager, was never an officer of the corporation; that "shall" in the statute is mandatory; that no documents were ever served upon any officer of the respondent; and thus the service of the complaint was invalid. (Mot. at 3, 4.) The ALJ is also quite aware of complainant's thoughts in opposition. The ALJ is of a mind that it is unnecessary to address the arguments of the parties. Other legal principles shall be employed to resolve the question.

Respondent's position rests upon a soggy legal basis. It states that it became aware of the complaint on May 12, 1994. Then

and there a duty was imposed on respondent to challenge the complaint's purported defective service in order to preserve its perceived defenses. For example, respondent could have made a special appearance attacking the alleged improper service of the complaint, or as an affirmative defense in its answer. It did neither. Rather, its answer to the complaint of June 20, 1994, was one of general appearance being an unqualified and unrestricted submission to the jurisdiction of the forum. One will search that pleading in vain to find mention of defective service of the complaint. Any alleged defect in service of the complaint was cured by respondent's answer.

On August 2, 1995, approximately 14 months following its answer and about six weeks prior to the hearing, respondent raised the defense of defective service. However, respondent has dozed too long and deeply on its supposed rights. It is now too late in the day to object. Assuming, without conceding, that service of the complaint may have been improper, respondent waived any objection by not raising its challenge sooner in some pleading. Standing alone, respondent's waiver is sufficient to deny the motion. It is not necessary at this time to reach and decide any other questions posed in the motion and response.

IT IS ORDERED that respondent's motion be **DENIED** in its entirety.



Frank W. Vanderheyden
Administrative Law Judge

DATED: August 29, 1995

IN THE MATTER OF LUVERNE FIRE APPARATUS CO., LTD., Respondent
Docket No. CWA-VIII-94-19-PII

Certificate of Service

I certify that the foregoing Order, dated 8/29/95, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region VIII
999 18th Street, Suite 500
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Copy by Regular Mail to:

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Marion Walzel
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Legal Staff Assistant

Date: August 29, 1995