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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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 In the Matter of: :
 : Docket No. RCRA VI-321-H
 SLOAN VALVE COMPANY, :
 :
 Respondent. :
 :
 -----x

Tuesday, August 22, 1995
 Environmental Protection
 Agency
 401 M Street, Southwest
 Washington, D.C.

The prehearing conference in the above-
 entitled matter convened, pursuant to notice, at
 10:01 a.m.

BEFORE:

CHIEF JUDGE JON LOTIS
 Administrative Law Judge

1995 SEP - 7 PM 4: 16
 REGIONAL HEARING CLERK
 EPA REGION VI

FILED

APPEARANCES:

On behalf of the Environmental Protection
Agency

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On behalf of Respondent Sloan Valve Company

STEVEN L. LEIFER, ESQ. [VIA TELEPHONE]
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P R O C E E D I N G S

CHIEF JUDGE LOTIS: We'll be on the record now. Would you please just, for the record, repeat those names, please?

MR. LEIFER: This is Steve Leifer from Howrey and Simon in Washington, D.C., representing the respondent, Sloan Valve Company.

MS. WHITING: And this is Laura Whiting at EPA Region 6, representing the agency.

CHIEF JUDGE LOTIS: All right. I've got my speaker phone on the loudest it can be and I can barely hear you. But I can hear you. And we've got the microphone right up against this for the reporter. So I think we'll be all right.

The conference was called at the request of the respondent, Sloan Valve and its counsel. And I would first want to ask the parties as to the status of any settlement discussions you may have had in the case to this point. Perhaps EPA counsel could respond first, and then Mr. Leifer for Sloan Valve can speak.

MS. WHITING: Today, EPA has sent to the

respondent a third draft consent agreement and consent order. And we are still waiting on respondent's comments on that draft. There are several outstanding issues, one of them being the penalty amount. We were close at one time and the deal has changed a bit. So I don't know yet what their response is to our penalty amount that we've proposed.

The consent agreement language, there's still some outstanding issues there. Some of them are probably relatively minor. There's one substantial point of disagreement on how we characterize the material in here as being a solid waste, which is the fundamental basis for the entire count one, which is the primary count of the complaint. And we have not reached an agreement on that language.

And then, there's some process descriptions in the first and second counts that haven't yet been agreed to. With respect to compliance, future compliance, which would be a part of the consent agreement, we do not yet know

what respondent intends to do to come into compliance. There have been a number of proposals that have been offered and then rejected for various reasons.

I don't know. Do you want me to get into the detail?

CHIEF JUDGE LOTIS: No. I don't.

MS. WHITING: Okay. There have been some offers that didn't work for one reason or another, either on the respondent's part or on EPA's part that we weren't happy with. And to my knowledge, respondent is now looking at a fourth option. But we have not seen a plan for that, anything in writing. They're just exploring, as far as I know.

There's certain language that we're requiring in a hazardous waste management plan that I don't know yet if respondent intends to accept that language. That's my summary of where we are in the settlement.

CHIEF JUDGE LOTIS: All right. Counsel for Sloan Valve?

MR. LEIFER: Yes. I pretty much agree

with Laura's characterization of our settlement discussions. We have gone back and forth on language issues. But we have come to the point where there seems to be one major overwhelming disagreement that we have that is an obstacle to settlement. And there are some other issues. I don't mean to say that this one issue is the only issue on the table. But it seems to be the controlling issue.

The reason I asked for this conference is I believe that there are very, very few facts, if any facts, that are in dispute. And I think that if we can focus on the legal issues that are in dispute, we might be able to expedite the resolution of this case. And I think, Your Honor, that when you hear the legal issues that are involved, I think we can then come back to settlement and you'll see why we're getting close. But then we're drifting apart and going back and forth, because we are having a legitimate dispute about one or two key points.

CHIEF JUDGE LOTIS: Are you suggesting

that you reach some sort of an agreement or stipulation with EPA's counsel as to what these legal issues are, and then brief them to me for a ruling?

MR. LEIFER: Well, that's one of my proposals. I have talked this over with Laura. And I don't think that we both see completely eye to eye on how to go about doing that. And I was hoping that, with Your Honor's mediation, we might work out an acceptable way of facing up to these threshold points or, at least, what I view as the threshold points.

CHIEF JUDGE LOTIS: See, it seems to me that there are two ways of going about this, the hard way and the easy way. And the hard way would be--perhaps they could both accomplish the same end--but it seems to me easier for both sides to agree as to the issues that need to be briefed and then brief the issues by way of maybe initial and reply briefs to me.

The second method would be, absent that agreement, is for Sloan Valve to file a motion for

a ruling on those legal issues on much the grounds that counsel has stated, that the resolution of those would possibly lead to the settlement of the case, and then have the response of the EPA. Going that route, that would probably engender another response from Sloan Valve. And we can continue around the pleadings here on that till I put an end to it.

And I would prefer to take the easier route and just have some sort of an agreement, if that's possible, on what those legal issues may be, and brief those issues to me. It may be that EPA does not agree with Sloan that the issues it designates are the only legal issues that need to be resolved. They may suggest other legal issues. And, in that case, the few issues that Sloan Valve is talking about may be expanded to be a few more. But that's just the nature of the situation, I believe, is that one side is urging that certain legal issues be resolved. The other side certainly would have the right to expand on that list and ask for the additional legal issues to be resolved.

And I think, counsel for Sloan Valve, you'll have to recognize that as part of the equation here.

MR. LEIFER: I think that's right, Your Honor. I think we pretty much agree with the point that you've made, that it would be a little bit easier on all sides if we could work out some sort of agreed upon stipulation as to the relevant facts and then put the legal issue before Your Honor for resolution. And I'm hopeful that we can work together to do that, possibly starting with this phone call.

CHIEF JUDGE LOTIS: What if we were to handle it this way--and I'll hear from EPA counsel on this--is we set some sort of target date for the submission of a stipulated matters of fact and also the stipulated legal issues to be resolved. And I would set a date that both sides could live with. I'd let you all decide the date when you think you could arrive at the stipulation and the list of legal issues.

I would assume, since the case has been

pending as long as it has and the fact that you've had numerous discussions concerning it, that that probably could be put together in a matter of 30 or 60 days, at max.

MR. LEIFER: Speaking for Sloan, I would think so. I think 30 days would be more than enough. We pretty much have a good handle on what the facts are, I think. And I don't think it would be difficult to try some sort of draft stipulation.

CHIEF JUDGE LOTIS: What about that, Ms. Whiting?

MS. WHITING: If I may step back for a moment, I'd like to get a better idea, if possible, as to just what legal issue or issues we have. I am questioning whether the issue that I think respondent wants to raise is something that couldn't be resolved in the settlement agreement and that EPA hasn't already offered to resolve in the settlement.

CHIEF JUDGE LOTIS: Well, what are some of the legal issues that you're looking at, counsel?

MR. LEIFER: Well, it's a little

complicated. If you had the patience, I was going to give you a little bit of a description of what goes on at the company.

CHIEF JUDGE LOTIS: Yes. But counsel for EPA just indicated that this legal issue, while I may not understand it, she may. And it may have been adequately taken care of or resolved unbeknownst to you or maybe that's something that EPA has already accommodated you on and you may not be aware of it. Maybe you could just say what the legal issue is.

MR. LEIFER: I'd be happy to do that. We've talked about this many, many times. I mean, my principal concern or the principal legal issue that seems to be inhibiting settlement in this case is the question of what is the point of generation for excess foundry sand.

CHIEF JUDGE LOTIS: I'm sorry. Point of generation for--

MR. LEIFER: Excess foundry sand.

CHIEF JUDGE LOTIS: All right.

MR. LEIFER: At what point does foundry

sand become a solid waste? I'm not saying that's the only legal issue that one can see in the case on the horizon, but that all the others, we've at least come close to settling. And if we could get that issue resolved, then while I can't promise the case would magically disappear, I believe that an obstacle to settlement would be resolved.

CHIEF JUDGE LOTIS: All right.

MS. WHITING: Your Honor, on that point, in EPA's third draft consent agreement--I'll just step back briefly. What we're arguing about are two different points of generation for the waste foundry sand. And the way we have drafted this third draft consent agreement is that we have--in our findings and fact and conclusions of law--we have been non-specific as to where that point-of-generation is.

Just to refresh your memory, Mr. Leifer, this is paragraph 36 of the consent agreement on page 9. We have been very general in simply stating that the foundry sand is a solid waste prior to the treatment process. And we have not

stated in here exactly where the point-of-generation is. And we've also offered to respondent language in the consent agreement whereby they neither admit nor deny the specific factual allegations in the complaint. And EPA feels like that's a reasonable accommodation and would also hope to resolve the case.

CHIEF JUDGE LOTIS: Let me say this, too, concerning the general matter of settlements. It's my view that settlements do not establish principles, do not establish precedents, and that to the maximum extent possible, the parties should be looking for ways to avoid the entrapment of settlement language which would indicate an acceptance of any legal principle that may have been involved in the case. So I certainly would applaud any efforts that are made to remove from settlement language anything that would indicate any sort of binding legal effect of any actin that might have been taken to precipitate the settlement or anything underlying the settlement that would cause the penalty level to be a certain amount.

So I certainly would suggest that the parties should strive to achieve that objective, that a settlement essentially stands for nothing, other than the disposition of the case, on the penalty level, perhaps, that had been selected without regard to the establishment of any principles that might have gone into or underlie the establishment of that penalty level.

MR. LEIFER: Well, Your Honor, I agree with one thing that Laura said and disagree with another. One is, she said that she had offered or EPA had offered to include language in which the respondent neither admitted nor denied the factual and legal allegations in the complaint. And that is absolutely true.

The second thing she said is it doesn't make it clear when the point-of-generation is. But while the language is more general in the latter drafts of the settlement agreement than it was in the former, it's still abundantly clear that she is--or not she, personally, obviously, but the EPA--is looking at a point-of-generation which is so

far back that we consider it within our industrial process.

CHIEF JUDGE LOTIS: Why is it necessary to get into any details concerning the facts here if the settlement is going to be one of a penalty disposition?

MR. LEIFER: Right.

CHIEF JUDGE LOTIS: And perhaps something in the way of a future compliance of whatever EPA counsel is referring to. What purpose does it serve, getting into details on the events here?

MR. LEIFER: None. And I didn't mean to do that. I was just kind of--

CHIEF JUDGE LOTIS: No. I'm not suggesting in terms of your commentary here. I'm suggesting in terms of the settlement document itself.

MR. LEIFER: None, other than I guess I wanted the Court to understand that we have some reluctance to agree to the language proposed, even though EPA is willing to include the "neither admit nor deny" language, for a couple of reasons. One

is that there is a finding in here which, even if we don't agree with it, exists. And the day after we sign the agreement, that finding has an impact on whether or not we are in compliance with EPA's interpretation of the law. We haven't admitted it, but it may cause us to be out of compliance with that particular finding the day after we sign the settlement agreement.

CHIEF JUDGE LOTIS: Now what can be done about that so as not to establish that? Can EPA-- and I'm not familiar with all the details. Is there any way to finesse that so that would not indicate that, that would not indicate that you were either in or out of compliance? I think the language should be perfectly neutral, so as not to suggest either.

MS. WHITING: Your Honor, if I could ask--

CHIEF JUDGE LOTIS: Yes.

MS. WHITING: --Mr. Leifer to explain exactly what he means. I'm not real sure what he means by saying that there is a finding in here that would establish whether they were in or out of

compliance.

MR. LEIFER: Yes. We're being a little cryptic because we haven't laid all the facts out. But as we have discussed, Laura, the point-of-generation issue, if the settlement agreement makes a finding, however it is generally couched, that the sand within our sand system is a solid waste, then we will have to manage that sand based on that finding. Otherwise, we may be in violation.

MS. WHITING: Well, as we've discussed before, unless there's something that you haven't told me yet, there are no practical ramifications from that finding because the area that's under dispute as to whether or not it's a solid waste, that activity is considered exempt reclamation. And there are no ramifications that attach to it, aside from perhaps having to sweep up the sand at the end of the day, which we don't find particularly onerous.

MR. LEIFER: Well, that is one. So it's not true that there are no ramifications. Every time some sand falls off our conveyor belt, we are

faced with an argument that we are storing a hazardous waste, which is not something we want to have to--or feel, legally, we should be faced with.

CHIEF JUDGE LOTIS: Is that what EPA counsel is saying, that they would be, ostensibly or arguably, in violation for failure to sweep that every day?

MR. LEIFER: They're saying that--

MS. WHITING: Yes. We have said that they would need to sweep it up at the end of the shift or at the end of the day, something that's reasonable within their daily operations. We have never said that we would anticipate that any sort of RCRA storage requirements would attach, as long as they continue to manage the sand in the way that they've explained to us that they've managed it all along, and that the only thing we can think of that they would need to do would be to sweep it about once a day.

MR. LEIFER: We thought that we could finesse this issue, to use Your Honor's word, because the complaint has nothing to do with the

material within our sand system. The graviment of the complaint is that sand taken out of the system was treated without a permit. That's 95 percent of the penalty that was assessed against us, with the remaining five percent, again, being manifest concerns and others totally unrelated.

So all we wanted to do was to avoid this issue. Part of the reason, Your Honor, and we'll be very frank with you, is that the foundry industry as a whole is very concerned about this finding. It changes the regulatory landscape for the foundry industry. And the industry collectively has been meeting with EPA to try to talk them out of this approach.

MS. WHITING: I think you're really getting beyond the nature of the case here. I really don't want to have to argue with you about-- I mean, unless the judge wants to hear it. I mean, I can tell you right now that all of the foundry industry's meetings with EPA have not changed our position one whit.

CHIEF JUDGE LOTIS: Well, it seems like,

at this point, I cannot offer any quick and immediate solutions. And I think counsel's suggestion for--if you cannot resolve this. And it sounds to me like it can and should be resolved as a matter of draftsmanship in this document so that neither side is prejudiced one way or another by the settlement in this proceeding. The settlement should not establish precedent. The settlement, in my opinion, should not put a company at peril because of one of its statements or findings that would put it, as counsel suggested, in violation the moment after the settlement is reached and pave the way for another case. That shouldn't be the objective of this settlement at all.

So if you're unable--and I would urge you to continue to attempt to work on language which would be acceptable to both. But if that can't be done, I would say that I would give the parties time to formulate a stipulation of both facts and legal issues, legal issues that I would need to decide, that would help in resolving the case and leading to a subsequent settlement.

So what I'd like to do is set several dates. One date would be a date for the filing of the stipulation of legal issues that you want me to decide. This would be a joint stipulation by EPA and the respondent. And following that, I would take a set of briefs, initial and reply briefs, to be filed simultaneously by the parties on those legal issues.

If it's necessary to submit a stipulation of facts along with a stipulation of legal issues, do that at the same time. So looking at my calendar--

MS. WHITING: Your Honor, if I may--

CHIEF JUDGE LOTIS: Yes.

MS. WHITING: --address some scheduling issues, something that we need to bring to your attention. Since I initially requested a hearing for sometime after October, several things have happened. I've been set for trial in another case involving a foundry. It's an older case with quite a large penalty. And it's set for trial on December 4th.

This December trial will have several of the same issues that are involved in this current case, including this point-of-generation issue. And it will, no doubt, directly address the point of generation of foundry sand. The two processes in the two cases are essentially the same. The December 4th company used to own Sloan Valve, and the processes are essentially the same.

And so, there may be collateral estoppel issues that are established there that may resolve all of the issues that are pending in the Sloan case, at least the legal issues.

CHIEF JUDGE LOTIS: It may be vice-versa, too; we resolve the legal issues before the resolution of the other case, that this would establish the precedents.

MS. WHITING: That's possible. But, Your Honor, I would also like to point out that I'm getting ready for this December 4th trial and I'm also pregnant now, and feeling as if I may not have all the time I need to prepare both of these cases at the same time.

CHIEF JUDGE LOTIS: Is there co-counsel on this case? I thought there was another counsel on the case.

MS. WHITING: No, sir.

CHIEF JUDGE LOTIS: Okay.

MR. LEIFER: Your Honor, can I be heard on this?

CHIEF JUDGE LOTIS: Yes.

MR. LEIFER: Obviously, I do not want to appear unsympathetic to Laura's professional or personal position. I guess, because this other case is several months off, I am willing to commit to an expeditious date for coming up with stipulations and a statement of legal issues. And I'm always also willing to take the laboring oar by doing first drafts and sending them down so that we could have this--

MS. WHITING: Your Honor, I never really heard anything from respondent's counsel as to this sudden need for an expedited review of this case until--

CHIEF JUDGE LOTIS: Well, I think the

case--it speaks for itself. The case has been pending for quite some time now. So I don't know if we need justification for scheduling at this point. It's just a question of working it in a way that would accommodate your situation, as well.

Let's go off the record for a moment.

[Discussion off the record.]

CHIEF JUDGE LOTIS: During the off-the-record session, we discussed some scheduling and scheduling difficulties. And nonetheless, I believe that it's important that we move ahead here. I encourage, once again, the parties to attempt to work out language differences so that it's clear that this settlement establishes no precedent one way or the other.

But absent that sort of an agreement, I'm going to set the following schedule: September 22nd will be the deadline for filing, if possible, a joint stipulation of facts and legal issues to be decided. If that can't be done, on or before September 22nd would be the date for filing of independent statements by each counsel.

Initial briefs on the legal issues to be decided would be filed on or before October 13th, with replies to that on or before October 27th. After that, I would attempt to issue a decision, if possible, as soon as possible after that date. The decision may be by way of a ruling from the bench.

Are there any other matters related to the scheduling?

MR. LEIFER: No, Your Honor.

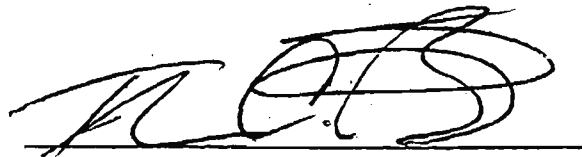
MS. WHITING: No.

CHIEF JUDGE LOTIS: Then this prehearing session is adjourned. Thank you.

[Whereupon, at 10:34, the proceedings were concluded.]

CERTIFICATE

I, THOMAS C. BITSKO, the Official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.

A handwritten signature in black ink, appearing to read 'T.C. Bitsko', written over a horizontal line.

THOMAS C. BITSKO