

19/1/79

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR

In re)	I.F. & R. Docket No. V-529-C
The Smithereen Company,)	
Respondent)	Initial Decision

Preliminary Statement

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 1(a), 1976 Ed.), ^{1/} instituted by a complaint issued by the Director, Enforcement Division, Environmental Protection Agency, Region V, Chicago, Illinois. The complaint alleges that Respondent, The Smithereen Company, on March 17, 1978 applied 2 registered pesticides in a manner inconsistent with their labeling in violation of the act. The complaint proposed a civil penalty in the amount of \$2,750 for each such violation, or a total of \$5,500. On July 20, 1978, Respondent filed an answer to the complaint in which it, in effect, denied that it violated the act as charged. ^{2/}

The parties submitted prehearing materials pursuant to section 168.36(e) of the rules of practice (40 CFR 168.36(e)) and Complainant

^{1/} Section 14(a) of the act was amended September 30, 1978, by Public Law 95-396, in several material respects. Since the violations of the act alleged in the complaint occurred prior thereto, we are concerned with such section prior to amendment.

^{2/} A copy of the complaint and answer were not mailed to and received by the Office of Administrative Law Judges until April 20 and 25, 1979, respectively. An Administrative Law Judge was designated to preside in this proceeding April 27, 1979.

was granted leave to amend a paragraph of the complaint. Respondent filed a motion for an accelerated decision which was denied by an order issued July 12, 1979.

A prehearing conference and hearing were held August 13 and 14, 1979, respectively, in Chicago, Illinois, before Herbert L. Perlman, Chief Administrative Law Judge, Environmental Protection Agency. Complainant was represented at the hearing by Michael Berman and Donald S. Rothschild, Attorneys, Enforcement Division, Environmental Protection Agency, Region V, Chicago, Illinois, and Respondent was represented by Chris Giannopoulos, its employee. Complainant presented 4 witnesses and introduced numerous exhibits into evidence. Three witnesses testified for Respondent. After the hearing, the parties filed briefs.

Findings of Fact

1. Respondent, The Smithereen Company, is a corporation whose address is 18 South Michigan Avenue, Chicago, Illinois. Respondent is a pest control operator with 3 additional offices in Chicago, Illinois.

2. On March 17, 1978, Respondent, pursuant to a long standing contract, performed a pest control service for the purpose of controlling mice at 824 East 58th Street, Chicago, Illinois, married student housing of the University of Chicago. Respondent's employee, Willie Davis, utilized 2 registered pesticides in such treatment, namely, P.C.O. Rat and Mouse Bait, currently called P.C.Q. Rat and Mouse Bait, and Rozol

Tracking Powder, both of which are anti-coagulant rodenticides. The label of P.C.O. Rat and Mouse Bait states at the top thereof in bold capital letters, under the word "CAUTION", as follows:

KEEP OUT OF REACH OF CHILDREN

The bottom portion of the label, under the word "CAUTION", further states, in part, as follows:

Treated baits must be placed in locations not accessible to children, pets, wildlife and domestic animals, or in tamper-proof boxes. . . Apply this product only as specified on this label.

The label of Rozol Tracking Powder states at the top thereof in bold capital letters, under the word "WARNING", as follows:

KEEP OUT OF REACH OF CHILDREN

At the middle of the label, under the words "PRECAUTIONS IN USE", appears the following:

. . . The tracking powder should be placed in locations not accessible to children, pets, wildlife and domestic animals, or in tamper-proof bait boxes.

Respondent also applied these 2 registered pesticides at 824 East 58th Street on March 13 and 23, 1978.

3. Mrs. Eugenia Seybold, a tenant at 824 East 58th Street, Chicago, Illinois, observed her 3 month old labrador puppy chewing on a pesticide bait tray similar to the one employed by Respondent on the back porch of her apartment which is one flight up from the basement of the building. The area in the back of the building is entirely enclosed by a fence and other buildings. On March 19, 1978, at 3:00 a.m., Mrs. Seybold's dog appeared to be healthy, but at 7:00 a.m., of that day the dog was

seriously ill and the dog died at approximately 8:00 p.m. of that day at the offices of a veterinarian where Mrs. Seybold had taken her. The dog appeared to have been poisoned by an anti-coagulant poison.

4. The basement area at 824 East 58th Street consists of 2 rooms or sections. Entrance into the basement is from a door located in the north east corner. Below the entry area is a line of storage lockers on the east wall of the east section. The east and west sections of the basement are divided by a wall which has an open doorway, but no door, located near the northern end of the wall. The west room has a clothes washer, dryer and sink at the northern part of the room and storage lockers are located on the west wall of the west room. The storage lockers have doors which are flush with the floor. The basement level of the building also contains an office and a small boiler room which are not accessible from the basement area described above.

5. Upon being informed by Mrs. Seybold that she had observed her dog chewing on a tray, Mr. Jacob Rubin, another resident at 824 East 58th Street, and a neighbor of Mrs. Seybold, examined the basement of the building where he found 2 bait trays of the type employed by Respondent, one on the floor near the east wall of the east room or part of the basement and one on the floor near the east wall of the west room of the basement just south of the open doorway between the 2 rooms or parts of the basement. The bait tray in the east basement

had a yellowish oatmeal or cornstarch like powder in it. The tray was nearly empty and some of its contents was spread around the floor. The bait tray in the west basement appeared to be undisturbed and was full. The bait trays used by Respondent at 824 East 58th Street are open plastic trays which are not tamper-proof.

6. Three children lived in the building involved on March 17, 1978. Tenants doing their laundry in the west room of the basement area generally take their children with them and many people also take their pets with them. Each tenant has a key to the basement area. The basement door is left open at times and while the door has a lock on it, the open areas of the basement were accessible at times to children and pets.

Conclusions

The complaint herein, as amended, charges the Respondent with 2 misapplications or misuses of registered pesticides at 824 East 58th Street, Chicago, Illinois, married student housing of the University of Chicago. Specifically, it is alleged that the Respondent, a pest control operator, applied on March 17, 1978 a registered pesticide, P.C.O. Rat and Mouse Bait, in a manner inconsistent with its labeling in violation of the act^{3/} in that "The application consisted of placing

^{3/} Section 12(a)(2)(G) of the act (7 U.S.C. 136j(a)(2)(G)) makes it "unlawful for any person - (G) to use any registered pesticide in a manner inconsistent with its labeling. . ."

open plastic trays containing said pesticide on the floor along the wall of the basement" and that this "mode of application was such that the pesticide was readily accessible to children and pets." A similar violation of the act is charged with respect to the application of another registered pesticide, Rozol Tracking Powder, allegedly applied on the same day at the same premises by Respondent in that "The application of Rozol Tracking Powder consisted of placing open plastic trays containing said pesticide on the floor along the wall of the basement and/or spreading the powder around the floor of the basement" and that these "modes of application are such that the pesticide was readily available to children."

Subsequent to the hearing and at the time counsel for Complainant filed his opening brief, such counsel moved that "the violation concerning the Misuse of Rozol Tracking Powder alleged in the Complaint. . . be voluntarily dismissed and that the proposed penalty for the misuse of Rozol Tracking Powder, in the amount of \$2750.00 not be assessed against The Smithereen Company." Such request was "based on the information in the transcript of the proceedings in the above matter."

What such counsel is saying or conceding, in reality, is that Complainant has not established by a preponderance of the evidence the charges of the complaint with respect to the alleged misuse of Rozol Tracking Powder on March 17, 1978. This is apparent from the record and Complainant's witness, Carl J. Erickson, testified that "There was no indication in any of the testimony or evidence and documents

that there was any misapplication of the Rozol Tracking Powder by Smithereen Company itself" (Transcript, p. 131). In fact, the only evidence in the record with respect to the application of the tracking powder is the testimony of Willie Davis, the applicator, to the effect that he did not place the tracking powder inside the basement at the premises involved because he did not find any holes there in which to place it and that he used the tracking powder in holes outside the building around the building foundation. The record further indicates that tracking powder would not be placed in bait boxes or bait stations as it is not used as a poisoned food to kill mice but operates as a rodenticide by adhering to the rodent's feet and being then licked by the rodent. To grant Complainant's motion voluntarily to dismiss the complaint with respect to the alleged misuse of the tracking powder at this stage of the proceeding and under these circumstances could, perhaps, prejudice the Respondent in that the charges involved could theoretically be reinstated. Such charges contained in paragraphs numbered 6, 7, 8 and 9 of the complaint, as amended, should be dismissed on the merits in this decision by reason of Complainant's failure to sustain them.

The situation with respect to the use or application of the P.C.O. Rat and Mouse Bait is not as clear and uncomplicated as with respect to the tracking powder. In this connection, the complaint, as noted above, alleges that the application of this registered pesticide "consisted of placing open plastic trays containing said pesticide on the floor along

the wall of the basement." The record indicates that a tenant of the building, Jacob Rubin, found 2 bait trays employed by Respondent with some bait therein in the basement of the building involved, one on the floor near the east wall of the east room of the basement at 824 East 58th Street and one on the floor near the east wall of the west room of the basement south of the open doorway between the 2 rooms or parts of the basement. Mr. Rubin examined or explored the basement area after being informed by another tenant of the building, Eugenia Seybold, that she had seen her puppy with a tray in the dog's mouth prior to the puppy's death.

It appears that the puppy may have died as a result of ingesting the rodenticide applied by Respondent.^{4/} However, complainant has not carried the burden of proof by a preponderance of the evidence that Respondent's employee, Willie Davis, placed the 2 trays of bait where Jacob Rubin had found them. Mr. Davis testified that on March 17, 1978 he placed 2 baited trays in the locked boiler room of the building involved and 2 trays in the west room or part of the basement, one under a washing machine or dryer at the north end thereof and one near the west wall thereof and under a sofa or couch that was located at the south end of the west part of the basement. Even if Mr. Davis should

^{4/} Serious doubt exists that the puppy would have expired on March 19, 1978 as the result of an application of P.C.O. Rat and Mouse Bait on March 17, 1978 as the pesticide is an anti-coagulant which requires continuous feeding over a period of time to kill rodents. Of course, the rodenticide had also been applied to the premises on March 13, 1978, but the complaint does not charge any misuse thereof on that date. In addition, there is some indication or speculation in the record that the dog may also have been hemorrhaging due to the fact that a child had fallen on her.

be disbelieved, in whole or in part,^{5/} Complainant still has not established that the bait trays were placed by Respondent's employee where Mr. Rubin found them. No one saw the placement of the bait stations by Respondent's employee on March 17, 1978, and there is testimony in the record that such trays had been moved in the past by tenants. Such movements had involved the taking of trays upstairs into an apartment or placing the trays in the trash, but that does not negative a movement of trays within the basement area itself although it is difficult to surmise why that would be done. In short, the circumstantial evidence adduced at the hearing by Complainant is not sufficiently strong or convincing to conclude that Respondent's employee placed the 2 baited trays where Mr. Rubin found them especially in view of the testimony of such employee.

By reason of the foregoing, the complaint as to the alleged misuse of the P.C.O. Rat and Mouse Bait should also be dismissed.^{6/} All contentions of the parties presented for the record have been considered

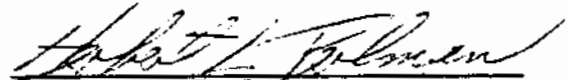
^{5/} The record contains contradictory evidence with respect to the existence and placement or location of the sofa or couch in the basement area of 824 East 58th Street. Several witnesses placed a couch as stored in the east corner of the east room of the basement near the entry door thereto and only Mr. Davis stated that a couch was in the south end of the west room. In addition, Marian Young, an EPA employee, testified that she did not see a couch in the basement during her visit there on March 28, 1978 and her photograph of the west room of the basement on that date does not reveal a couch there. Respondent's president testified that he saw an old couch in the basement some few days after April 4, 1978.

^{6/} It is unnecessary, therefore, to consider whether Respondent falls within the term "distributor" in section 14(a) of the act prior to its latest amendment. Compare In re Evergreen Pest Control, I.F. & R. Docket No. IX-157C (Apr. 27, 1979) with In re Evergreen Helicopters, Inc., I.F. & R. Docket No. IV-214C (June 10, 1977). See also, In re Hygienic Sanitation Company, Inc., I.F. & R. Docket No. III-184C (Initial Decision, Sept. 18, 1979) and I.F. & R. Docket No. III-131C (Initial Decision, Dec. 21, 1978).

and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are denied.

Order^{7/}

The complaint herein and this proceeding are hereby dismissed.


Herbert L. Perlman
Chief Administrative Law Judge

October 31, 1979

^{7/} Unless appeal is taken by the filing of exceptions pursuant to section 168.51 of the rules of practice (40 CFR 168.51), or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator (See section 168.46(c)).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

IN THE MATTER OF:
THE SMITHEREEN COMPANY
18 South Michigan Avenue
Chicago, Illinois

79 DEC 3 P 4: 14
I.F. & R. Docket No. V-529-C

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Initial Decision filed on October 31, 1979 by Herbert L. Perlman, Administrative Law Judge in the above-referenced cause, and this certification have been served on November 28, 1979 as shown below.

Certified Mail to:

Ralph E. Brown, Esquire
Walsh, Case & Coale Lawyers
104 South Michigan Avenue
Chicago, Illinois 60603

R. E. Jennings, President
The Smithereen Company
18 South Michigan Avenue
Chicago, Illinois 60603

Hand delivered to the Regional Judicial Officer pursuant to Region V

Delegation 5-15:

Thomas F. Harrison
Regional Judicial Officer
U.S. Environmental Protection Agency
230 South Dearborn Street
Chicago, Illinois 60604

Hand delivered to:

Michael R. Berman, Attorney
Enforcement Division
U.S. Environmental Protection Agency
230 South Dearborn Street
Chicago, Illinois 60604

Teresa Wysocki
Teresa Wysocki, Regional Hearing Clerk