2/21/75


BEFORE THE
UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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| IN RE: | : | I.D. No. 104359 |
| CHAPMAN CHEMICAL COMPANY | : | |
| | | INITIAL DECISION |
| Respondent | : | |
| | : | MARVIN H. JONES<br>Administrative Law Judge |

APPEARANCES : FOR THE COMPLAINANT

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BRUCE R. GRADOFF, ESQ.
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FOR THE RESPONDENT

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This proceeding was initiated upon the issuance of a complaint dated February 5, 1974, by the Director, Enforcement Division, Environmental Protection Agency, Region IV, which charged the above respondent with violations of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 et seq. (FIFRA) and sought the assessment of a civil penalty of $5,000 under Section 14(a) of the Act, 7 U.S.C. 136 l(a). The respondent filed a timely answer on February 7, 1974, and requested a hearing which was held in Memphis, Tennessee, on November 22, 1974. Appearances at said hearing are noted above.

The complaint alleges that respondent violated the Act in that on or about July 2, 1973, it shipped in interstate commerce from Jackson, Mississippi, to Monroe, Louisiana, the pesticide "BHC-1" that was misbranded. Misbranding is alleged under 7 U.S.C. 136 j(a)(1)(E); 136 (q)(1)(G); 136 (q)(1)(F); and 136 (q)(2)(C)(iv) in that the label did not bear any warning or caution statements, directions for use, ingredient statement or registration number assigned. None of said assignments are independently

assessable because no one assignment requires an element of proof not required by the other. The drum was stenciled with the product name, "BHC-1", the Lot Number "669743"; and the weight "461 net". The Act requires that the drum containing said pesticide should have borne the label accepted in connection with its registration on April 28, 1966, under Reg. No. 1022-144.

Pursuant to Section 168.36, subsections (a) and (c), of the Rules of Practice, the parties were requested on April 11, 1974, to correspond with the Honorable Frederick W. Denniston, Administrative Law Judge, for the purpose of accomplishing some of the objectives of a prehearing conference. Said correspondence appears in the record.

The purpose of the hearing was to resolve the single factual issue of whether Chapman Chemical Company shipped in interstate commerce a pesticide in a container which did not bear a proper label and thus was misbranded within the meaning of 7 U.S.C. 136 j(a) and 40 CFR 162.108.

On the basis of the entire record, including the briefs of the parties, I hereby make the following

FINDINGS OF FACT

1. Respondent, Chapman Chemical Company, at all times pertinent to this action, maintained a manufacturing plant and office located at Memphis, Tennessee, and was at said location engaged in the interstate marketing of pesticides, including the pesticide "BHC-1 EMULSIFIABLE CONCENTRATE".

2. The product "BHC-1 EMULSIFIABLE CONCENTRATE", hereinafter "BHC-1", manufactured by respondent, is a registered pesticide whose label was accepted on April 28, 1966, under EPA Reg. No. 1022-144.

3. It is stipulated by the parties that gross sales of Chapman Chemical Company were in excess of $1,000,000 for the year 1973.

4. In manufacturing BHC-1 to be shipped in a 55-gallon drum container the procedure adopted by Chapman, since 1968, or earlier, is:

A. To affix the approved label early in the manufacturing process, using an adhesive manufactured by H. B. Fuller Company and recommended for use on drums to be stored outside.

B. When the drums are selected for shipment, the order picker normally identifies the product through its label.

C. Upon shipment, it is the duty of the warehouse foreman to check the labels thereon to insure proper labeling, even though periodic inspections of merchandise to be shipped, including checking for proper labeling, is made by the plant superintendent.

5. At some time prior to July 1, 1973, the 55-gallon drum in question was shipped to Jackson, Mississippi, for storage there in the warehouse of Superior Transfer and Storage Company (Superior).

6. On or about July 2, 1973, Superior, pursuant to an understanding with respondent, shipped in interstate commerce from its warehouse to respondent's customer in Monroe, Louisiana, the pesticide BHC-1, in a 55-gallon drum which, on inspection by EPA on August 14, 1973, was found not to have a registered label affixed to the container.

7. The 55-gallon drum of BHC-1, which was the first drum that had been ordered by the customer, Reed and Sons Hardwood, Inc. (Reed), since 1972, was delivered by Red Ball Motor Freight, Inc., of Jackson, Mississippi, on July 5, 1973, and was stored lying on its side on the open ground for about five weeks of the period following delivery and prior to the time of said inspection.

8. The aforesaid drum containing BHC-1, at the time of said inspection, was located on a wood rack (or "cradle") lying on its side, in close proximity to the ground and had been on said rack for approximately seven to ten days.

9. At the time of inspection it was determined that said 55-gallon drum of BHC-1 contained no glue particles or vestige of an approved registered label; and nowhere on the ground in the general area was anything observed which looked like a pesticide label. The drum did, however, contain stenciling on the top of the drum which read, "669743 461 mat BHC-1", and the inked-in address label which read, "Reed & Sons, Monroe, La. From: Chapman Chemical, 500 Ford, Jackson, Ms".

10. In the same general area as the aforementioned drum at Reed's yard, also lying on its side in the open and exposed to the elements, was

another 55-gallon drum of EHC-1 bearing what appeared to be a proper paper label of respondent. This drum had been at the Read premises since at least 1972 (when Read bought out Walter Kellogg Lumber Company who purchased said other drum of EHC-1) and most likely had the same adhesive applied to its label.

11. Subsequent to the issuance of the Complaint of February 5, 1974, respondent stated that it immediately checked all drums, over which they had direct control, not only to verify that they were labeled, but also to insure that the adhesive had created a durable bond between the label and the drum. Respondent's Material Control Manager confirmed said procedure and further stated that every drum label was covered with a second coat of adhesive to prolong the label's resistance to severe weather conditions, and that the second coat was applied merely as a precaution.

12. Tests comparing the weathering characteristics of the polyvinyl acetate emulsion adhesive previously used with other adhesive formulations show that under continued and intense weather conditions neophrene latex adhesives maintain a secure bond longer than the other materials tested. Respondent's Material Control Manager testified that he never observed an instance where a label had been totally removed from a drum as a result of mishandling. Chapman subsequently switched to H.B. Fuller's #813 neophrene latex adhesive in early March 1974, and has been using this material since that date.

13. No evidence was introduced that anyone personally observed whether or not the 55-gallon drum of EHC-1 bore a registered label while in the Superior warehouse prior to shipment, at the time of shipment, or later.

14. Superior, a public warehouse used by respondent since 1971, was, prior to its shipment to Read, entrusted with the storage and shipment of the 55-gallon drum of EHC-1 in question.

15. On this record, the carrier, Red Ball Motor Freight, Inc., could have identified the drum of EHC-1 as containing an insecticide from the stenciling appearing on the top of the drum; the bill of lading prepared by Superior described what it had requested the carrier to ship, namely, insecticide.

16. The Manager of Read testified that his Company and its predecessor had used EHC-1 for many years and its employees were familiar with its use.

17. The Manager, further testified that the drum, on the date inspected by EPA, was "neither real clean nor real dirty or covered with a bunch of stuff. There was some dust on it, of course."

18. By letter dated February 7, 1974 (Respondent's Exhibit B) the office manager of Superior advised respondent that: "...let me assure you that we never ship any item from our warehouse unlabeled. The shipment of SMC-1 going to Reed and Sons Hardwood Company in Monroe, Louisiana, was most assuredly labeled. This is the only way our workers know what item they are pulling from stock...".

19. Chapman Chemical Company has never received a complaint that any drum of SMC-1 shipped by it was unlabeled when it was received by the user.

20. On June 22, 1973, the U.S. District Court for the Western District of Tennessee, accepted respondent's plea of "nolo contendere" to counts of a criminal information charging respondent with four violations of FIFRA in 1970 and two violations in 1972, which consisted of non-registration of product shipped in four instances and misrepresentation as to the composition of the product shipped in the remaining counts, for which respondent was penalized a total of $500.

## CONCLUSIONS

At the hearing conducted on November 22, 1974, in Memphis, Tennessee, the factual issue to be resolved was, as now, whether Chapman Chemical Company shipped, in interstate commerce, a pesticide in a container without a proper registered label affixed thereon, and which was thus misbranded within the meaning of 7 U.S.C. 136 j(a) and 40 CFR 162.108. As proof of the same facts will establish all of the violations charged, respondent is subject to the imposition of but one penalty should such determination be in the affirmative [Blockburger vs U.S., 284, U.S. 299, 304 (1932); 39 FR 27711, Section I(B)(2)].

The complainant proposed to assess and now urges assessment of a civil penalty of $5,000. This was based on the civil penalty schedule for violations of Section 14(a) of FIFRA, 7 U.S.C. 136 l.

Thus it must be here determined, first, whether or not respondent shipped BHC-1 in interstate commerce in violation of the Act, and, second, if such finding is in the affirmative, what, if any, penalty is appropriate.

Respondent stresses that, on this record, it is shown that the 55-gallon drum of BHC-1 was shipped by Chapman with a label--and with a label which had been properly affixed. However, respondent seeks to rely strongly on the weakness of complainant's case. There was no direct evidence that the drum was shipped by Chapman without a label either when shipped from Memphis to Superior or by Superior to Reed. There was no testimony as to whether or not a proper label appeared on said drum when it was delivered to Reed. Lacking also was any direct evidence that a label had at any time been removed or that the handling of the drum, after delivery, was of such severity that a label properly affixed on the drum would have become removed.

We conclude that complainant made a prima facie showing that respondent shipped, in interstate commerce, from Jackson, Mississippi, to Monroe, Louisiana, a 55-gallon drum of its product, BHC01, without a proper label thereon. It is admitted that the drum, when officially inspected by EPA on the premises of customer, Reed, on August 14, 1973, did not bear a registered label. The evidence further shows that the drum showed no evidence of glue particles or any vestige of the approved registered label. Nowhere on the ground, in the general area, were any particles sighted which looked like remnants of said label. It should be here mentioned that certain markings did appear on the top of the drum. Stenciled thereon was "669743 461 Net BHC-1". The inked-in address label was also on the drum which read: "Reed and Sons, Monroe, La. From: Chapman Chemical, 500 Ford, Jackson, Ms.".

To rebut the presumption raised, respondent presented evidence, first, that the drum of respondent's product was shipped from a warehouse in Jackson, Mississippi.

The evidence clearly shows that Superior has been entrusted by Chapman with the storage and shipment of Chapman products for a period of many years. Superior's new warehouse was constructed in 1971 after a fire destroyed the structure utilized by it prior to that time. The evidence

definitely establishes an arrangement (of which customers are advised) whereby orders can be placed with and shipment obtained from Superior. Under the arrangement, product (e.g., the 55-gallon drum of BHC-1 here in question) is shipped to and stored in Superior's warehouse prior to sale to customers. We are not here concerned with whether any failure to affix the proper label required by the Act occurred at Memphis or at Jackson because the distinction is inconsequential. It is clear that the law contemplates that shipment from Jackson was as much the responsibility of respondent as was the shipment from its Memphis plant. And it matters not whether Superior be categorized as an agent or as an independent contractor (United States vs Parfait Powder Puff Co., 163 F 2d 1008, 1010(3), citing United States vs Dotterweich, 320 U.S. 277, 64 S.Ct. 134, 88 L. Ed. 48).

In the interest of procuring distribution of its product in interstate commerce, respondent chose to use the facilities of, and entrusted Superior to act in its behalf. The acts of the instrumentality thus created are controlled, in the interest of public policy, by imputing any of its acts, which contravene the law, to its creator and imposing a penalty upon the latter. This principle is applicable though respondent may not be conscious of any wrongdoing. Rather than to subject an innocent and wholly helpless public to such hazard, it is more equitable to hold responsible the respondent who, at least, has the opportunity of informing itself (U.S. vs Dotterweich, supra).

The following statement in Parfait, supra, l.c. 1010(3) is appropriate in the instant case:

> "Defendant may not put into operation forces effectuating a placement in commerce of a prohibited commodity in its behalf and then claim immunity because the instrumentality it has voluntarily selected has failed to live up to the standards of the law."

Nor is Superior's Letter of February 7, 1974 (Respondent's Exhibit B) determinative of the issue presented. Obviously, it was responsive to correspondence from, and possibly contact by, respondent on or about the

date stated. While it is not here suggested that duplicity was practiced, it is readily apparent that the statement is subject to more than one interpretation, and therefore little weight can be accorded it. If it's writer was capable of giving testimony under oath to the effect that the drum when shipped, had a registered label affixed, then such testimony should, and likely would, have been elicited at the hearing and there subjected to cross-examination. The more reasonable interpretation to be accorded said exhibit is that the drum contained markings sufficient to advise their workers as to what item they were pulling from stock. It is unquestioned that the net weight and "BHC-1" were stenciled on top of the drum. This was sufficient for the preparation of the bill of lading showing the product shipped--insecticide. This information could be considered labeling, as would the inked-in address "label" but the presence of a registered label is not thereby established.

Considerable testimony was devoted to proof of on-site conditions at the Read premises, with the suggestion of the possibility that a label affixed to the drum prior to and at the time of delivery was subsequently removed and obliterated. The general area where the drum remained on the ground for some five weeks was unpaved and can be typified generally as a varying mixture of dirt, sawdust, ashes, and bark, with the presence also of cinders, blowing sawdust, and steam. It is suggested that extremely rough (if not abusive) treatment to the drum is indicated in testimony of Mr. Terrell, Read's Manager. Mr. Terrell indicated he had not observed the drum prior to its inspection by EPA on August 14, 1973, and therefore could not state whether the drum contained a label or not. He stated that on the date of inspection the drum had been transferred to a rack or cradle (either by two or more men rolling it to and lifting it onto the rack, or with a forklift). He did not know if the drum was otherwise rolled around, or if it stayed in one position. The condition of the drum was, by him, described as "neither real clean nor real dirty or covered with a bunch of stuff. There was some dust on it, of course". Mr. Terrell further testified that rainfall was far above average during the six weeks preceeding the EPA inspection. The drum likely was subjected to blowing chip dust (and sawdust) but not to wood chips which would not blow that far. Steam was emitted from a steam line estimated at not more than 30-feet away from where the drum in question was stored.

The foregoing evidence creates an inference that the drum in question could possibly have been subjected to rough handling and treatment. However, when considered with other evidence hereinbelow outlined, the record as a whole shows that the absence of a proper label is not attributable to its handling after delivery, but to the fact that a proper registered label was not affixed to the drum when said commodity was shipped in interstate commerce.

It is not disputed that:

1. On the top of said drum, in addition to the stenciled markings, heretofore mentioned, was an inked-in address label which at the time of said inspection was intact and the inspector was able to observe therefrom the complete names and addresses of both the shipper and customer. While the type or quality of adhesive used to affix said address label to the drum is not developed in this record, the effect of steam, emitted on the premises, and the unseasonably heavy rainfall experienced during the weeks preceading inspection, would be aptly demonstrated by the condition of the address label.

2. The label affixed by respondent to another 55-gallon drum which was subjected to the same handling and exposure (but over a much longer period) still bore what appeared to be a proper paper label of respondent on the said date of inspection, and no degree of removal or obliteration was noted.

3. The evidence presented by respondent, hereinafter more fully set forth, is persuasive that their approved registered labels are affixed to their shipping containers with top quality adhesive recommended by its manufacturer for use on drums to be stored outside. From respondent's own evidence, I conclude that, if a proper label had been affixed to said drum at any time prior to shipment, the label or some vestige thereof would have thereafter appeared on said drum. Its Material Control Manager has never observed an instance where a label has been totally removed from a drum as a result of mishandling.

Respondent points out that, under the procedure adopted by it, the registered label is affixed to the drum container prior to filling the drum. On page 6 of its brief is outlined nine (9) inspections which a Chapman drum container must pass from time of manufacture until it comes to rest on

the premises of the customer. The testimony offered by respondent described normal procedures and the witnesses were adamant in their belief that the drum in question could not have been shipped without a registered label affixed. However, no direct testimony was elicited from any witness who personally observed or inspected the container here in question for the presence of a registered label thereon.

The procedures adopted and practiced by respondent are admirable and commendable as is their continuing effort to use highest quality adhesive and alert their personnel in Memphis and elsewhere as to the importance of proper labeling in accordance with the Act. The evidence of respondent's good faith in this regard is persuasive and convincing. However, it does not necessarily follow from the fact that respondent ordinarily exercises great care, that departures from the usual practice were never made. [Tingey vs E.F.Houghton, 30 CAL 2d 97, 179 P.2d 807; Gall vs Union Ice Co., 239 P.2d 48 (1951)].

From the foregoing we find, and here hold, that the evidence of respondent falls short of effectively rebutting complainant's prima facie case, and that respondent is subject to assessment of an appropriate civil penalty against it for commission of the violation so charged.

CIVIL PENALTY

Section 14(a)(3) [7 U.S.C. 136 l(a)(3)] provides in pertinent part:

> In determining the amount of the penalty the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect of the person's ability to continue in business, and the gravity of the violation.

Thus, Congress intended that the penalty should fit the offender as well as the offense.

Since, on this record, it is found that respondent is subject to the assessment of a civil penalty for the violation charged ("misbranding"), the Administrative Law Judge must make an independent judgement as to the appropriateness of the penalty to be assessed. [IN THE MATTER OF AMVAC CHEMICAL CORPORATION, I.F.&R. No. IX-4C, Docket No. 141.7(P)].

The first factor required by the statute to be considered in determining the amount of the penalty is the size of respondent's business. It is stipulated by the parties that in 1973 respondent's sales exceeded $1,000,000. For the purpose of considering this factor and the second, hereinbelow, it is noted that the President of respondent, in correspondence forwarded in the course of the Prehearing procedure, pursuant to Section 168.36(a) (39 FR page 27663), stated that said gross sales for 1973 were, in fact, $3,456,363 and that 70 people were employed by it.

The second factor to be considered is respondent's ability to continue in business. No testimony was elicited relative to this consideration during the course of the November 22, 1974 hearing. However, again taking notice of said correspondence of respondent's President, he stated in his letter of March 6, 1974 that his company, though having sales of over $3 million, experienced a loss in 1973 of approximately $225,000 and that their bank credit at that writing exceeded $300,000. In his letter of April 25, 1974, he again confirmed the amount of their sales in 1973, but advised that Chapman was acquired by Quantex Corporation in July 1973, and that the net loss, after various credits arising out of the acquisition and consolidation of the two companies, was expected to be $78,000. He was of the opinion that an assessment of the magnitude proposed would have a real and detrimental effect on respondent's ability to continue in business.

The facts mentioned, particularly the reported loss are not meaningful unless the reason for same is also considered and it is determined whether losses are to be contemplated from future operation of the company. With reference to the loss of 1973, respondent's President included in his letter of February 7, 1974 (page 2 thereof) the following statement:

> "I believe it is also pertinent to advise you that a key program of the new management has been to reduce the mammalian toxicity of the company's products. One reason for our large losses in 1973 was the research expenditure made in order to develop these products. The new products should be commercialised this Spring."

The above statement is indicative that respondent is optimistic and forward-looking. The loss can be typified as one of a nonrecurring nature.

In the premises, though temporary inconvenience may result, we are unable to find that payment of the penalty herein assessed will affect the respondent's ability to continue in business.

The third factor to be considered in determining the amount of the penalty, is the gravity of the violation. In our view, the penalty should fit both the violation and the respondent; that is, we should consider the gravity of harm possibly attendant to members of the public because of said violation and the seriousness of the misconduct of respondent in so violating the Act.

As stated in the AMVAC Chemical case, supra:

> "As illustrative of the degree of gravity of harm, it is apparent that a violation involving the marketing of a highly toxic pesticide that is not registered is much more serious than a violation in which the label of a registered pesticide fails to bear the registration number."

In the instant case, shipment of BHC-1 without the applicable warnings and precautionary statements poses a definite hazard to those who might come in contact with it. The gravity of harm is referrable not only to those persons who, under the evidence, are actually and obviously affected by the absence of cautionary language resulting from the "misbranding" charged, but to those persons who conceivably can be, or might have been, so affected by such omission. Before its delivery to Reed, said drum of BHC-1 was under the control of respondent, Superior's employees and the driver of the carrier who transported said product. On arriving at Reed, said drum remained on their premises which suggests that most of the persons to be affected were Reed employees (knowledgeable concerning the character of and the hazards inherent in the product) with the possibility that patrons and other persons might on occasion frequent said premises. There is no evidence in the record concerning the accessibility of said area to members of the public but the presence of equipment such as a debarker, a boiler room, steam lines and water trough suggest that few members of the public would have occasion to frequent the location. However, further evidence revealed that the "other drum" had possibly been on the premises since 1970, and therefore, we can

a comparable period. The hazard to persons unfamiliar with the properties of 8406-1 is amplified as the time within which the product remains on said premises is increased. In like manner, the gravity of respondent's violation becomes more apparent.

As stated, we must consider gravity of misconduct in addition to considering gravity of harm.

The AMVAC case, supra, states:

> "As to gravity of misconduct, matters which may be properly considered include such elements as intent (to violate) and attitude of respondent; knowledge of statutory and regulatory requirements; whether there was negligence and, if so, the degree thereof; position and degree of responsibility of those who performed the offending acts; mitigating and aggravating circumstances; history of compliance with the Act; and good faith or lack thereof. It is observed that the Rules of Practice specify these last two elements as those that may be considered in evaluating the penalty." [Section 168.53(b) there cited is now 168.60(b)(2)].

While, under the law, respondent is responsible for the violation charged, we find its attitude and that of its well-informed management to be excellent. The record makes a positive showing that respondent has devised an excellent procedure to prevent future violations such as that here considered. On the whole, consideration of the conduct of respondent's operation is most favorable. The violation, while of a serious nature, was not intentional, and we find the likelihood of recurrence of such violations to be minimal.

Complainant cites respondent's history of compliance with reference, particularly, to the information filed by the U.S. Attorney, in six counts, charging respondent with the sale of a non-registered product in four instances (twice in 1970 and twice in 1972) and with sale of product whose composition was different from that represented in connection with the registration of its label, (two charges in 1970). In June 1973, a plea of nolo contendere was tendered to and accepted by the court and a $500 penalty assessed against and paid by the respondent. It is noted not only that the nature and character of the charges there differ materially from those here

considered, but that the date of said occurrences are somewhat remote. Consequently, particularly in view of the honest and forthright manner in which respondent's president exhibits a good faith attempt to foreclose any possibility of like violation in the future, we conclude that little weight should be accorded the unfavorable aspects suggested by its compliance history.

On consideration of all facts contained in this record and pursuant to Rule 168.46(b), 39 FR 27664, we have determined that the sum of $1,800 is an appropriate penalty to be assessed against respondent for its violation of the Act, in the particulars charged.

The proposed Finding of Fact and Conclusions, Briefs and Arguments submitted by the parties have been considered. To the extent that they are consistent with Findings of Fact and Conclusions herein, they are granted, otherwise they are denied.

Having considered the entire record and briefs of counsel and based on the Findings of Fact and Conclusions herein, it is proposed that the following Order be issued

FINAL ORDER

Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, a civil penalty of $1,800 is assessed against the respondent, Chapman Chemical Company, for violations of said Act as set forth in the complaint dated February 5, 1974.

February 21, 1975

Marvin E. Jones
Administrative Law Judge