UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Dempster Industries, Inc.	)	Docket No. EPCRA VII-91-T-606-E
Beatrice, Nebraska,	)	
	)	
Respondent	)	

INITIAL DECISION

(Dated August 2, 1994)

APPEARANCES

On Behalf of the Agency:

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I. Background

By a Complaint dated June 10, 1992, the Environmental Protection Agency ("Complainant" or "EPA") brought this action against Dempster Industries, Inc. ("Respondent" or "Dempster"). Dempster, a metal fabrication company, manufactures water supply systems and fertilizer application equipment. It is charged with two counts of violating Section 313 of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11001 et. seq. and 40 C.F.R. §§ 372.22 and 372.30.

Section 313 of EPCRA requires the submission of a toxic chemical release inventory form ("Form R") for any year a company processes more than the threshold quantity of a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65. EPA claims that Dempster violated this requirement by failing to file Form Rs by July 1, 1990, for the chemicals chromium and nickel. These chemicals are released in the company's fabrication of stainless and carbon steel. A hearing on the matter was held on October 21, 1993.

II. Summary of Decision

This decision finds Dempster not liable on either count. Accordingly, there is no cause to consider penalties.

III. Count I

Count I of the Complaint alleges that in 1989, Dempster processed chromium compounds in excess of the 25,000 pound threshold limit, yet failed to file a Form R, even though chromium is listed as a toxic chemical under Section 313(c) of EPCRA and at 40 C.F.R. § 372.65.

The EPA's "Section 313 Reporting: Issue Paper" (Respondent's Exhibit 3) provides that, when computing threshold determinations, companies may exempt metal "articles" if: the item is formed to a specific shape or design during manufacture; its function is dependent on its shape; and, during the item's normal processing or use, no toxic chemical is released. A company loses this article exemption if solid waste, such as shavings and turnings, are disposed of or thrown away.

If these wastes are collected and recycled, however, there is no "release" and the material remains exempt. Alternatively, if the processing or use of all similar materials results in the release of less than 0.5 pounds of a toxic chemical to any environmental media in a calendar year, the EPA will allow the release quantity to be rounded to zero, and again the item remains exempt.

Respondent generated wastes containing chromium compounds during calendar year 1989 at its Beatrice, Nebraska facility. These wastes included metal grindings, cuttings, shavings and turnings. According to EPA, Dempster lost its article exemption because it has not established that the wastes it sent off-site were ultimately recycled, or that it released less than 0.5 pounds of chromium into the air from welding operations. Dempster contends that its chromium wastes were recycled, and that less than 0.5 pounds of toxins were released into the air from its welding processes in 1989.

What does the evidence show?

The EPA presented a witness who inspected the Beatrice, Nebraska facility. On direct examination of the inspector, the EPA counsel asked no questions concerning the recycling of Dempster's metal wastes. In short, no direct testimony was presented by the EPA on the issue. The EPA did introduce as an exhibit (Ex. 2), a copy of its witness' inspection report. The only evidence in the EPA's presentation concerning the matter of recycling appears on page 4 of that report, the relevant portion of which follows:

> Since we were waiting to get the amounts of the above products, I suggested we take a tour of the production part of the facility and Mr. Earnhart agreed. We started in the area where there was a series of drills. (App. 21 #1). When I asked about the disposition of the shavings, Mr. Earnhart said they were sold to a scrap dealer who recycled them.

As the excerpt above shows, the evidence the Complainant presented through its witness' inspection report merely documented a statement made by a Dempster employee that the shavings were recycled. At the hearing, the President of Dempster also testified that the chips and shavings were recycled. (Tr. 124, 127, 131-132). That testimony was not challenged by the testimony of any EPA witness. There is simply no evidence in this record to show that the wastes were not recycled.

The EPA argues that even though Dempster has shown that its metal waste was sent off-site for recycling, it has not proven that this waste material was ultimately recycled. (Complainant's Trial Brief p. 3). Complainant makes reference in its final brief to certain notes made by its witness Doug Elders of a phone conversation between himself and Mr. Catlin, the owner of the company that recycles Dempster's waste. Complainant suggests that these notes show that Dempster does not recycle 100% of its waste and that Dempster therefore loses its article status.

The notes to which the Complainant makes reference were never offered or admitted into evidence. As a result of the EPA's failure to offer this material as evidence, Respondent has not had an opportunity to address or refute it. As Mr. Catlin was present at the hearing of October 21, 1993, the EPA had the opportunity to call him to the stand and question him on the matter. (Tr. 129). Complainant, however, failed to do so. Complainant also had the opportunity, through direct examination of its own witness Mr. Elders, to elicit testimony concerning the conversation. Again, it failed to do so. As a decision in these proceedings can be based only on the evidence of record, Complainant's eleventh-hour argument raised by way of a reply brief, is entitled to no weight or consideration. The evidentiary record is closed.

The EPA rules provide that each matter of controversy is to be decided by a preponderance of the evidence. 40 C.F.R. § 22.24. Here EPA presented no evidence to show that Dempster lost the article exemption because of a failure to recycle its wastes. The evidence that does exist supports Dempster's position that its wastes are recycled. Recall that Dempster is entitled to an article exemption if it either recycles its wastes or if it releases less that 0.5 pounds of a toxic chemical into the environment. Because the evidence shows that Dempster recycles its wastes the EPA fails on Count 1 of the Complaint.

In light of the finding above, the issue concerning whether Dempster may also be entitled to an article exemption under the 0.5 pound weight criterion need not be decided. However, to make for a more complete record if this decision should be subject to further review, I will address that issue.

Dempster calculates that 0.36 pounds of toxins were released from the welding process. (Ex. 11). Complainant maintains that Dempster failed to show that the toxins released by the metals being welded do not raise Dempster over the 0.5 pound limit. EPA hypothesizes that an additional 0.14 pounds or more may have been released from the metals being welded, which would negate Dempster's article exemption.

Jeff Swearingen, a Director of Engineering from Dempster's consulting firm, testified that the emission estimates provided in the EPA's "Section 313 Reporting: Issue Paper" (Respondent's Exhibit 3) do not consider whether the emissions come from the rod or the metal being welded. (Tr. 179-80). Moreover, EPA's Section 313 Reporting: Issue Paper (p.13) recognizes that "[t]he materials contained in the welding rod or electrode will make up much of the release from welding activities." While that paper recognizes that oxyacetalene and oxymethene cutting of metals will produce emissions primarily from the base metal being welded, there is no evidence to show that such cutting operations were performed here.

Complainant has not presented evidence to show that Dempster's total emissions exceeded the 0.50 hold level. Complainant merely speculates that Dempster's calculations fail to take all emissions into account. No evidence was presented to substantiate this speculation. The weight of the evidence before me indicates that such emissions, if any, as may have occurred from the metal being welded would not cause Dempster to exceed the 0.5 pound limitation.

It is Complainant's responsibility under 40 C.F.R. § 22.24 to present evidence showing that a violation occurred, rather than simply suggesting that it may have occurred. Here, Complainant merely offers unsupported hypothetical flaws in Respondent's conclusions. The EPA must present more than a mere

hypothesis that 0.14 pounds or more of a toxin was released from the metal being welded. In sum, EPA has failed to meet its burden of going forward and proving that a violation has occurred.

Complainant has failed to present evidence or argument which refutes Respondent's calculations as set forth in Respondent's exhibits or which shows that the material sent for recycling was not recycled.

Accordingly, Dempster is not liable under Count I of the Complaint.

IV. Count II

Count II of the Complaint alleges that in 1989, Dempster processed nickel compounds in excess of the 25,000 pound threshold limit, yet failed to file a Form R for that compound even though nickel is listed as a toxic chemical under Section 313(c) of EPCRA and at 40 C.F.R. § 372.65.

The EPA made its determination of the amount of nickel processed from data in material safety data sheets ("MSDS"). Its investigator took the average from the range of nickel concentrations listed on the MSDS and multiplied that number by the total amount of each of the products that Dempster processed in 1989. (Complainant's Exhibit 2). Based on these numbers, the investigator arrived at a total of 67,708 pounds of nickel processed that year. Since the limit for 1989 was 25,000 pounds and Dempster did not file a Form R, Dempster would be in violation of EPCRA § 313, 42 U.S.C. § 11023, and of the requirements of 40 C.F.R. Part 372.30.

The MSDS provides general information on the composition of any chemical that a company may have on-site. In this instance the MSDSs that EPA relied upon covered a range of values for nickel depending on the grade of steel being manufactured.

The case development officer from the EPA who submitted this case for prosecution admits that the Respondent is not limited to the information contained on the MSDS, but may use the best information available to calculate whether or not it is required to file a Form R. (Tr. p.89).

The information that Dempster relied on for its calculations was obtained from chemical analysis reports. These reports were prepared by the steel mills which produced the steel that Dempster used in its operations. (Respondent's Exhibits 8 and 9). That information provided Dempster with a specific metal content rather than a range of possible contents. Dempster multiplied the nickel content listed in the chemical analysis certifications by the amount of each metal used and arrived at a

total of 9,893.8 pounds of nickel compound processed in 1989. (Respondent's Exhibit 8).

The best information available showed that Dempster processed 9,893.8 pounds of nickel compounds in 1989. This is far below the threshold 25,000 pounds. Dempster, therefore was not required to file a Form R for 1989 for nickel.

The EPA asserts that Dempster failed to provide specific proof from its suppliers that the metals Dempster received contained the content percentages listed on the data sheets. Complainant says that Dempster has not overcome complainant's allegation that the nickel content of the metal is properly measured by the average nickel contents shown on the MSDS.

In Respondent's Exhibits 8A, 8B, 8C, 9E, 9F, 9G, and 9H, Dempster presented the standards and test results for the materials it used. These exhibits specify the metal concentrations that Dempster used to calculate the amount of nickel it processed in 1989.

Complainant has drawn particular attention to the fact that Dempster ordered T-409 steel from Toma Metals, yet is relying on the AISI standard content for 409 steel. Complainant alleges that these metals are not necessarily equivalent. However, the President of Dempster gave direct testimony that his company orders 409 steel from the Toma Steel Company and that T-409 is the same as 409 steel from a chemical analysis standpoint (Tr. 197). In addition, Jeff Swearingen, from Dempster's consulting firm, testified that the AISI standards for 409 steel require a specific recipe for chemical content and that, accordingly, 409 steel contains the same chemical composition as any other 409 steel. Complainant has not presented evidence or testimony to refute Dempster's claims.

Dempster has provided ample evidence to support its belief that it processed 9,893.8 pounds of nickel compound in 1989. Pursuant to 40 C.F.R. § 22.24, the EPA has the burden of going forward with its claim and presenting evidence to contest the Respondent's calculations. Complainant has failed to do so.

Accordingly, Dempster is not liable for the violations alleged Count II of the Complaint.

V. Order

Both counts of the Complaint against Dempster are dismissed.

Pursuant to 40 C.F.R. § 22.27(c) this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the

Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision. (See 40 C.F.R. § 22.30).

Jon G. Lotis
Administrative Law Judge