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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

In the Matter of	
SED, INCORPORATED, James B. Caldwell, John Olmsted	Docket No. TSCA-V-C-417
Respondents	Judge Greene

ORDER GRANTING COMPLAINANT'S MOTION
FOR PARTIAL "ACCELLERATED DECISION"
and DENYING RESPONDENTS' MOTION
FOR SUMMARY JUDGMENT

Complainant moved for partial "accellerated decision" in this matter, seeking judgment as to the liability of respondents Caldwell and Olmsted for alleged violations of 40 CFR §761.65(a), [promulgated pursuant to authority contained in section 6 of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2605] and of section 15 of TSCA, 15 U.S.C. §2614, which provides that violations of certain regulations, including the one here at issue, are violations of section 15 of TSCA, 15 U.S.C. §2614. Complainant's earlier motion for default order against corporate respondent SED, Incorporated (SED), for having failed to answer the complaint, was granted with the provision that if respondents Caldwell and Olmsted, or either of them, filed an answer to the complaint on behalf of respondent SED within fourteen days of service of the order, the order would not take effect. As no answer was filed within the time provided, the default order against respondent SED for failure to answer the complaint became effective.

In support of the present motion, complainant attaches affidavits, copies of depositions of respondents Caldwell and Olmsted, and certain other materials. These documents, complainant asserts, establish that no genuine issues of fact remain and that complainant is entitled to judgment as a matter of law. 1/

1/ Complainant's Motion for Partial Accellerated Decision, p. 1.

40 CFR §22.20 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, which govern this proceeding, provide for "accellerated decision"

> in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing, or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to all or any part of the proceeding.

This provision, analogous to Rule 56 of the Federal Rules of Civil Procedure, may be used to determine before trial whether a genuine issue of material fact exists, i. e. whether a real basis for the non-moving party's case exists. In making this determination, the record must be "examined in the light most favorable to the non-moving party," Gossett v. Du-Ra-Kel Corporation, 569 F. 2d 869, 871 (5th Cir. 1978). If this examination discloses (a) the existence of material facts, or a sufficient disagreement which must be resolved by the court, or (b) that inferences to be drawn from the record may differ with respect to an issue critical to the outcome of the matter, summary judgment may not be granted. Respondents must, therefore, show that their defense contains evidence sufficient to raise a factual issue requiring resolution at trial in order to overcome complainant's motion and supporting materials. At the very least, they must must show why they are not able to ob-

tain such evidence, Gossett v. Du-Ra-Kel, supra, at p. 872.

The summary judgment procedure "does place some obligation on the non-moving party and does not permit that party to rest on his pleadings or the plea that he may bring forth opposing facts through further discovery or trial," Id. at 873. There must be "significant evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial," First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968), at p. 289, or some "significant probative evidence" tending to support respondent's defense, Id. at p. 290. In short, in response to complainant's motion respondents must show what evidence they have to controvert complainant's assertions that there is no genuine issue of fact, and such evidence must be significantly probative. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962). If the evidence is "merely colorable," Dombrowski v. Eastland, 387 U.S. 82 (1967), or not significantly probative, First National Bank of Arizona, supra, at p. 290, summary judgment may be granted.

Respondents received and stored PCB materials, liquid as well as solids including capacitors (see generally deposition of respondent Caldwell, particularly p. 130 ff.) pending their development of a separation process which, they believed, would enable them to separate out for incineration the PCBs in the

materials they had received, for a fee of about forty-six to fifty cents per pound, from their customers (see respondent Caldwell's deposition, pp. 108-109).

The complaint charges that respondents failed to remove and dispose of polychlorinated biphenyls (PCBs) contained in 294 SARASPACS 2/ stored for disposal at respondent's Hillsboro, Ohio, facility prior to January 1, 1984, as required by 40 CFR §761.65(a). 3/ 40 CFR §761.65(a) provides as follows:

> This section applies to the storage for disposal of PCBs at concentrations of 50 ppm or greater and PCB Items with PCB concentrations of 50 ppm or greater.
>
> (a) Any PCB Article or PCB Container stored for disposal before January 1, 1983, shall be removed from storage and disposed of as required by this part before January 1, 1984. Any PCB Article or PCB Container stored for disposal after January 1, 1983, shall be removed from storage and disposed of as required by Subpart D of this part within one

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2/ Respondents' acronym for certain palletized steel containers (see respondent Caldwell's deposition, p. 42; Fisher affidavit, p. 5) which hold four 55-gallon barrels, or 1576 gallons, per each SARASPAC. In other words, the complaint in effect alleges that PCB containers having some 86,680 gallons of capacity were stored at respondent's facility prior to January 1, 1983, were not disposed of by the January 1, 1984, deadline imposed by TSCA regulations at 40 CFR §761.65(a). See also respondent Caldwell's deposition, pp. 93 (lines 2125) and 94 (lines 1-8).

3/ Complaint, Count I, paragraphs 2, 4 (p. 2).

year from the date when it was first placed into storage. 4/

In answer to the complaint, respondents Caldwell and Olmsted generally denied the allegations, and asserted affirmativly that (1) the obligation to remove and dispose of PCBs was respondent SED's, and that (2) the complaint failed to state a cause of action. Subsequently, respondent Caldwell moved to dismiss the complaint for failure to contain specific allegations concerning the "personal involvement of [respondent] Caldwell, as required by 15 U.S.C. §2614." This motion was denied on January 10, 1986.

Complainant's motion for partial "accellerated decision" is supported by affidavits of government inspectors that PCBs

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4/ Failure to comply with this regulation is a violation of section 15 of TSCA, 15 U.S.C. §2614:

> Section 15. Prohibited Acts.
>
> It shall be unlawful for any person to -
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> (1) fail or refuse to comply with (A) any rule promulgated or order issued under Section 2603 of this title, (B) any requirement prescribed by Section 2604 or 2605, or (C) any rule promulgated or order issued under Sections 2604 or 2605.

in concentrations of at least 50 parts per million (ppm) 5/ stored on respondents' premises before January 1, 1983, were still there as late as May 29, 1984. 6/ In support of its view that respondents Caldwell and Olmsted, as officers and directors of the corporation, were responsible for the violations charged, complainant attached copies of sworn statements made by respondents shortly before the complaint issued. The statements show that both respondents were officers and directors of respondent SED, and were virtually exclusively responsible for the conduct of the business in which the corporation was engaged. 7/ Complainant argues, based upon these showings,

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5/ Deposition of respondent Caldwell, p. 99 (lines 1-21).

6/ Affidavits of Daniel Z. Fisher, employed by the Ohio Environmental Protection Agency (OEPA), and Gregory Czajkowski, employed by EPA, pp. 2 and 2-3, respectively.

7/ The deposition of respondent Caldwell contains statements by Mr. Caldwell that he was president, treasurer, and a director of the corporation, that he owned, at various times, 40-50% of the stock of the corporation, and that he was "technically responsible for everything in the corporation as president and chief operating officer." (Deposition of respondent Caldwell, pp. 76-78, 126, 129, 203).

The deposition of respondent Olmsted contains statements that he was vice-president, secretary, and a director of the corporation, that he owned, at various times, 40-50% of the stock, and that he and respondent Caldwell were the sold directors of the corporation. The statements show that respondent Olmsted was closely involved, i. e. in a position to control, incoming and outgoing shipments of PCBs. (Deposition of respondent Olmsted, pp. 103-105, 148).

that the "responsible corporate officer doctrine" enunciated in U. S. v. Dotterweich, 320 U.S. 277 (1943), and U. S. v. Park, 421 U.S. 658 (1975) imposes civil liability upon respondents Caldwell and Olmsted for the violations here charged. This argument is supported by reference to instances where, in connection with violations of statutes intended for the protection of public health and safety, liability in the form of monetary penalties for statutory violations has been upheld against responsible corporate officers: U. S. v. Hodges X-Ray, 759 F. 2d 557 (6th Cir. 1985), Rollins Environmental Services, Inc. v. Parish of St. James, 775 F. 2d 627 (5th Cir. 1985). In connection with violations of environmental statutes, and toxic substances in particular, complainant points to the imposition of civil liability against respondents in Hercules, Inc. v. EPA, 598 F. 2d 91 (D. C. Cir. 1978). (Motion for Partial Accellerated Decision, pp. 1-4).

In response to complainant's motion, both respondents replied that the PCBs in question were not being held for disposal but for recycling. 8/ Respondent Caldwell also argued that the storage had in fact been safe and posed no threat to pub-

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8/ Respondent Caldwell's response, Memorandum in Support of Respondent James B. Caldwell's Position (Response), pp. 1-5. Respondent Olmsted's Answer to Complainant's Motion for Partial Accellerated Decision, p. 2 (paragraph numbered 3).

lic safety. 9/ Based upon this assertion, respondents make a distinction between this matter and Dotterweich, Park, and Hodges X-Ray, supra, where the danger to the public, respondents say, was imminent. 10/ Respondent Caldwell stated further in an affidavit that, with respect to the operation of respondent SED, "decision making was done by officers and employees of the corporation which "included people other than respondents Caldwell and Olmsted." 11/ Respondent Olmsted argues, in response to the motion, that complainant did not establish that the PCBs stored at the facility exceeded 50 ppm. 12/ He argues also that in Dotterweich, Park, and Hodges X-Ray, supra, "there existed clear evidence that defendants had the legal, physical, and financial resources necessary to prevent and correct the offending conditions," whereas here, "SED financial records in possession of complainant and the referenced depositions of Respondents . . . conclusively support the contrary conclusion in this case." 13/

9/ Respondent Caldwell's Response, p. 3.

10/ Id, p. 2.

11/ Affidavit of respondent Caldwell, p. 1, attached to Response. Respondent Olmsted's response also suggested that this aspect of the case differed from the facts in Dotterweich, Park, and Hodges X-Ray, supra. Answer to Complainant's Motion for Partial Accelerated Decision, paragraph 2(a).

12/ Answer to Complainant's Motion for Partial Accellerated Decision, paragraph 1(c).

13/ Id, paragraph 2(b) and (c).

Further, respondents urge that in the cases cited by complainant "it was obvious that the laws were knowingly violated. In this instance it is still unclear whether there was any violation of any law, regulation, or rule." Last, respondent Caldwell argues that evidence obtained during a search conducted at the Hillsboro facility on April 30,, 1985, by EPA had been illegally obtained and should be suppressed, since no consent from respondents was obtained before the search was conducted. 14/

Sorting out these responses, it is clear that none constitute the sort of probative evidence ordinarily considered to be sufficient to overcome a properly supported summary judgment motion. Only three of the responses even suggest the presence of a factual issue, namely the contentions that: (1) complainant had not proven that the PCBs that are the subject of the complaint contained at least 50 ppm; (2) the PCBs were not stored for disposal, but for recycling; and (3) persons other than respondents Caldwell and Olmsted made decisions on behalf of the corporation. However, none of these mere assertions reach the level of provative evidence. Further, with respect to (1) above, respondent Caldwell states in his deposition that "everything we got we assumed was PCB by definition and handled it accordingly. . . it was not a requirement of ours [that clients report the PCB levels

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14/ Respondent Olmsted's answer.

of the PCB wastes shipped to SED]: . . . we asked no questions because the information was not necessary." 15/

With respect to (2) above, it is clear from the depositions and other material attached to complainant's motion that respondent's business was to dispose of PCB materials sent to it. Hence, although some processing may have taken place, or was supposed to take place, the ultimate objective of the business, and the reason it was started, was disposal of PCBs as separated out of the wastes in which they arrived by means of a technology that respondents hoped to perfect. The PCBs would then be shipped elsewhere for incineration). Under these circumstances, it is hardly unreasonable to conclude that the PCBs were being stored for disposal, even if some particular technique was to be applied in aid of the disposal. 16/

15/ Deposition of respondent Caldwell, p. 99, lines 8, 12-14, 20-21. Further, at pp. 96-97, respondent Caldwell stated that SED "wanted to be sure we didn't get radioactive material . . . we did not want materials other than PCBs . . . . they were not supposed to give us anything other than PCB. . . (O)ur understanding (and we believe we're correct in this) of the TSCA regulations is that PCBs in any material are PCBs, are classified as PCBS and must be treated as PCBS and fall under the PCB regulations and therefore we were not concerned about that."

16/ Deposition of respondent Caldwell, pp. 108-109, and particularly pp. 131 ff. It is noted that contracts with clients provided for storage and disposal of PCBs (p. 108), and clients were charged accordingly, 46 to 50 cents per pound. "We made a business judgment that that would be sufficient to cover our costs and get rid of the material," according to respondent Caldwell.

With respect to (3) above, depositions attached to complainant's motion make abundantly clear that respondents Caldwell and Olmsted together ran the business, made the principal -- if not all -- the business decisions, and were responsible for directing the intake of materials, pricing, technology, contracts, and much else. 17/ The so-called "responsible corporate officer doctrine' set out in cases cited by complainant is, put simply, that where an officer of the corporation had a responsible relationship to the acts of a corporation that violated health and safety statutes, that officer may be held individually liable, criminally or civally, as the statute provides, for violations charged. This is so whether or not the official knew that the law was being violated. U. S. v. Hodges X-Ray, 759 F. 2d 557 (6th Cir. 1985), at p. 561. As a leading case, U. S. v. Dotterweich, 320 U.S. 277 (1943) puts it, at pp. 281, 284-285,

> . . . . the only way in which a corporation can act is through the individuals who act on its behalf [citation omitted] . . . a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence . . . The offense is committed . . . by all who do have such a responsible share in the furtherance of

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17/ Id., pp. 76-78, 88-90, 100-102, 108-109, 112, 125-126, 129, 203.

> the transaction which the statute outlaws . . . Hardship there doubtless may be under a statute which thus penalizes the transaction through consciousness of wrongdoing may be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at lease the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are totally helpless.

Regarding the type of legislation to which this doctrine applies, the court in Dotterweich said, at pp. 280-281, that

> The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. [Citations omitted] The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct -- awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. United States v. Balint, 258 U.S. 250.

In summary, respondents have not demonstrated, in response to complainant's motion for partial "accellerated decision,"

that there are any material facts in dispute in connection with the complaint herein. Nor have respondents demonstrated, by showing that there is a legal question at issue, that summary judgment may not be granted.

Last, in responding to complainant's motion, respondent Olmsted moved for summary judgment. 18/ The motion is based upon arguments that complainant has not "fullfill(ed) its legal burden of proof that any respondent violated section 6(a) of TSCA," because (1) evidence "critical to an affirmative defense" of showing that material stored was "fully intended as feed stock for its recycling operation under development . . ." was removed and destroyed under the control and authority of EPA;" (2) respondents "can not be responsible for that which they are without any effective capability to prevent or control by citing Dotterweich, Park, and Hodges X-Ray," because, in this case (a) there was no immediate or direct risk to the public, "as demonstrated by EPA's failure to remove and dispose of SED's stored material;" (b) no clear evidence exists here that respondents have the "legal, physical, and financial resources necessary to prevent and correct the offending conditions, [as there was in Dotterweich, Park, and Hodges X-Ray]; and (c) the law was not knowingly violated, "if there were any violations."

18/ Answer to Complainant's Motion for Partial Accellerated Decision, p. 2

Respondents' motion raises no possibility of genuine factual or legal issues that could bear upon the decision as to liability in this matter, or which could be resolved, based upon this motion, in respondents' favor. 19/ Therefore, respondents' motion for summary judgment must be denied.

Accordingly, it is determined that complainant's motion is adequately supported, and that respondents' replies have raised no genuine issues of material fact that require resolution at trial.

Complainant's motion for partial "accellerated decision" respecting liability for the violations charged in the complaint is granted.

It is ORDERED that the parties shall confer for the purpose of attempting to settle the matter of civil penalty, and shall have sixty (60) days in which to do so.

And it is FURTHER ORDERED that the parties shall report upon their progress toward settlement no later than February 23, 1990.

J. F. Greene
Administrative Law Judge

March 1, 1990
~~December 27, 1989~~
Washington, D. C.

19/ Some points raised may go to the amount of penalty to be assessed.

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 March 1, 1990. This is a corrected copy of the first one.

Shirley Smith
Secretary to Judge J. F. Greene

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