

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the Matter of:)	
)	
Dico, Inc.)	CERCLA 106(b) Petition No. 95-1
Des Moines TCE Site)	

ORDER DISMISSING PETITION FOR REIMBURSEMENT

By Order dated August 28, 1995, the Board granted Dico, Inc.'s (Dico's) motion to stay the proceedings in this matter pending a decision of the United States District Court for the Southern District of Iowa on Dico's motion to dismiss a cost recovery action filed by the United States under § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986. In its motion for a stay, Dico stated that the District Court was in the process of considering Dico's motion to dismiss on the ground that the United States had not established Dico's liability for trichloroethylene ("TCE") contamination at the Des Moines TCE site.^{1/} Upon consideration,

^{1/}The Des Moines TCE site is a plume of volatile organic compounds located southwest of the City of Des Moines, Iowa in the floodplain of the Raccoon River. Following a remedial investigation in 1985, U.S. EPA Region VII determined that Dico's facility was a major source of the VOC contamination. See Remedial Investigation Summary, U.S. EPA Region VII (Dec. 19, 1985). Soil and groundwater samples from various locations at the facility were found to contain a variety of contaminants including TCE. On July 21, 1986, the Region issued an administrative order under CERCLA § 106(a) requiring Dico to design and implement a system to extract and treat groundwater in the vicinity of Dico's facility. The Region determined that the

(continued...)

the Board decided to stay the present proceedings until the District Court had ruled on Dico's motion. The Board took this action in the event that the District Court determined that Dico was not liable for any of the contamination. Under such circumstances, it might not have been necessary to hold an evidentiary hearing to determine whether or not the remediation costs were divisible, and, if so, to determine the appropriate formula and dollar amount for any reimbursement as contemplated by the Board's Order for an Evidentiary Hearing dated July 25, 1995.^{2/} The Board held that because no prejudice would result to either party while the stay remained in effect, and because Dico was limiting its stay request to the time needed for the court to rule on its motion to dismiss, the matter should be stayed until the District Court ruled on Dico's motion. The Region and Dico

^{1/}(...continued)

release and threatened release of TCE in the area surrounding Dico's facility constituted an imminent and substantial endangerment to public health and the environment. See Exh. A to Region VII's Response to Petition for Reimbursement of Costs Under 42 U.S.C. Section 9606(b)(2) ("Region's Response"). Dico, a manufacturer of metal wheels and brakes, used solvent containing TCE to degrease metal parts during the manufacturing process. Oily waste sludge containing TCE from the degreasing process was disposed of by applying it on the facility's grounds for purposes of dust control and by discarding it in a drainage ditch on the property. See Summary of Remedial Alternative Selection at 1 (Exh. F to Region's Response).

^{2/}In its July 25, 1995 Order, the Board concluded that although Dico was a liable party under CERCLA, Dico may be able to establish that a reasonable basis exists for apportioning costs, and that the reimbursement petition could not be fairly resolved without an evidentiary hearing on this issue. Order for an Evidentiary Hearing. The Board therefore scheduled an evidentiary hearing before a Regional Presiding Officer. Order Scheduling Evidentiary Hearing (Aug. 8, 1995).

were ordered to jointly notify the Board of the District Court's action in this regard within three days of service of the Court's order. By order dated February 2, 1996, the District Court denied Dico's motion to dismiss.

By motion dated February 12, 1996, Dico requested that, in the interest of judicial economy, the Board continue the stay to avoid duplication of effort. See Petitioner Dico, Inc.'s Suggestions in Support of Motion to Continue Stay of Proceedings ("Motion to Continue Stay"). In particular, Dico stated that it would soon file its answer and counterclaim in the District Court proceeding and that in its counterclaim Dico would assert "precisely the same reimbursement claim at issue in these administrative proceedings." *Id.* at 1. The Region opposed continuation of the stay. See EPA Region VII's Response to Petitioner's Motion to Continue Stay of Proceedings ("Response") (Feb. 28, 1996).

By order dated March 1, 1996, the Board granted Dico's request and continued the stay. The Board stated, in part:

It appears from the record before us that the government's cost recovery action in the District Court is for reimbursement of costs incurred at the identical site involved in the reimbursement petition before the Board. In addition, the Region has not denied that issues of divisibility and apportionment similar or identical to those currently before the Board may arise in the course of the District Court proceeding. In fact, in a recent motion submitted to the District Court the government appears to acknowledge that this is a possibility. See Motion *of the* United States *for Reconsideration and Request for Oral Argument*, Civil Action No. 4-95-CV-10289 at 9 (Feb. 16, 1996) (stating that if Dico were to introduce evidence on the issue of divisibility and apportionment in the District Court, the burden would be on Dico to make its case). Under

the circumstances, we believe that there is a substantial likelihood that the District Court will reach issues that could have a direct affect [sic] on the present proceedings.

Accordingly, in the interest of judicial economy, **Dico's** motion, to continue the stay is granted and the evidentiary hearing in this matter will be stayed pending the outcome of the cost recovery action in the District Court.

Order Continuing Stay at 3.

The District Court has now resolved the relevant liability and divisibility issues against **Dico**. Specifically, by order dated April 1, 1997, the District Court granted the government's motion for summary judgment on **Dico's** liability and the amount of response costs and entered a final judgment against **Dico** for \$4,378,110.66. See *United States v. Dico, Inc*, Civil No. 4-95-10289 (S.D. Iowa 1997). In so doing the District Court rejected precisely the same arguments as to divisibility and apportionment raised by **Dico** in its petition for reimbursement and on which this Board had scheduled an evidentiary hearing.

By motion dated April 25, 1997, the Region argues that the Board should now dismiss **Dico's** § 106(b) petition for reimbursement. In particular, the Region states:

Since the District Court in the Lawsuit issued a final judgment against **Dico** on the same issues that **Dico** has raised in this matter, **Dico** should not be allowed to relitigate these issues before the Board under the res judicata doctrine. "Under the res judicata doctrine, * * * 'a final judgment on the merits bars further claims by parties or their privies on the same cause of action.'" *United States v. Gurley*, 43 F.3d 1188, 1195 (8th Cir. 1994), quoting from *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed. 210 (1979). To determine whether the claims were the same, the Court in *Gurley*, looked at "whether the facts are related in time, space, origin, or motivation, whether

they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations * * * ." *Id.* at 1196, quoting from *Lane v. Peterson*, 899 F.2d 737, 742 (quoting *Restatement (Second) of Judgments* § 24(2) (1980)). The Lawsuit and Dico's Petition both involved claims for activities involving the same parties, the same site, the same environmental contamination, and the same time period. Clearly, since Dico requested a stay of consideration of its Petition pending the outcome of the Lawsuit, Dico considered the two matters to form a convenient trial unit and their consideration as a trial unit conformed to Dico's expectations.

Motion to Lift Stay, to Reconsider Order Granting Evidentiary Hearing, and for Summary Judgment Denying Reimbursement ("Region's Motion") at 6.

In its response dated April 28, 1997, Dico does not dispute the Region's statement that the District Court, in ruling on the government's CERCLA § 107(a) action for response costs, resolved (in the government's favor) the precise divisibility issues raised in Dico's § 106(b) petition. Nor does Dico dispute the Region's assertion that all the elements of *res judicata* are present in this proceedings. Rather, Dico asserts that the doctrine of *res judicata* should not be applied in this case because Dico plans to file an appeal from the District Court's order. According to Dico, the stay should remain in effect and "[t]his Board should take no action whatsoever until the Iowa lawsuit is finally disposed of." Dico, Inc's Suggestions in Opposition to the U.S. Environmental Protection Agency's Motion to Lift Stay, to Reconsider Order Granting Evidentiary Hearing, and for Summary Judgment Denying Reimbursement at 3. In support of this argument, Dico cites to several *State* court decisions

(none of which are from Iowa) holding that a judgment is not final for purposes of res judicata while the judgment is on appeal. *Id.* at 2-3. Thus, but for the pending appeal, Dico does not dispute the Region's assertion that the Board is bound by the District Court's determination under the doctrine of **res judicata**.

Further, as previously stated, it was Dico which requested that the Board stay this matter pending resolution of the District Court proceeding to avoid any duplication of effort. Indeed, in its February 12, 1996 Motion to Continue Stay, Dico stated that continuation of the stay was necessary to avoid duplication of effort because Dico planned to "assert precisely the same reimbursement claim at issue in these administrative proceedings * * * [and] [u]nless these proceedings are stayed, this would, of course, result in the same claim being litigated at the same time before this Board and before the District Court." Motion to Continue Stay at 1-2. In addition, Dico stated that should the District Court resolve the divisibility and apportionment issues on the merits, then the proceedings before the Board "will be moot and Dico will ask for dismissal of these proceedings." *Id.* at 4. Thus, in effect, Dico has previously argued for giving the District Court's determination preclusive effect in the present proceeding. Having urged the Board to stay its hand pending the outcome of the District Court proceeding, Dico can not now be heard to object to being bound by an adverse determination in that proceeding.

Contrary to Dico's assertion, in determining the applicability of *res judicata* it is federal rather than State law that applies. *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946) ("It has been held in non-diversity cases, since *Erie R. Co. v. Tomkins*, that the federal courts will apply their own rule of *res judicata*."); *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 325 n.12 (1971) ("In federal-question cases, the law applied is federal law."); *United States v. Gurley*, 43 F.3d 1188, 1195-96 (8th Cir. 1994) (applying federal law of *res judicata* in CERCLA cost recovery action). The established rule in the Federal Courts is that "a final judgment retains all of its *res judicata* consequences pending decision of the appeal * * *." C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4433 at 308 (1981). *See Huron Holding Corp. v. Lincoln Mine Operating Co.* 312 U.S. 183, 189 (1941) (it has long been recognized in the federal courts that the pendency of an appeal does not detract from the decisiveness and finality of a judgment).

Under these circumstances, we conclude that the District Court's determination on the issue of divisibility and apportionment has preclusive effect in this proceeding. Accordingly, the evidentiary hearing is canceled and Dico's petition for reimbursement is dismissed.

So ordered.^{3/}

^{3/}In the event that the District Court's summary judgment determination is reversed on appeal and the District Court

(continued...)

ENVIRONMENTAL, APPEALS BOARD

By: _____
Kathie A. Stein
Environmental Appeals Judge

Dated: *September 22, 1997*

^{3/}(...continued)
ultimately determines that divisibility of costs is appropriate in this case, Dico would be free to file a motion requesting that the Board reinstate Dico's petition for reimbursement.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Dismissing Petition for Reimbursement in the matter of Dico, Inc., Des Moines TCE Site, CERCLA Appeal No. 95-1, were sent to the following persons in the manner indicated:

By First Class Mail
Postage Prepaid
and Facsimile:

Daniel J. Shiel
Assistant Regional Counsel
U.S. EPA Region VII
726 Minnesota Avenue
Kansas City, KS 66101
Fax # (913) 551-7925

Stanley A. Reigel
Morris & Hecker
2600 Grand Avenue
Kansas City, MO 64108-4606
Fax # (816) 474-4208

Robert Patrick
U.S. EPA Region VII
726 Minnesota Ave.
Kansas City, KS 66101
Fax # (913) 551-7925

Dated: **SEP '2 2 1997**

Mildred T. Johnson
Secretary