10-30-92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
AUTOSPLICE, INC.,	)	Docket No. EPCRA-09-91-0003
	)	
Respondent	)	

INTERLOCUTORY ORDER SPECIFYING FACTS
WHICH APPEAR SUBSTANTIALLY UNCONTROVERTED
AND THE ISSUES UPON WHICH HEARING WILL PROCEED

Complainant United States Environmental Protection Agency (Complainant or EPA) has filed a motion for a partial accelerated decision on the issue of liability in this matter pursuant to 40 C.F.R. § 22.20.[1] In opposition, Respondent has moved for an

[1]Section 22.20 provides:

> (a) General. The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.
>
> (b) Effect. (1) If an accelerated decision or a decision to dismiss is issued as to all the issues and claims in the proceeding, the

accelerated decision against EPA and for dismissal of the complaint.[2]

The complaint in this matter alleges that Respondent failed to submit Toxic Chemical Release Inventory Reporting Forms (Forms R) for the toxic chemical copper for the calendar years 1988 and 1989 as required by Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11023.

In its answer to the complaint Respondent stated, in part, that "Respondent made early efforts to determine whether it was subject to reporting requirements contained in [EPCRA] . . . . Respondent in good faith continued to believe that said statute did not apply to Respondent's facility until December 1991 when Respondent's General Counsel received the Civil Complaint herein.

* * * * * * *

> decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.
>
> (2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

[2]Respondent has also moved for reimbursement of costs, attorney's fees and other relief.

Upon becoming aware that EPCRA is applicable to its facility, Respondent filed its Form R's for three years 1988, 1989 (and 1990)."

Before the present motions were filed the parties made their prehearing exchanges. Based upon the complaint and the answer, the prehearing exchanges and exhibits filed by the parties I find that the following are "substantially uncontroverted":

1. Respondent is a person as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7). (Complaint ¶ 5; Respondent's Answer (Resp. Ans.) ¶ 5.)

2. Respondent is an operator. (Complaint ¶ 7; Resp. Ans. ¶ 7.)

3. Respondent operates a "facility" as defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4) and 40 C.F.R. § 372.3. (Complaint ¶ 7; Resp. Ans. ¶ 7.)

4. The facility has ten (10) or more "full-time employees" as defined by 40 C.F.R. § 372.3. (Complaint ¶ 8; Resp. Ans. ¶ 8.)

5. The facility is classified under Standard Industrial Classification Codes 20 through 39 (i.e., 3679) as in effect on July 1, 1985. (Resp. Exhs. 1 and 2 at ¶ 3.5.)

6. In 1988 at the facility Respondent processed copper in a quantity exceeding 50,000 pounds which was the applicable threshold amount requiring the filing of a Form R for 1988. (Complaint ¶ 13; Resp. Ans. ¶ 13.)

7. In 1989 at the facility Respondent processed copper in a quantity exceeding 25,000 pounds which was the applicable threshold

amount requiring the filing of a Form R for 1989. (Complaint ¶ 18; Resp. Ans. ¶ 18.)

8. Respondent did not submit a Form R for 1988 to the EPA Administrator or to the State of California on or before July 1, 1989. (Complaint ¶ 14; Resp. Ans. ¶ 14.)

9. Respondent did not submit a Form R for 1989 to the EPA Administrator or to the State of California on or before July 1, 1990. (Complaint ¶ 19, Resp. Ans. ¶ 19.)

Complainant contends that there are no material issues of fact preventing a finding of liability against Respondent. However, Respondent maintains that it is exempt from the EPCRA Section 313 reporting requirements because the toxic chemical (copper) involved here falls within the "article" exemption. See 40 C.F.R. § 372.38(b) and § 372.3.[3]

---

[3]40 C.F.R. § 372.38(b) provides, in pertinent part:

> Articles. If a toxic chemical is present in an article at a covered facility, a person is not required to consider the quantity of the toxic chemical present in such article when determining whether an applicable threshold has been met under § 372.25 or determining the amount of release to be reported under § 372.30. . . .

40 C.F.R. § 372.3 provides:

> Article means a manufactured item: (1) Which is formed to a specific shape or design during manufacture; (2) which has end use functions dependent in whole or in part upon its shape or design during end use; and (3) which does not release a toxic chemical under normal conditions of processing or use of that item at the facility or establishments.

Respondent asserts that under the regulations for an item (that contains a toxic chemical) to be considered an "article", exempt from Section 313 reporting, it must: (a) be formed to a specified shape during manufacture, (b) have end use functions dependent on its shape, and (c) not release a toxic chemical during processing. According to an EPA policy directive the third requirement of the "article" definition above (i.e., non-release of a toxic chemical) can be met if all "resulting waste" or scrap from a process is recycled or reused. Applying these requirements to Respondent's stamping operation, Respondent maintains that Autosplice's tab terminals are formed to a specific shape during manufacture; that the terminals' end use functions are dependent upon their shape, and that Respondent recycles 100% of its brass scrap through a scrap dealer, thereby avoiding a "release." Therefore, Respondent submits that it fulfills the article exemption test.

Complainant argues that Respondent has not demonstrated that its stamped connector process does not result in a "release" of copper and insists that its inspector concluded that Respondent's collection process for the brass scrap is not enclosed or self-contained and that significant amounts of the scrap scatter long before collection.

As for the inspector's conclusions, Respondent emphasizes that "some seventeen months after the inspection, Complainant hurriedly presented additional observations" from the inspector and "requests this court to closely scrutinize these new recollections."

The disagreement about the application of the "article" exemption centers primarily upon whether the waste from Respondent's stamping process is recycled or reused off-site. However, Complainant also challenges whether the brass stamping operation meets the first and second criteria for the article exemption.

I conclude that a genuine issue of material fact exists as to the nature of Respondent's brass stamping operation and whether the nature of that operation meets the criteria for an article exemption. Therefore, I find that a hearing is appropriate to resolve that issue. I reject Complainant's suggestion that the hearing should be limited to a determination of whether Respondent can prove that it recycles 100% of the waste being generated. Likewise, based upon the findings of fact (supra, pp. 3-4), I reject Respondent's assertion that "[i]f a hearing is deemed necessary, the entire issue of liability should be heard."

Consequently, Complainant's motion for partial accelerated decision and Respondent's motions for accelerated decision and to dismiss should be, and hereby are, denied. I have found that certain facts (supra, pp. 3-4) are substantially uncontroverted. However, I do not make a finding of the issue of liability as to Counts I and II in this case. A hearing will be scheduled for the purpose of resolving the issue of the application of the article exemption and thereby, as to the issue of liability for those counts.

Pursuant to 40 C.F.R. § 22.20(b)(2) I further find that the issue of the amount, if any, of the civil penalties, which appropriately should be assessed for any violations which may be found herein, remains controverted and the hearing should be scheduled for the purpose of deciding that issue as well.

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: October 30, 1992
Washington, DC

IN THE MATTER OF AUTOSPLICE, INC., Respondent
Docket No. EPCRA-09-92-0003

Certificate of Service

I hereby certify that this Interlocutory Order Specifying Facts Which Appear Substantially Uncontroverted and the Issues Upon Which Hearing Will Proceed, dated OCT 30 1992, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Steven Armsey
Regional Hearing Clerk
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Copy by Certified Mail,
Return Receipt Requested to:

Attorney for Complainant:

Ann H. Lyons, Esquire
Assistant Regional Counsel
U.S. EPA, Region 9
75 Hawthorne Street, 16th Fl.
San Francisco, CA 94105

Attorney for Respondent:

Peter E. Zahn, Esquire
General Counsel
Autosplice, Inc.
10121 Barnes Canyon Road
San Diego, CA 92121

Doris M. Thompson
Secretary

Dated: OCT 30 1992