5/27/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
Sam Emani d/b/a Auto Stop of Godby Road	:	Docket Number: CAA-IV-93-007 CAA-IV-93-007
Respondent	:	Judge Greene

ORDER GRANTING "ACCELERATED" DECISION AS TO PENALTY

Clean Air Act § 113 (d) (1) (B), 42 U.S.C. § 7413 (d) (1) (B), and § 609(e), 42 U.S.C. § 7671h (e); 40 C.F.R. § 82.40:

1. With respect to the civil penalty issue in the circumstances of this case, no oral evidentiary hearing is required, it being clear that nothing of consequence is to be gained by holding such a hearing. Decision as to the appropriate penalty may properly be rendered here upon a motion for "accelerated decision."

2. Inability to pay a penalty proposed in a complaint is treated as an affirmative defense to the penalty issue, and must be established by respondent with credible, reliable evidence. Failure or refusal to produce such evidence leaves the penalty issue appropriate for summary determination upon motion by the opposing party.

3. The appropriate civil penalty, where Respondent asserted inability to pay but consistently refused to provide credible, reliable evidence of such inability, is the penalty proposed by Complainant, if, as here, (a) that proposal was made in accordance with the Act and applicable U. S. Environmental Protection Agency penalty policies; (b) the proposal is fair and reasonable based upon the record; and (c) no credible basis for a reduction of the proposed penalty appears in the record.

Appearances:

David A. Savage, Esquire, Office of Regional Counsel, Region IV, 345 Courtland Street, N. E., Atlanta, Georgia 30365, for Complainant.

Mr. Sam Emani, 100 Acorn Ridge, Fairburn, Georgia 30213, for Respondent.

BEFORE: J. F. Greene, Administrative Law Judge
Decided August 31, 1994

DECISION AND ORDER

On May 27, 1994, an Order Granting Motion for Partial "Accelerated Decision" was entered in this matter. The Order granted judgment against respondent as to liability for the charges alleged in the complaint. [1],[2]

Respondent herein was found liable for selling a twelve-ounce container of automobile air conditioner refrigerant in commerce from its place of business on December 1, 1992, after the effective date of the federal prohibition against such sales, to an individual who was not trained or certified pursuant to 40 C.F.R. § 82.40 to operate approved refrigerant recycling equipment, who did not assert or demonstrate such training, and who did not intend to resell the container.[3] It was also found that Respondent did not display a sign regarding the prohibition against such sales, as required by 40 C.F R. § 82.42(c).[4] Based upon these violations, it was determined that respondent is subject to imposition of a civil penalty pursuant to section

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[1] A copy of the Order Granting Motion for Partial "Accelerated" Decision of May 27, 1994, is attached hereto.

See **Complainant's Motion for Partial Accelerated Decision,** November 22, 1993.

[2] The Order also denied Complainant's Motion for Default judgment of November 29, 1993.

[3] Count I of the Complaint.

[4] Count II of the Complaint. **Order Granting Motion for Partial "Accelerated Decision,"** May 27, 1994, at 8-12.

113(d)(1)(B) of the Clean Air Act.[5]

The parties were ordered to confer for the purpose of attempting to settle the remaining issue, i. e. the amount of the penalty, and were directed to report upon status during the week ending June 24, 1994.[6] On June 21, 1994, Complainant reported that the case had been discussed with Respondent, but that no progress had been made toward settlement because "Respondent is unwilling to submit his tax returns to Complainant and, therefore, Complainant is unable to evaluate Respondent's claim of inability to pay."[7] On June 28, 1994, Respondent was given through August 5, 1994, in which to produce credible evidence of inability to pay the civil penalty proposed by Complainant.[8] As of August 5, 1994, respondent had not produced such evidence.[9]

A preliminary issue here is whether respondent is entitled to an oral evidentiary hearing in connection with a determination as to the appropriate penalty for the violations found. That issue may be reduced, on the facts of this matter, to a question

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[5] **Id** at 12.

[6] **Id.** at 13.

[7] **Third Status Report**, June 21, 1994.

[8] **Order Denying Motions and Scheduling Submission of Materials**, June 28, 1994. In the Order, Respondent's request (which was treated as a motion) for reversal of the May 27, 1994, Order granting "accelerated decision" in Complainant's favor, was denied.

[9] **Fourth Status Report**, August 8, 1994.

of whether respondent has a right to present evidence and argue his case on the penalty issue orally where there has been little or no willingness to support allegations of inability to pay at appropriate earlier points in the history of this matter.

Assertions of inability to pay must be considered to be in the nature of affirmative defenses the establishment of which are peculiarly within a respondent's ability. This interpretation is consistent with the federal Administrative Procedure Act, 5 U.S.C. § 551, § 556, and with EPA regulations. Not unreasonably, it is up to Respondent to demonstrate inability to pay, since this was asserted as a defense to the penalty proposal.

The question of whether an opportunity must be afforded to present evidence orally on the penalty issue has been addressed previously in decisions at this level, and it has been held uniformly that in appropriate cases no oral evidentiary hearing is required.[10] An oral evidentiary hearing convened to hear unsupported assertions -- here, further unsupported

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[10] See In the Matter of Bestech, Inc., Docket No. IF&R-004-91-7073-C, March 13, 1992, at 4-5 slip opinion; Environmental Protection Agency v. Streeter Flying Service, Inc., IF&R VII-612C-85P, August 27, 1985, at 6-7 slip op.; In re World Wide Industrial Supply, FIFRA 1085-01-13-012P, January 9, 1986, at 4. See also Rainbow Paint and Coatings, Inc., EPCRA Docket No. VII-89-T-609; In re Swing-A-Way Manufacturing Co., Docket EPCRA-VII-91-T-650-E (Order Denying Motion for Accelerated Decision as to Penalty for Certain Counts. In the Matter of Jenny Rose, Inc., Docket IFR III 395-C, February 22, 1993, to the effect that respondent is not entitled to a hearing concerning the penalty question under all circumstances.

assertions -- argument would be unproductive. Opportunity to confront the government's witnesses serves no purpose for the opposing party or for the presiding judge when the issue raised by a respondent is whether respondent can afford to pay a penalty, if respondent has failed or refused to produce sufficient credible evidence to support that assertion. When the process of reaching a decision will not be enhanced or assisted by the receipt of evidence in an oral evidentiary hearing, an agency is not required to provide one, as opposed to providing "some form of hearing," in the absence of remarkable circumstances.[11] Due process does not mandate that a party be given an oral hearing as opposed to the opportunity to submit written comments.[12] It is sufficient if respondent has been given "a meaningful opportunity to present [its] case."[13]

Upon review of this record, it is clear that Respondent's failure to supply documents necessary to good faith settlement efforts, in which the parties have been ordered to engage, regarding his own assertions of inability to pay, leaves this defense as nothing more than an unsupported argument which does

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[11] See 2 Fed. Proc. LEd § 2:103; Mathews v. Eldridge, 424 U. S. 319, 332. See also discussion at 333-335, 343-349.

[12] 2 Fed. Proc. LEd §2.106; Allied Van Lines v. United States, 303 F. Supp. 742 (C. D. Cal. 1969).

[13] Id. at 349. See also 333: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See also the discussion at 348-349.

not constitute a dispute over material facts at issue such as would justify going to trial. Neither is there any reason to believe, on this record, that oral testimony would be helpful in resolving credibility aspects, if there are any, of the issue. Respondent's defense, if it were to be presented orally at trial without adequate supporting data, could be accorded no more weight than can be given now based upon the written record. Respondent has the burden of showing that something is to be gained with respect to the penalty issue by going to trial. No such showing has been made. Moreover, any party to a suit, including the federal government, ought not to be sandbagged by evidence produced for the first time in the courtroom, when, despite numerous opportunities to disclose his evidence, and despite having been given a deadline for doing so, Respondent has failed or refused. Indeed, Respondent has had unlimited opportunity to supply adequate evidence to support his defense to the penalty issue.

A review of the facts and law here reveals no denial of respondent's rights.

This case represents an area of federal government enforcement which some may consider to be less urgent than much other government activity in protecting the public health and safety. But enforcement efforts must not be nibbled away even by "small" violations of the Act. It is quite possible -- even likely -- that complainant could have agreed to a significant

reduction of the penalty in exchange for a cease and desist order if sufficient reliable evidence of inability to pay had been produced. After many months of settlement efforts, during which no progress has been made (and as recently as August 23, 1994, Complainant reported that respondent "refuses to discuss settlement at this time,"[14] this matter must come to an end without the needless expenditure of additional public resources. Respondent has made no good faith effort to cooperate. There is no entitlement to further consideration. There is no legal or evidentiary reason in the current posture of this case to convene an oral evidentiary hearing. A review of the facts and law reveals no denial of respondent's due process rights.

As has been noted above, the civil penalty proposed in the complaint totalled $3105 for the two charges.

Section 113(e) of the Act provides that:

> In determining the amount of the penalty to be assessed . . . the court. . . shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence . . . , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation . . . .

It is concluded, based upon Complainant's moving papers, that the $3105 civil penalty proposal has been made by

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[14] **Fifth Status Report** by Complainant, August 23, 1994.

complainant in consonance with the Act and the applicable civil penalty policy, including the Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Inolving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82, Protection of the Stratospheric Ozone, Subpart B: Servicing of Motor Vehicle Air Conditioners, of July 19, 1993.[15] Accordingly, it is determined that the penalty proposed by complainant is fair and reasonable on the facts and in the circumstances of this case. Complainant's basis for requesting imposition of a penalty in the amount of $3105 is unrebutted. It is determined that there is no substantial evidence in this record to justify a reduction of that amount.

An Order will be entered providing for payment for the full civil penalty proposed by complainant with a provision that, if Respondent produces complete copies of complete federal income tax records for the years 1991, 1992, and 1993 within ten (10) days of the date of service of this Order, a request to stay the effective date of this Order for an appropriate period will be entertained.

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[15] **Complainant's Memorandum in Support of Motion for Partial Accelerated Decision as to Penalty**, August 8, 1994, at 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a "person," as defined by law.

Respondent is liable for violations of the Clean Air Act and implementing regulations (see Order Granting Partial Accelerated Decision" of May 27, 1994, attached hereto.

Respondent has provided insufficient credible evidence upon which a finding of inability to pay all or any portion of the civil penalty proposed by complainant could be based, despite full opportunity to do so.

Respondent was informed that it was necessary to furnish income tax returns for the last three years or other equivalent credible evidence, and was subsequently given additional time to do so but has not.

In these circumstances, Respondent is not entitled to an oral evidentiary hearing and it is determined that no such hearing is required to be held in this matter.

The penalty proposed in the complaint was determined in accordance with relevant statutory and regulatory strictures, and in accordance with Environmental Protection Agency policy regarding penalties proposed to be assessed in cases brought pursuant to the Clean Air Act. The proposal is fair and reasonable on the record of this case.

No further reduction of the penalty is warranted, on this record.

There being insufficient credible evidence upon which to base

any finding of inability to pay the penalty proposed by Complainant, Complainant's motion for "accelerated" decision as to penalty must be granted.

ORDER

Accordingly, it is ORDERED that respondent shall pay a civil penalty of $3105 for violations previously found, within sixty (60) days from the date of service of this Order, by forwarding to the Regional Hearing Clerk a cashier's check or a certified check for the said amount payable to the United States of America which shall be mailed to:

U. S. Environmental Protection Agency
Regional Hearing Clerk
P. O. Box 100142
Atlanta, Georgia 30384

PROVIDED, HOWEVER, that if, within ten (10) days from the date of service of this Order, Respondent provides to complainant complete copies of complete federal income tax returns for the years 1991 through 1993, a petition to stay the effect of this Order for an appropriate period pending complainant's assessment of the contents of the tax returns will be entertained.

J. F. Greene
Administrative Law Judge

August 31, 1994
Washington, D. C.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
SAM EMANI d/b/a AUTO STOP OF GODBY ROAD	:	**DKT. NO. CAA-IV-93-007**
	:	Judge Greene
Respondent	:	

ORDER
GRANTING MOTION FOR PARTIAL "ACCELERATED DECISION"

This matter arises under section 113(d)(1)(B) of the Clean Air Act (the Act), 42 U.S.C. § 7413(d)(1)(B),[1] section 609(e) of

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[1] Section 113(d)(1) of the Act, **Administrative Assessment of Civil Penalties**, provides in pertinent part that:

> (1) The Administrator may issue an adminstrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person --
> . . . .
>
> (B) has violated or is violating any other requirement or prohibition of subchapter I, III, IV, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued, or approved under this chapter. . . .

the Act, 42 U.S.C. § 7671h(e), and regulations pertaining to the establishment of standards and requirements for servicing motor vehicle air conditioners promulgated pursuant to authority.[2]

The complaint charges that Respondent violated section 609(e) of the Act, 42 U.S.C. § 7671h, and the regulations at 40 C.F.R. §§ 82.30, 82.42(c) by selling "[a] class I substance[3] that is suitable for use as a refrigerant in a motor vehicle air conditioner system . . . that was in a container which contains less than 20 pounds of such refrigerant" to an individual not "properly trained and certified," (Count I) and by failure to display prominently "a sign where sales of such containers occur which states that 'it is a violation of federal law to sell containers of class I and class II refrigerant of less than 20 pounds of such refrigerant to anyone who is not properly trained and certified to operate approved refrigerant recycling equipment'" (Count II). Complainant proposes a total civil penalty of $3015.00.[4]

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[2] See section 609(a) of the Act, 42 U.S.C. §7671(h)(a). Regulations which relate to the establishment of standards and requirements regarding the servicing of motor vehicle air conditioners were promulgated on July 14, 1992. These regulations became effective on August 13, 1992, and are codified at 40 C.F.R. §§ 82.30-82.42 (1993).

[3] A class I substance is defined in the Act as "each of the substances listed as provided in section 7671a(a) [section 602(a) of the Act]." 42 U.S.C. § 7671(3) [section 602(a)] specifies that the U.S. Environmental Protection Agency (EPA) Administrator shall publish an initial list of class I substances, which must contain specified groups of chlorofluorocarbons and halons, together with carbon tetrachloride and methyl chloroform.

[4] **Amended Administrative Complaint**, October 12, 1993, at 3, ¶ III.

The parties were unable to settle. Complainant made pretrial exchange according to schedule. No pretrial exchange was received from Respondent. Complainant moved for partial "accelerated decision" on the ground that no material facts remain in dispute with respect to the charges set forth in the complaint, and that Complainant is entitled to summary determination as to liability as a matter of law.[5] Shortly thereafter Complainant filed a motion for default judgment, urging that Respondent had failed to answer the amended complaint[6] and had failed to comply with three orders (including the order for pretrial exchange) issued by the administrative law judge.[7]

Taking first the motion for summary determination as to liability for the violations alleged, the question is whether Complainant, as the moving party, has met its burden of establishing that there is no genuine issue as to any material fact and is entitled to judgment as to liability as a matter of law. In order to determine this, inferences must be drawn from the evidence as viewed in a light most favorable to Respondent, and all

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[5] **Complainant's Motion for Partial Accelerated Decision**, November 22, 1993.

[6] Complainant's motion for leave to amend the complaint was granted on October 5, 1993. The amended complaint was served on October 13, 1993. In the amended complaint, Complainant proposed to reduce the proposed penalty to $3015.00 based upon a revised EPA penalty policy.

[7] **Complainant's Motion for Default; Complainant's Memorandum in Support of Motion for Default**, November 29, 1993, at 1-2.

reasonable doubt must be resolved in Respondent's favor. Summary judgment cannot be granted if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable trier of fact could hold for the nonmoving party.[8] The question is "whether the evidence presents a sufficient disagreement to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law."[9]

Section 609(e) of the Act provides in pertinent part as follows:

> Small containers of class I or class II substances
> Effective 2 years after November 15, 1990, it shall be unlawful for any person to sell or distribute, or offer for sale or distribution, in interstate commerce to any person (other than a person performing service for consideration on motor vehicle air-conditioning systems in compliance with this section) any class I or class II substance that is suitable for use as a refrigerant in a motor vehicle air-conditioning system and that is in a container which contains less than 20 pounds of such refrigerant.[10]

The regulations at 40 C.F.R. §§ 82.30 and 82.34(a) provide as follows:

> SUBPART B - SERVICING OF MOTOR VEHICLE AIR CONDITIONERS
>
> **§ 82.30 Purpose and scope.**
>
> (a) The purpose of these regulations is to implement section 609 of the Clean Air Act, as amended (Act) regarding the servicing of motor

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[8] See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

[9] Id. at 251-252.

[10] 42 U.S.C. § 7671h(e).

vehicle air conditioners.

(b) These regulations apply to any person performing service on a motor vehicle for consideration when this service involves the refrigerant in the motor vehicle air conditioner.

§ 82.34 Prohibitions.

(a) Effective November 15, 1992, no person may sell or distribute, or offer for sale or distribution, any class I or class II substance that is suitable for use as a refrigerant in motor vehicle air-conditioner and that is in a container which contains less than 20 pounds of such refrigerant to any person unless that person is properly trained and certified under § 82.40 or intended the containers for resale only, and so certifies to the seller under § 82.42(b)(4).

Section 82.42(c) of the regulations provides as follows:

§82.42 Certification, recordkeeping and public notification requirements

(c) Public Notification. Any person who conducts any retail sales of a class I or class II substance that is suitable for use as a refrigerant in a motor vehicle air conditioner, and that is in a container of less than 20 pounds of refrigerant, must prominently display a sign where sales of such containers occur which states: "It is a violation of federal law to sell containers of Class I and Class II refrigerant of less than 20 pounds of such refrigerant to anyone who is not properly trained and certified to operate approved refrigerant recycling equipment."

Complainant argues that the following facts are not in dispute: that Respondent is a "person," as defined at section 302(e) of the Act, 42 U.S.C. § 7602(e), who conducted a retail sale

of a class I substance that is suitable for use as a refrigerant in a motor vehicle air conditioning system; that subsequent to November 15, 1990, Respondent sold a small (less than 20 pounds) container of such a class I substance in commerce to a person who was not properly trained and certified under applicable regulations and did not intend the container for resale; and that the sign required by 40 C.F.R. § 82.42 was not posted.

Respondent answered the original complaint in a letter in which he stated that an employee "may have" sold a can of refrigerant to an individual.[11] The other elements of the offense were neither admitted nor denied by Respondent (such as whether the individual to whom the refrigerant was sold was properly trained and certified to operate approved refrigerant recycling equipment,[12] which the regulations require[13]). Respondent did not dispute that the sign with the information required by 40 C.F.R. § 82.42(c) was not posted where the sale was made. Further, none of the facts which subject Respondent to the Act were disputed in the answer. That is, Respondent presented nothing which calls into dispute its status as a person who conducts retail sales in interstate commerce of a class I substance suitable for use as a

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[11] Respondent's letter of June 6, 1993, which is considered a sufficient an answer to the complaint in the circumstances here.

[12] As has been noted, Respondent did not answer the amended complaint. The answer to the original complaint will be analyzed, since the only substantive difference in the amended complaint is the (reduced) amount of the penalty.

[13] See 40 C.F.R. § 82.34.

refrigerant in a motor vehicle air conditioner, that the refrigerant was in a container of less than 20 pounds,[14] and that the sign required by the regulations was not posted at the point of sale of the refrigerant.[15]

Respondent, who is not represented by counsel, has written a letter in opposition to summary determination, and requests a hearing either at its place of business or at the office of U. S. Senator Paul Coverdell.[16]

In reviewing the requirements of the Act and regulations, and the record, including the pleadings and all subsequently filed documents, it is clear that viewed in a light most favorable to Respondent, no material facts as to the violations alleged in the complaint remain in dispute.

In circumstances where no material facts are at issue, and where, based upon those facts and the law, an opposing party is clearly entitled to judgment as a matter of law, the court must grant a motion for summary judgment as to liability. In short, where no facts need to be decided, there is no reason to hold a hearing for the purpose of taking evidence. Doing so, even if it could be justified based upon applicable law, would waste public resources as well as Respondent's time and resources. The law,

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[14] See 40 C.F.R. § 82.42, set out infra p. 5.

[15] 40 C.F.R. § 82.42.

[16] See Respondent's letter of November 28, 1993.

which cannot be changed here, permits no other result.

Accordingly, Complainant is entitled to prevail on its motion for summary determination as to liability for the violations alleged in the complaint. Complainant's motion for partial "accelerated decision" must be granted.

Turning to Complainant's motion for default judgment, fairness requires that Complainant's motion for default be denied for the present, subject to renewal at a later time if circumstances warrant. As has been noted, Respondent is not represented by counsel, and may not have understood fully that the consequences of failing to comply with orders issued by the administrative law judge may include a default order (a decision in Complainant's favor both as to liability and as to the amount of the penalty proposed). In these circumstances, it would be unfair to grant the motion for default at this point in the proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Complainant's motion for default judgment must be denied, in fairness to an unrepresented small Respondent.

2. Respondent is a "person," as that term is defined at section 302(e) of the Act, 42 U.S.C. § 7602(e). It owns and operates an auto repair and parts shop under the name Auto Stop of Godby Road at 2341 Godby Road, College Park, Georgia.

3. Respondent is subject to the provisions of the Act and

implementing regulations, 40 C.F.R. Part 82, **Protection of Stratospheric Ozone.**

4. Respondent sold a twelve-ounce container of automobile air conditioner refrigerant (dichlorodifluoromethane) in interstate commerce[17] from its place of business known as Auto Stop of Godby

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[17] Respondent's sale was "in interstate commerce" within the meaning of section 609(e) of the Act under either a "flow of interstate commerce," or an "affecting interstate commerce" rationale. Under the "flow of interstate commerce" approach, an "apparently local activity will be considered 'in interstate commerce' when it is an essential component of an inseparable activity." City of Cleveland v. Cleveland Electric Illuminating Co., 538 F. Supp. 1295, 1301 (N.D. Ohio 1980) (citing Bain v. Henderson, 621 F.2d 959, 960 (9th Cir. 1980)). See also United States v. Yellow Cab, 332 U.S. 218, 228 (1947) ("[w]hen . . . goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character."); Gulf Oil Corp. v. Cobb Paving Co., 419 U.S. 186, 195 (1974) (interpreting the "flow of interstate commerce" as "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer."); Rio Vista Oil, Ltd. v. Southland Corp., 667 F. Supp. 757 (D. Utah 1987) (applying this approach to the retail sale of goods previously shipped in interstate commerce).

Here, the can of refrigerant was produced in the State of New York. As a result, its sale to Respondent was in interstate commerce. Under "flow of interstate commerce" principles, Respondent's subsequent sale of the product, though intrastate, was in interstate commerce.

Other courts have taken a more restrictive view of whether goods shipped from out of state remain within the "flow of interstate commerce." These courts have applied the "intent" test derived from the Fair Labor Standards Act, and subsequently applied in Robinson-Patman cases. See Walling v. Jacksonville Paper Co., 317 U.S. 564, 570 (1942); Walker Oil Co. v. Hudson Oil Co., 414 F.3d 588, 590 (5th Cir.), cert. denied, 396 U.S. 1042 (1969); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969);

Footnote 17 continued on pages 10-11.

Zoslaw v. MCA Distributing Corp., 693 F. 2d 870 (9th Cir. 1982) (Zoslaw, however, did not apply the three-part test, infra). Even under this approach, however, Respondent's sale was in interstate commerce.

Under the "intent" test goods shipped into a state are considered to remain within the flow until the goods reach their "intended" destination. Xoslaw, 693 F. 2d at 878 (citing 4 J. Von Kalinowski, Antitrust Laws and Trade Regulation, § 26.02[3] (1969 & Supp. 1981)). In determining the point of destination, courts consider whether the goods respond to a particular customer's order or anticipated needs. E.g., Walling, 317 U.S. at 567-70. Specifically, goods remain in interstate commerce under three circumstances:

> where they are purchased by the wholesaler or retailer upon the order of a customer with the definite intention that the goods are to go at once to the wholesaler or retailer from the supplier to meet the needs of specified customers pursuant to some understanding with the customer although not for immediate delivery; and where the goods are purchased by the wholesaler or retailer based on anticipated needs of specific customers, rather than upon prior orders or contracts.

Walker, 414 F.2d at 590 (emphasis added) (citing Walling, 317 U.S. at 564). In Walker, the court found that the third prong was not met, because there was insufficient evidence that the demands and identity of customers were ascertainable prior to the time of sale. Walker, 414 F. 2d at 590. See also Walling, 317 U.S. at 570 (emphasizing, however, that "we do not mean to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather that on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' within the meaning of the Act.").

In the instant case, the third prong of this test is satisfied. Here, it can be inferred that Respondent ordered the product based on the anticipated needs of its customers, with, logically, the intention of selling it as quickly as possible. As the product had not yet reached its intended destination, it remained within the "flow of interstate commerce." See Zoslaw, 693 F. 2d at 878. As the Supreme Court has stated in discussing the third prong: "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." Id. (citation omitted).

Road on December 1, 1992, after the effective date of the federal prohibition against such sales, to an individual who was not so

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In addition, Respondent's sale was in interstate commerce under the "affecting commerce" rationale, as set forth by the Supreme Court in United States v. Darby, 312 U.S. 100 (1940): "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it so as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." Id. at 118 (emphasis added). Stated differently, Congress "may choose the means reasonably adapted to the attainment of the permitted end, even though they involve the control of intrastate activities." Id. at 121. Moreover, this power extends to acts that, taken individually, have no affect on interstate commerce. See Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (effect on wheat market of farmer's decision to consume wheat grown himself might be trivial. But this decision, "taken together with that of many others similarly situated, is far from trivial . . . .").

Here, the effective regulation of interstate commerce in cans of refrigerant necessitates their regulation in intrastate commerce. This is because intrastate sales of the product affect interstate commerce. First, the cans are sold for use in motor vehicles, which "are indisputably in [interstate] commerce." South Terminal Corp. v. EPA, 504 F. 2d 646, 677 (1st Cir. 1974). For example, even in an "intrastate" sale, such as here, it is likely that the car using the refrigerant would at some point be taken out of state. Second, "the problem of pollution itself involves the nation as a whole; pollutants are not respecters of state borders." Id. Thus, pollution from multiple, intrastate sales of cans of refrigerant could have a substantial interstate effect. See Wickard, 317 U.S. at 127-28. Federal regulation of this effect would be a "means reasonably adapted to the attainment of the permitted end," in this case, the control of interstate pollution under the Clean Air Act.

trained or certified pursuant to 40 C.F.R. § 82.40 to operate approved refrigerant recycling equipment, did not assert or demonstrate that she was so trained (nor did respondent make a determination with respect to this requirement) and who did not intend to resell the container.[18]

5. Respondent did not display the sign required by 40 C.F.R. § 82.42(c).

6. Respondent violated section 609(e) of the Act, 40 C.F.R. §§ 82.30, 82.34(a), and 82.42(c), and is subject to imposition of a civil penalty pursuant to section 113(d)(1)(B) of the Act.

7. Remaining to be determined is the amount of the civil penalty to be assessed for the violations found here.

ORDER

Accordingly, it is ordered that Complainant's motion for accelerated decision as to liability for the violations recited in the complaint be, and it is hereby, granted. Complainant's motion for default order is denied at the present time.

And it is **FURTHER ORDERED** that, no later than June 10, 1994,

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[18] **Complainant's pretrial exhibit 1, ¶ 4.**

the parties shall confer for the purpose of attempting to settle the issue of the amount of the penalty. They shall report upon the status of their effort during the week ending June 24, 1994.

J. F. Greene
Administrative Law Judge

May 27, 1994
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on June 1, 1994.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: Sam Emani d/b/a Auto Stop of Godby Road
DOCKET NUMBER: CAA-IV-93-007

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