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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Meyer Laboratory, Inc.	)	I.F. & R. Docket No. VII-1320C-98P
	)	
Respondent	)	

Initial Decision

This case was initiated pursuant to Section 14 of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136*l* by the filing of a complaint on April 23, 1998. The first amended complaint, filed May 4, 1998, charges Respondent Meyer Laboratory, Inc. in one count with violating FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), and its implementing regulations at 40 C.F.R. § 156.10, which make it unlawful to distribute or sell a pesticide that is misbranded. Complainant seeks a penalty of $5,500[(1)] for this alleged violation.

An evidentiary hearing was held in this matter on February 3, 1999 in Kansas City, Missouri.

STATUTORY BACKGROUND

FIFRA § 12(a)(1)(E) provides in pertinent part that "[e]xcept as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person . . . any pesticide which is . . . adulterated or misbranded." 7 U.S.C. § 136j(a)(1)(E). Section 2(gg) of FIFRA defines "distribute or sell" as "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." 7 U.S.C. § 136(gg);

see also 40 C.F.R. § 152.3(j) (definition of distribute or sell). A pesticide is misbranded under FIFRA § 2(q)(1)(F) if its label does not contain directions necessary for the proper and safe use of the product, and under FIFRA § 2(q)(1)(G) if its label does not contain a warning or caution statement which may be necessary and if complied with, is adequate to protect health and the environment.(2) Thus, to make out its case Complainant must show both that the product at issue was misbranded, and that it was "distributed or sold" as that phrase is defined under FIFRA and its implementing regulations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following facts relating to the alleged violation in this proceeding are not in dispute. The complaint in this matter was filed subsequent to an inspection of Respondent's facility in Blue Springs, Missouri on April 29 and 30, 1997 by Mr. Darryl Slade, an inspector for the Missouri Department of Agriculture. When Slade arrived at Respondent's facility he identified himself, presented his credentials, stated the purpose of his visit, and asked to speak to the person in charge. The receptionist summoned Mr. Jerry Rinne and introduced him to Slade who presented Rinne with his credentials and a notice of inspection. Tr.-16-19 (Slade); Tr.-87-88 (Rinne). Rinne then accompanied Slade as he conducted his inspection on both April 29 and 30.

In the course of his inspection of the plant's warehouse area, the inspector observed a single fifteen gallon container of one of Respondent's products, Meyer Sanitime ("Sanitime").(3) Tr.-21 (Slade); CX 2. Meyer stipulated that the label on the 15 gallon container of Sanitime lacked the pesticide's and the establishment's registration numbers, and that the net contents, a precautionary statement, storage and disposal information and directions for use were all absent from the label (Tr. 11). Thus the remaining question on the issue of liability is whether the fifteen gallon container of Sanitime was "sold or distributed," as that phrase is defined under FIFRA. For the reasons that follow I conclude that the product was not "sold or distributed" and therefore that Respondent is not liable for the violation charged.

Complainant contends that the fifteen gallon container of Sanitime observed by Inspector Slade was "released for shipment" and thus "sold or distributed" as that phrase is defined under FIFRA. In support of its position Complainant points both to a statement signed by Mr. Rinne and to the testimony of Inspector Slade. The statement signed by Mr. Rinne was prepared by Mr. Slade at the conclusion of his inspection and later included as part of his inspection report. This statement included a passage stating that the "15 gallon container of Sanitime that Meyer Laboratory had in the warehouse . . . was released for shipment or distribution and ready to be sold as is." CX 4 at 2; Tr.-24 (Slade). Inspector Slade testified at the hearing that the statement, which was composed by him and upon presentment signed by Mr. Rinne, reflected statements made to him by Mr. Rinne during his inspection that the fifteen gallon container of Sanitime was packaged, labeled and released for shipment. Tr.23-25.

Complainant maintains further that the presence of the container in an area of the warehouse where finished products were normally stored fits the meaning that EPA has given to the term "release for shipment." Complainant points to the Preamble to the Final Rule for Part 152, as published in the Federal Register, which states that"[t]he Agency, in inspecting for compliance, will ***assume*** that a product that is packaged, labeled, and stored in an area where finished products are normally stored has been released for shipment" in support of its argument. 53 Fed. Reg. 15952, 15953 (May 4, 1988) (emphasis added). Finally, Complainant asserts that Respondent has produced no credible evidence to support its claim that it had in place a procedure to re-label pesticides before they were shipped out of the warehouse.

In response, Respondent asserts that Slade did not in fact speak to the individual in charge of daily operations at the plant. In support of its assertion Respondent points to Rinne's testimony that the declaration "I am responsible for the daily operation of the company" contained in the statement, prepared by Slade and signed

by Rinne, was not true. Tr.-89. To the contrary, Respondent maintains that Rinne was in charge of manufacturing only, that shipping was handled by the warehouse clerk, and that Mr. Kurth, Respondent's president, was responsible for the daily operation of the plant. Tr.-89-90 (Rinne); Tr.-95-96 (Kurth). Consequently, Rinne was not in a position to, and did not, correctly represent the status of the fifteen gallon container of Sanitime to Slade.

Moreover, Respondent contends that because the inspector told Rinne that signing the statement prepared by the inspector would be "no big deal," Rinne signed the statement without checking with the warehouse clerk or the company president, Mr. Kurth. Tr.-90-91. According to Respondent, the shipping clerk is the person who ensures that products are properly labeled prior to shipment, and the company's in-house quality control program would have corrected the label errors before the product left the warehouse. Tr.-96, 99 (Kurth); Respondent's Exhibit 1. Respondent further argues that there must be actual shipment and an intent on the part of the producer to place the product into the stream of commerce and that these necessary elements of a violation are absent in this case.

A number of factors lead the Court to conclude that the product in question was not in fact "sold or distributed" at the time of Mr. Slade's inspection. One consideration is that during the course of the two day inspection, reviewing forty to fifty different types of products and hundreds, if not thousands, of individual items, Mr. Slade found only *one* container to have an inadequate label[(4)]. Tr. 33-35. Of particular interest is the fact that *all* of the other containers of Sanitime had appropriate labels. Tr.39. The Court takes particular note that, in contradistinction to the other pesticide products examined by Mr. Slade, the fifteen gallon container, unlike the other containers, was *not* "in a case, a package case ... sitting on pallets." Tr. 20-21.

Further, in assessing the probative value of the statement signed by Mr. Rinne, the Court considers it significant that Mr. Slade *could not recall* whether he had represented that the one container in issue was not a "big deal," that it was possible that he made such representations, but he could not remember what his specific remarks were. Tr. 37-38. Thus it is possible that Mr. Rinne was lulled, to some degree, into signing the statement, a statement which was composed by Mr. Slade, not Mr. Rinne.

I also find, based on the credible testimony of Mr. Rinne, that certain important elements of the statement signed by him were in error. Most significantly, the assertion that Mr. Rinne was in charge of daily operations at the plant, and shipping in particular, was incorrect. Mr. Rinne's assertion that he is responsible for manufacturing, but not shipping, was unrebutted. This was supported by the testimony of the President of Meyer Laboratory, Arthur Kurth, who corroborated that the shipping clerk was responsible to ensure that all products are properly labeled. Tr. 95-96.

In addition, the Court finds credible and persuasive Mr. Kurth's explanation, as elaborated in Respondent's Exhibit 1, of Respondent's procedures for ensuring that products with deficient labels such as that observed by Slade are not sold or distributed. In assessing the credibility of Meyer's position[(5)], it is also noteworthy that its objection to the legitimacy of the Complaint was not a late-arrived explanation put forth on the eve of trial. Instead, it asserted from the very beginning that the product was not ready to be shipped, explaining that a proper label would have been affixed prior to shipping. Respondent's Answer, June 2, 1998. Accordingly, I find that the single fifteen gallon container of Sanitime at issue in this proceeding was not "held for sale or released for shipment," and therefore not sold or distributed for purposes of FIFRA.

A reading of the cases cited by Complainant in support of its position does not present any reason to disturb this conclusion. The case Elco Manufacturing, I.F.& R. Docket No. III-33C (Initial Decision, June 4, 1975) cited by Complainant in support of its reliance on Rinne's signed statement, is distinguishable. In that case the products in question were already packaged, sealed and ready for shipment. In order for the inspector to examine the bottles and their labels, the cartons

containing the pesticide had to be opened.[6] Thus there were independent indicia that the products in question were being held for sale. Additionally, in Elco the statement was signed by the respondent's president, an individual who was in charge of the plant's daily operations and who was found by the presiding judge to be fully aware of the significance of what he was signing. By contrast, the statement relied upon by Complainant here was not signed by Respondent's president, but rather was signed by an individual who was responsible for only a part of the plant's operations, and that part was unrelated to shipping.

The case of Sanico, I.F. & R. Docket No. IX-234C (Initial Decision, Oct. 24, 1979) is similarly distinguishable. In Sanico the presiding judge found that the official in charge of the plant, and the warehouse manager, based upon his conduct, believed the sampled product was being held for sale. Further, the former director of operations for the plant testified that the product observed and sampled by the inspector would have been sold to a purchaser seeking to buy the product in question that day. Sanico's argument was, in effect, that its misbranded and adulterated products could not be found in violation until the time they were actually sold.

Respondent here, on the other hand, while also making as one of its arguments, an assertion similar to that in Sanico -- that it could not be found in violation until an actual shipment occurred[7] -- demonstrated at hearing that it had a procedure to ensure that the fifteen gallon container of Sanitime would not be sold or distributed until the appropriate label had been affixed, something Sanico did not attempt to do.

Complainant cites the case Water Services, Inc., I. F. & R. Docket No. IV-167-C (Initial Decision, Dec. 20, 1976), to support its contention that Respondent must show that it had procedures in place to catch misbranded or adulterated products before they are sold or distributed. As in the case at bar, Water Services turned on the factual question of whether or not the respondent had released for shipment the products at issue. Complainant's argument there hinged on a receipt for pesticide samples indicating that the samples were taken from product that was packaged, labeled and released for shipment and signed by a plant employee not in charge of day to day operations. This statement was overcome by the testimony at hearing of the respondent's president and other witnesses, that the respondent had in place a policy and procedures that would ensure that misbranded or adulterated products would not be sold or distributed.

Similarly, the statement relied upon by Complainant in the instant proceeding was signed by Rinne, a plant employee not in charge of daily operations. In addition, like the presiding officer in Water Services, I have found testimony presented by Respondent at hearing explaining the plant's procedures for ensuring that misbranded products are not sold or distributed to be credible and persuasive. The evidence presented by Respondent at hearing overcomes any presumption concerning the status of the container of Sanitime that might otherwise attach to the statement signed by Rinne.

CONCLUSIONS AND ORDER

1. In accordance with Rule 22.24 of the Consolidated Rules, the Complainant "has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint..." The standard applied in resolving matters in controversy is "upon a preponderance of the evidence. Id. at Section 22.24(b).

2. Applying these standards, the Complaint in this matter is dismissed. For the reasons set forth in the body of this decision, it is concluded that EPA has not demonstrated that the charged violation occurred.

So Ordered.

_____
William B. Moran
United States Administrative Law Judge

Dated: August 26, 1999

1. 40 C.F.R. Part 19, "Adjustment of Civil Monetary Penalties for Inflation," increased the maximum penalty for FIFRA violations occurring after January 30, 1997 from $5,000 to $5,500.

2. 40 C.F.R. § 156.10 provides further that "[e]very pesticide product shall bear a label containing the information specified by the Act and the regulations in this part." Section 156.10 requires the contents of a label to show clearly and prominently the following: the name, brand or trademark of the product; the name and address of the producer or registrant; the net contents; the product registration number; the producing establishment; an ingredient statement; required warning or precautionary statements; directions for use; and the product's use classifications.

3. EPA Registration No. 2311-11-60052

4. It is also noteworthy that despite having information that Meyer had manufactured three other 15 gallon containers of Sanitime and that these had been shipped to a buyer, EPA made no effort to track down their delivery. Tr. 23, 39. This information would have been telling in resolving whether a proper label was affixed prior to shipping. Mr. Kurth testified that the information regarding where the other 15 gallon containers were shipped was available. Tr. 99.

5. While not dispositive, it also appears to the Court that a company like Meyer, with sales in excess of a million dollars per year, would be less likely to challenge such a relatively small penalty assessment absent a principled basis for objecting to the charge.

6. As mentioned *supra* the other containers, which *were* in a case and palletized, had to be opened. Indeed, by Mr. Slade's own testimony, the single fifteen gallon container was in a distinct area of the warehouse. After noting that the one gallon containers were properly labeled, he left that area, stating "[*a]fter that point, as I was walking through the warehouse*, I did notice a fifteen gallon container of Sanitime." Tr. 21. (emphasis added).

7. It is worth noting that in Sanico the argument that an actual sale was necessary for the finding of a violation was explicitly rejected as contrary to the statute. The Court agrees that it is not necessary to show an actual sale to establish a violation. However, because it is found that Respondent did not sell or distribute the product at issue in this proceeding on the ground that it was not "held for sale or released for shipment," I need not discuss further Respondent's argument that to be in violation of FIFRA § 12 an actual shipment must occur.

Last updated on March 24, 2014