12/27/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

In the Matter of	:	
SWING-A-WAY MANUFACTURING CO.	:	Dkt. No. EPCRA-VII-910-T-650E
Respondent	:	

Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. §11001 et seq., § 313 (42 U.S.C. § 11023) and § 325 (42 U.S.C. § 11045: (1) Amounts of nickel remaining in plating bath and rack stripping solution must be included in the calculation of quantities "processed," for purposes of determing whether a reporting threshhold has been reached. (2) The appropriate civil penalty to be assessed in this case, on the facts herein, is $48,000.00. A small reduction in the penalty proposed by the government is justified where, as here, cooperation on respondent's part exceeded ordinary levels.

Appearances:

Becky Ingrum Dolph, Esquire, Office of Regional Counsel, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, for complainant.

Mr. Gerry Vogelpohl, Process Supervisor, Swing-A-Way Manufacturing Company, 4100 Beck Avenue, St. Louis, Missouri 63116-2694; for respondent.

Before: J. F. Greene
Administrative Law Judge

Decided: December 27, 1993

DECISION AND ORDER

Partial "accelerated decision" with respect to liability for charges alleged in counts II, III, and IV of the complaint herein was granted on November 20, 1992.[1] Thereafter, complainant moved for "accelerated decision" as to the civil penalty for the violations found, which was denied on March 12, 1993, because of a general reluctance to impose civil sanctions without providing an oppor- tunity for an oral evidentiary hearing in the absence of a clear statement from respondent that no such hearing was desired.[2]

Accordingly, this matter went to trial on the issues of liability for the violation alleged in Count I of the complaint, and on the issue of apropriate civil penalty to be imposed for the violations found with respect to counts II, III, and IV.

Count I of the complaint charges that respondent failed to submit a toxic inventory release inventory report for the processing of nickel in connection with the manufacture of can openers and other items, to the Administrator of the United States Environmental Protection Agency and to the State of Missouri by July 1, 1990. Section 313 of the Act, 42 U.S.C. § 111023, and 40 C.F.R. Part 372 require the submission of reports in connection with the use or processing of toxic chemicals in excess of certain

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[1] **Order Granting Complainant's Motion for Judgment as to Liability for Certain Counts**, November 20, 1992. A copy of this Order is attached hereto.

[2] **Order Denying Motion for "Accelerated Decision" as to Penalty for Certain Counts,"** March 12, 1993.

amounts set forth in the implementing regulations. In this case, the threshhold amount to be reported is 25,000 pounds.[3]

The record reveals that respondent is the owner and operator of a facility located at 4100 Beck Avenue, St. Louis, Misouri[4], which manufactures can openers and ice crushers[5]; that respondent has ten or more full time employees at this facility[6]; that respondent's facility falls in Standard Industrial Code 20-39 [7]; that respondent "processes" nickel at its facility in the manufacturing process[8]; that nickel is a toxic chemical listed under Section 313(c) of the Act and 40 C.F.R. § 372.65[9]; and that respondent did not submit a toxic chemical inventory report by July 1, 1990, for processing during calendar year 1989, as required by the Act and the implementing regulations[10]. Accordingly, with respect to the violation charged in Count I of the complaint, it remains only to be determined whether respondent was required to submit a toxic chemical release inventory report for nickel for

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[3] See § 313(f) of the Act, 42 U.S.C. § 11023.

[4] **Stipulation #1 of the parties**, June 16, 1992 [**Joint Exhibit (JX) 1, paragraph 1**].

[5] **Stipulation 4**, June 16, 1992 (**JX 1, paragraph 4**).

[6] **Stipulations #2 and #19 of the parties**, June 18, 1992; **JX 1, paragraphs 2 and 19.**

[7] **Stipulation #3 of the parties**, June 16, 1992 (**JX 1**, paragraph 3).

[8] **Stipulation 5 of the parties** (**JX 1** at paragraph 5).

[9] **Stipulation 6 of the parties** (**JX 1**, paragraph 6).

[10] **Stipulation 10 of the parties** (**JX 1**, paragraph 10).

calendar year 1989.

Complainant argues that EPA's inspection of the facility revealed that respondent "processed," as that term is defined at 40 C.F.R. § 372.3 and at section 313(b)(1)(C)(ii) of the Act, 42 U.S.C. § 11023 (b)(1)(C)(ii), in excess of 25,000 pounds of nickel. This figure is based in part upon a respondent's purchase of 44,080 pounds of nickel during calendar year 1989.[11] Respondent argues that purchase of 44,080 pounds of nickel does not establish that 25,000 or more pounds was in fact processed at the facility for that year, because purchases of nickel are typically made in greater amounts when the price of nickel is low for stockpiling and use when prices rise. Respondent calculated at trial that only 23,998 pounds of nickel were actually plated onto respondent's products during 1989.[12] Respondent does not maintain beginning and end-of-year inventory records.[13]

Complainant's evidence indicates that the quantity of nickel remaining in the plating baths and rack stripping solutions amounted to 5526 pounds.[14] Therefore, according to complainant, respondent processed at a minimum, using the amount which respondent believes was plated onto the products, 23,998 pounds for a total of 29,524 pounds -- well over the quantity which triggers the reporting requirement for the year 1989. Complainant argues at

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[11] **Stipulation 7 of the parties** (**JX 1**, paragraph 7).

[12] **TR at 41, 45**; respondent's exhibit (**RX**) **1**.

[13] **Stipulation 9 of the parties** (**JX 1, paragraph 9**).

[14] **TR 41-45**; complainant's exhibit (**CX**) **36-38**.

length that the entire amount used in the manufacturing process, i. e. the quantity actually applied to the can opener and ice crusher parts plus the amount of nickel remaining in the solutions after the plated parts are lifted out must be counted as part of the "processing". Considering the language of the Act and the regulations, the logic of this argument cannot be denied, and is persuasive. The term "process," as defined at section 313(b)(1)(C)(ii) of the Act, cannot reasonably be construed in the narrow sense contended for by respondent. In reaching this determination, reliance is placed chiefly upon two factors: (a) the language of the statute and the regulations, which clearly contemplate that chemical quantities consumed as waste in processing operations as well as chemical quantities which do in fact end up in or on products that result from such operations are to be included in the count for purposes of reporting how much chemical was "processed"; and (b) it is the clear intent of the Act and implementing regulations, given the statutory objectives recited in the Act, that the public should be informed as to quantities of toxic chemicals that go into facilities' operations. To hold otherwise would frustrate the objectives of the Act. It is specifically noted that the language in question here supports the interpretation which forms the basis for this decision: regardless of the clarity of the objectives of a given piece of legislation, if the language of the statute and/or the implementing regulations does not give reasonable notice of the conduct that is expected of the regulated community, violations cannot fairly be found.

Accordingly, it must be held that respondent "processed" in excess of the threshhold amount of nickel in calendar year 1989, and was required to file a toxic chemical inventory report, which it did not do.

Turning to the penalty issue, section 325(c)(1) of the Act provides that civil penalties in an amount not to exceed $25,000 per violation may be assessed for each day a violation continues. The Rules of Practice which govern this proceeding provide as follows, at 40 C.F.R. § 22.27(b):

> Amount of civil penalty. If the presiding officer determines that a violation has occurred, the presiding officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the presiding officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the presiding officer shall set forth in the initial decision the specific reasons for the increase or decrease.

Careful consideration has been given to the language of the Act and regulations. It is determined that complainant's proposal is reasonable and proper except fact that respondent's cooperation with EPA, specifically with complainant and this tribunal, has not been taken sufficiently into account. For example, at all times respondent's representatives gave EPA all the information it sought, without hesitation; Mr. Vogelpohl for respondent, although not an attorney, stipulated willingly to facts not in dispute, which made complainant's and this tribunal's job easier and quicker

than is commonly the case. This conduct permitted a far more efficient determination as to the remaining facts and the law than is usually possible even with experienced attorneys representing all parties. This conduct, and the unusual cooperation seen on both sides, contributed greatly to a resolution of this matter in the public interest. Because this extent of cooperation is unusual and went beyond expectations, the proposed penalty is reduced by $5000 per count, for a total of $48,000.

An ususual aspect of this serious matter was the apparent willingness of respondent to delegate the conduct of its defense to a non-attorney, even if that individual was in charge of compliance with environmental statutes and regulations. Regardless, Mr. Vogelpohl's conduct of respondent's case was remarkable in the circumstances, and warrants special mention.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The findings of fact and conclusions of law previously set out in the **Order Granting Complainant's Motion for Judgment as to Liability for Certain Counts** of November 20, 1992, are incorporated herein by reference.

2. Respondent "processed," as that term is defined, 25,000 pounds or more of nickel during calendar year 1989. In consequence of the reporting threshhold that year being 25,000, respondent was required to file a toxic chemical inventory reporting form for the processing of nickel for that year. Because respondent did not do so, it violated section 313 of the Act, 42 U.S.C. § 11023, and the requirements of 40 C.F.R. Part 372.

3. Nickel remaining in the plating bath and rack stripping solutions after respondent's product parts are removed is part of the amount of nickel "processed," and must be counted for reporting purposes in determining how many pounds were "processed" in a calendar year.

4. Respondent is a "person" as that term is defined in the Act at section 329(7).

5. Respondent is liable for civil penalties for violations of the Act and regulations found herein and found previously in the **Order Granting Complainant's Motion for Judgment as to Liability for Certain Counts** of November 20, 1992, attached hereto and made a part hereof.

6. Except for failure to take into account the high degree of cooperation and interest in expeditious resolution of this matter on the part of respondent's representative Mr. Vogelpohl, complainant's proposal as to the amount of civil penalties to be imposed is reasonable and in accordance with authority. It is held that fairness dictates that such cooperation be taken into account to the extent of $5000 per count. Accordingly, a reduction in the penalty proposal from $17,000 per count to $12,000 per count is warranted, and is fair, reasonable, and in the public interest.

ORDER

Respondent having been found liable for the violations alleged in the complaint, it is hereby ordered that respondent shall pay a civil penalty of $12,000 per count, for a total of $48,000.

This penalty shall be paid in full within thirty (30) days of the date of entry of this Order, shall be made by cashier's or certified check payable to the United States of America, and sent to:

Regional Hearing Clerk
EPA Region VII
c/o Mellon Bank
Post Office Box 360748M
Pittsburgh, Pennsylvania 15251

Failure to pay the civil penalty assessed herein may result in the commencement of a civil action in federal district court to recover the amount due together with interest thereon at the rate of four percent. (4%) per annum.

J. F. Greene
Administrative Law Judge

Washington, D. C.
December 27, 1993