IN THE MATTER OF THERMAL REDUCTION COMPANY, INC.

EPCRA Appeal No. 91–2

FINAL DECISION

Decided July 27, 1992

Syllabus

Respondent appealed from a Default Order imposing penalties for violations of the Emergency Planning and Community Right-to-Know Act of 1986. The Default Order was issued after Respondent failed to file an answer to the Complaint served upon it. Respondent maintained the Default Order should be set aside on the grounds it was not the entity intended to be served with the Complaint and it did not commit the alleged violations.

Held: Service of process was properly effected upon Respondent. Under the facts and circumstances of this case, the Default Order should not be set aside. Accordingly, the Default Order is affirmed.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

Respondent, Thermal Reduction Company, Inc., appeals a Default Order issued by the Regional Administrator of the U.S. Environmental Protection Agency's Region II. The Regional Administrator concluded[1] that Respondent violated Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11023 *et seq.*, and 40 CFR § 372.30 of the implementing regulations. The Regional Administrator ordered payment of a civil

[1] Respondent failed to file an answer to the Complaint. A party may be found in default after motion, upon failure to file a timely answer to the complaint. 40 CFR § 22.17(a). Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. *Id.* In the Default Order, the Regional Administrator concluded Respondent was in default and consequently admitted all facts alleged in the Complaint.

penalty under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), in the amount of $34,000.00.

The order issued by the Regional Administrator constitutes an initial decision of the Agency under 40 CFR § 22.17(b). An initial decision may be appealed to the Environmental Appeals Board under 40 CFR § 22.30 (57 Fed. Reg. 5325, February 13, 1992).

I. *BACKGROUND*

In 1987 and 1988, a business entity known as "Thermal Reduction Company" was doing business at One Pavilion Avenue in Riverside, New Jersey. In November 1989, representatives of the Environmental Protection Agency inspected "Thermal Reduction Company" at the Riverside address to determine compliance with Section 313 of EPCRA.[2]

On March 25, 1991, Region II filed a Complaint alleging violations of Section 313 of EPCRA in 1987 and 1988 by "Thermal Reduction Company, Inc.," a New Jersey corporation doing business at One Pavilion Avenue in Riverside, New Jersey. The president of Thermal Reduction Company, Inc., Martin Kraemer, was served with the Complaint.[3] In May 1991, counsel for Region II directed two letters to Mr. Kraemer, as president of Thermal Reduction Company, Inc., regarding the Complaint.[4] Mr. Kraemer acknowledged receipt of each letter in a telephone call following each letter. In one telephone conversation, Mr. Kraemer represented that an answer would be filed. When no answer was filed, Region II filed a Motion for Default Order, pursuant to 40 CFR § 22.17(a), on June 13, 1991.

[2] Section 313 of EPCRA requires the owner or operator of a facility with more than ten employees and falling within the coverage of the Standard Industrial Classification Codes 20 through 39 to complete a toxic chemical release form for certain toxic chemicals which the facility manufactured, processed, or otherwise used in quantities exceeding specified thresholds during the preceding calendar year. 42 U.S.C. § 11023(a) and (b).

[3] Respondent has claimed that it is not the same entity as the corporation that allegedly committed the violations. In this regard, Respondent acknowledges receipt of the Complaint and subsequent documents by stating "service of the complaint and other documents in this matter was not effected upon the intended respondent [Thermal Reduction Company] but only upon the purported respondent [Thermal Reduction Company, Inc.] with a name similar to that of the intended respondent." *See* pages 1 and 2 of Respondent's Appellate Brief.

[4] The Motion for Default Order refers to the written and oral communications between Region II and Mr. Kraemer in May 1991. Respondent has not disputed either the authenticity of the two letters attached to the Motion for Default Order or Region II's description of statements attributed to Mr. Kraemer in such communications.

Thermal Reduction Company, Inc. was served with a copy of this Motion on the same day.[5] Thermal Reduction Company, Inc. failed to file a reply in opposition to the Motion and a Default Order was issued by the Regional Administrator, pursuant to 40 CFR § 22.17(b), on July 29, 1991.[6]

II. *DISCUSSION*

Respondent raises both procedural and substantive issues. First, Respondent maintains it was not the entity intended to be served with process by Region II. It maintains that Region II intended to serve process upon another entity with a similar name, "Thermal Reduction Company." Consequently, it argues service of process upon it was invalid.

In fact, the record reveals Region II did intend to serve process on the entity who was named and identified in the Complaint, "Thermal Reduction Company, Inc." As alleged in the Complaint, Region II believed the Respondent to be a New Jersey corporation located at One Pavilion Avenue, Riverside, New Jersey. Respondent acknowledges it is a New Jersey corporation located at such address. In fact, it distinguishes itself from the other entity known as "Thermal Reduction Company" on the basis that such other entity is believed to be either a Delaware corporation or Pennsylvania limited partnership. The Complaint, two letters concerning Respondent's failure to answer the Complaint, and the Motion for Default Order were mailed by Region II to the president of Respondent at the address of Respondent. Clearly, Region II intended to effect service of process on Respondent. As previously noted, Respondent admits receipt of the Complaint. Therefore, service of process was not invalid as alleged by Respondent.

Second, Respondent raises a substantive issue by denying certain material issues of fact alleged in the Complaint. Respondent maintains the Default Order should be set aside because it was not the entity which is alleged in the Complaint to have violated EPCRA in 1987 and 1988.

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[5] The Motion for Default Order was mailed to Thermal Reduction Company, Inc. on June 13, 1991. Service of all pleadings and documents other than the complaint is complete upon mailing. 40 CFR § 22.07(c).

[6] A party's reply to a motion for default order must be filed within twenty days after service of such motion. 40 CFR § 22.17(a). Adding five additional days for mailing to the time allowed for filing a reply to the Motion in accordance with 40 CFR § 22.07(c), Thermal Reduction Company, Inc.'s reply to the Motion was due July 8, 1991.

When fairness and a balance of the equities so dictate, a default order will be set aside. *In the Matter of Midwest Bank & Trust Co., Inc.,* RCRA (3008) Appeal No. 90–4, at 6 (Oct. 23, 1991). As a general principle, default orders are not favored and doubts are usually resolved in favor of the defaulting party. *See* 10 Wright, Miller & Kane, *Federal Practice and Procedure 2d,* §2681, at 402–403 (1983). When making such a determination, the Environmental Appeals Board will consider the totality of the circumstances presented. *See Midwest Bank & Trust,* at 6–7.

It should be noted that Respondent failed to file a reply opposing the Motion for Default Order.[7] If no reply is filed to a motion within the designated period, the parties may be deemed to have waived any objection to the granting of such motion. 40 CFR §22.16(c). Other than its rather belated contention that it was not the party intended to be served with process and that it did not commit the violations alleged in the Complaint, Respondent offers no explanation for its failure to reply to the Motion for Default Order. Respondent offers no additional reason why it should not be deemed to have waived its objections to the granting of the Motion.

In its appeal of the Default Order, Respondent denies it is the owner of the facility which was inspected by EPA on or about November 3, 1989. It denies it manufactured, imported, processed or otherwise used any chemical or chemical category subject to Section 313 of EPCRA during 1987 and 1988. It denies it was a facility with ten full-time employees during 1987 and 1988. It denies it was a facility falling within Codes 20 through 39 of the Standard Industrial Classification Code during 1987 and 1988. It maintains the "Thermal Reduction Company" which operated at the very same address during 1987 and 1988 ceased to do business prior to service of the complaint on "Thermal Reduction Company, Inc."

While making these assertions, Respondent also acknowledges in an ambiguously phrased statement that it does share some form of legal relationship with "Thermal Reduction Company." It states that in the 1990 transaction wherein it changed its name from N & P Corporation to "Thermal Reduction Company, Inc.," it acquired certain assets and certain employees of the "Thermal Reduction Company."[8] It also states that as a result of this transaction, it has

[7] A party may be found to be in default for failure to file a timely answer to the complaint only after a motion is made and such party is afforded an opportunity to reply. 40 CFR §22.17(a).

[8] *See* page 3, paragraph 4, of the Notice of Appeal.

authority to "compel [(Thermal Reduction Company'] to accept service of the complaint."[9]

It is not necessary for us to decide whether Respondent could have successfully defended against the Complaint had it chosen to do so. All the assertions it now makes should have been made in an answer to the Complaint. No answer was filed. All the assertions could have been included in a reply to the Motion for Default Order. No reply was filed. We decline to accept these assertions, raised for the first time on appeal, as a basis for overturning a properly issued Default Order.

Viewing all of the circumstances of this case together, we find Respondent has failed to make a sufficient equitable argument to warrant setting aside the Default Order. The Default Order of the Regional Administrator of Region II is therefore affirmed. Respondent shall pay a total civil penalty of $34,000.00. In accordance with 40 CFR § 22.31(b), payment must be made within 60 days after receipt of this Order by sending a certified or cashier's check, payable to the Treasurer, United States of America, to:

U.S. EPA—Region II
Regional Hearing Clerk
P.O. Box 360188M
Pittsburgh, PA 15251

So ordered.

[9] *Id.*