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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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IN THE MATTER OF:)	DOCKET NO. I.F.&R. VII-233C
)	-----
ECONOMY PRODUCTS COMPANY, INC.)	Marvin E. Jones
)	Administrative Law Judge
)	1735 Baltimore
)	Kansas City, Missouri 64108

INITIAL DECISION

By Complaint filed June 8, 1977, the US Environmental Protection Agency (Complainant) charged Economy Products Company, Inc., of Omaha, Nebraska (hereinafter Respondent) with a violation of the following provisions of Section 12 (7 USC 136j) of the Federal Insecticide, Fungicide and Rodenticide Act, as Amended [7 USC 136]:

1. That it violated Section 12(a)(1)(E), 7 USC 136j(a)(1)(E) [see also Section 2(q)(1)(G), 7 USC 136(q)(1)(G)] in that Sample No. 142010 MIDWEST CRABGRASS CONTROL CONTAINS DACTHAL, which was shipped from Omaha, Nebraska to Yankton, South Dakota on or about May 25, 1976, was MISBRANDED in that the label did not bear a warning or caution statement which is necessary and, if complied with, adequate to protect health and the environment. In particular, the label of said product failed to bear the caution "Harmful if swallowed" which statement is required and did appear on the label accepted in connection with Respondent's registration March 14, 1968 under Registration Number 3770-52. For such violation a civil penalty in the sum of \$693.00 is proposed.

2. That it violated Section 12(a)(1)(E), 7 USC 136j(a)(1)(E), [see also 2(c)(1), (7 USC 136(c)(1), and 2(q)(1)(A), 7 USC 136(q)(1)(A)] in that Sample No. 142014 GURNEY'S POTATO DUST, which was shipped from Omaha, Nebraska to Yankton, South Dakota circa January 20, 1976 was:

A. MISBRANDED in that the label thereon states "Active ingredients: Ethylene bisdithiocarbamate ion - - 3.0225%", whereas, when

tested, the product did not contain said ingredient in the amount represented; and

B. ADULTERATED in that its strength or purity falls below the professed standard of quality under which it was sold. For such violation a civil penalty in the sum of \$990.00 is proposed.

3. That it violated said Section 12(a)(1)(E) in that Sample Number 142020 CATTLE AND STOCK INSECTICIDE EMULSIFIABLE (12½% LINDANE), sold by Respondent circa January 20, 1976 was

A. MISBRANDED in that the label thereon states: "Active Ingredients: Gamma Isomer of Benzene Hexachloride (from Lindane) - - 12.50%", whereas the product contained a lesser percentage of said ingredient; and was

B. ADULTERATED in that its strength or purity falls below the professed standard of quality under which it was sold (to the extent it was not effective for fly control as claimed). For such violation a civil penalty in the sum of \$1,617.00 is proposed.

Said Section 12(a)(1)(E) provides:

"12(a) In general.--

"(1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person--

"(E) any pesticide which is adulterated or misbranded;..."

Section 2(c)(1) and 2(q)(1)(G) are as follows:

"2(c) Adulterated.--The term 'adulterated' applies to to any pesticide if:

"(1) its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold;"

"2(q) Misbranded.--

"(1) A pesticide is misbranded if--

"(G) the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements imposed under section 136a(d) of this title, is adequate to protect health and the environment."

An Adjudicatory Hearing was convened on October 6, 1977, in Sioux City, Iowa, pursuant to a request for same by Respondent's President, George Money, dated July 8, 1977. Appearing for Respondent at said Hearing was its General Manager and Chief Executive Officer, Arlen Pottebaum. At the Hearing the parties presented an "Agreement of Facts" which were read into the record by which Respondent admits categorically the violations charged and parties further agree on the record that the civil penalties proposed in the Complaint were "properly developed with the guidelines for assessment of civil penalties as reference."

Complainant's Exhibits A through I were, by agreement of the Parties, received in evidence. Said Exhibit "G" evidences a "Notice of Judgment No. 1636 in re: Economy Products, Inc."--a report of the outcome of a prior enforcement action initiated against Respondent. In that case, the Respondent was charged with misbranding and adulteration, as in the instant case, and a Final Order, assessing a civil penalty in the sum of \$500.00 was issued pursuant to a Consent Agreement entered into by the parties, circa January 1976.

Said Exhibits "H" and "I" are copies of "warning letters" advising Respondent, on December 31, 1975 and on November 27, 1974, respectively, that Insecticides described in said letters were in violation of pertinent regulations.

CIVIL PENALTY

In this case, Respondent by its Chief Executive Officer (Pottebaum) readily admits facts establishing beyond any question that the violations charged did in fact occur.

Pottebaum recounts that he, the President of Silak Company, was, in July 1976, solicited by Respondent's president to manage Economy Products Co., Inc, after OSHA had closed the Omaha plant due to said company's failure to comply with OSHA regulations. The company has had problems with Quality Control and its financial condition has deteriorated to the point where bankruptcy might be anticipated. He stated that the President had manifested an indifference to EPA labeling regulations by failing or refusing to correct labels containing apparent inaccuracies. This caused, on at least one occasion, the cited instance where the customer returned a product three times because of "misbranding"--where the wrong label was used on a particular product. On this occasion Pottebaum closed the Omaha plant until the misbranding could be cleared up and subsequently succeeded in getting the aforementioned customer to accept the product then correctly labeled. On July 25, 1976, the Board of Directors released the President (Money) from all duties except his duties as president (for which his salary is \$2,000.00 per month^{1/}). As he seems to be unable to exercise control over products manufactured in Omaha by Money, a move is underway to disassociate the company from the President who is apparently continuing to produce products which are violative of EPA FIFRA regulations. Money operates three or four other companies in addition to his duties with the instant Respondent.

1/ Pottebaum testified that this salary has not been paid since February 1976, but that the company is likely indebted to Money for said back salary.

The financial condition of Economy Products Co., Inc. is not good. Six judgments totaling \$30,000.00 (for raw materials purchased from suppliers) are outstanding, and its Financial Statement (Economy Exhibit 1) indicates that the company is losing money and its inventory and sales are decreasing; its accounts receivable have decreased, and its accounts payable have increased^{2/}. Silak Company and a number of the creditors are considering forcing Economy into bankruptcy within a very short time.

40 CFR 168.46 provides that the Administrative Law Judge (ALJ) in determining the dollar amount of the civil penalty appropriate to be assessed, shall consider the elements set forth in Section 168.60(b); it further provides that the ALJ may consult the Guidelines for the Assessment of Civil Penalties (39 FR 27711), but may at his discretion, increase or decrease the assessed penalty from the amount proposed to be assessed in the Complaint.

40 CFR 168.60(b) states, in pertinent part:

"(b) Evaluation of Civil Penalty.

"(1) In evaluating...the Regional Administrator must consider (i) the gravity of the violation, (ii) the size of respondent's business, and (iii) the effect of such penalty on respondent's ability to continue in business.

"(2) In evaluating the gravity of the violation,... shall also consider (i) respondent's history of compliance with the Act,... and (ii) any evidence of good faith or lack thereof."

In the premises, it is clear that the violations are of sufficient gravity to warrant the penalty proposed. Considered in light of respondent's past history and its apparent indifference to regulations governing the manufacture and sale of its product (at least up until July 1976) said gravity appears even more severe. The action of the Board,

2/ Its long-term indebtedness includes unsecured notes to suppliers totaling \$77,668.12 as of 12/31/76.

while commendable, has not been totally reassuring on the issue of whether such violations will continue. With proper consideration of the effect that this assessed civil penalty will have on Respondent's ability to continue in business along with all other factors properly to be considered, it is my recommendation that a civil penalty in the total amount of \$1,350.00 should be assessed against respondent.

This Initial Decision and the following proposed Final Order assessing a civil penalty shall become the Final Order of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided in 40 CFR 168.46(c):

"FINAL ORDER

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 USC 1361(a)(1)], a civil penalty of \$1,350.00 is assessed against Respondent Economy Products Company, Inc., for violations of said Act which have been established on the basis of Complaint issued herein, and Respondent is ordered to pay same by Cashier's or Certified Check, payable to the United States Treasury within sixty (60) days of the receipt of this Order."

This Initial Decision is signed and filed this 29th day of November 1977, at Kansas City, Missouri.


ALJ

ATTACHMENT

Parallel Citations to Sections of FIFRA
in the Statutes at Large and in Title 7, United States Code,
Supp. V (1975)

<u>Statutes at Large</u>	<u>7 U.S.C.</u>	<u>Statutes at Large</u>	<u>7 U.S.C.</u>
Section 2	Section 136	Section 15	Section 136m
3	136a	16	136n
4	136b	17	136o
5	136c	18	136p
6	136d	19	136q
7	136e	20	136r
8	136f	21	136s
9	136g	22	136t
10	136h	23	136u
11	136i	24	136v
12	136j	25	136w
13	136k	26	136x
14	136 l	27	136y