UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Tower Central, Inc.,	)	**Docket No. CAA-III-030**
	)	
Respondent	)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: November 17, 1997
Washington, D.C.

Appearances
For Complainant:

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I. Introduction

This civil penalty proceeding arises under Section 113(d) of the Clean Air Act ("the Act"), 42 U.S.C. § 7413(d). The U.S. Environmental Protection Agency ("EPA") seeks civil penalties against Tower Central, Inc. ("Tower"), totaling $33,423, for three alleged violations of Section 609 of the Act. 42 U.S.C. § 7671h. Section 609 addresses the servicing of motor vehicle air conditioners ("MVAC's") involving refrigerant. It is part of a

statutory program intended to prevent the release of ozone-depleting substances into the atmosphere. *See* Tr. 26- 28.

EPA initiated this proceeding by filing a three-count amended complaint against Tower. Counts 1 and 2 charge violations of Section 609(c) of the Act, while Count 3 charges a violation of Section 609(d)(1) of the Act. Specifically, Count 1 alleges that Tower repaired or serviced MVAC's involving refrigerant without using approved refrigerant recycling equipment as required by 40 C.F.R. 82.36. Count 2 alleges that a Tower employee repaired or serviced the MVAC's referenced in Count 1 without first obtaining refrigerant recycling training and certification in accordance with 40 C.F.R. 82.34(a). Count 3 alleges that Tower repaired or serviced MVAC's without submitting to EPA the approved equipment and training certification required by 40 C.F.R. 82.42.

In an order issued on April 14, 1997, this court granted in part EPA's motion for accelerated decision as to the issue of liability. 40 C.F.R. 22.20(a). Tower was found to have violated Section 609 of the Clean Air Act as alleged in Counts 1 and 3. EPA, however, was not awarded judgment as to Count 2 because of the existence of material issues of fact.

Thereafter, a hearing was held in Pittsburgh, Pennsylvania, on July 10, 1997, to determine whether Tower committed the violation alleged in Count 2, and to determine the appropriate civil penalty to be assessed for the violations found.

II. Facts

Tower is a West Virginia corporation with its principal place of business in Wheeling, West Virginia. Jt. Ex. 1, Stip. 1. It is in the business of hauling flatbed carriage, primarily steel. Tr. 115, 117. Tower has between 45 to 50 employees, of whom 25 to 30 are full-time truck drivers. Tr. 118. The company owns approximately 30 to 35 vehicles and it leases about 10 vehicles from independent contractors. *Id*.

On July 20, 1993, EPA sent a letter to Tower requesting that the respondent provide certain information regarding its service and repair of motor vehicle air conditioners, involving refrigerant. EPA made this request pursuant to Section 114 of the Clean Air Act.

42 U.S.C. § 7414.[(1)] Such a request by EPA is commonly referred to as a "Section 114 letter." Tr. 28-31; Compl. Ex. 1 & Jt. Ex. 1, Stip. 1.

The purpose of EPA's Section 114 letter was to determine whether Tower was in compliance with Section 609 of the Act. Among other things, in this letter EPA requested the following information:

(1) the number of MVAC's serviced on or after August 13, 1992; (2) invoices for the purchase of approved refrigerant recover/recycle, or recover only, equipment; (3) invoices from

August 13, 1992, for any service on an MVAC, including recharging, performed without utilizing certified equipment and/or technicians; (4) the name of every technician performing service on an MVAC; (5) a copy of each technician's certificate indicating training in refrigerant recycling at an EPA-approved training course; and (6) a copy of the company's certification to EPA that the company has acquired, and is using, approved equipment and that each such individual authorized to use the equipment is properly trained and certified.

Tower responded to EPA's Section 114 letter on August 2, 1993. Compl. Ex. 2 &

Jt. Ex. 1, Stip. 2. In addition to providing the requested documentation, respondent's counsel informed EPA that since August 13, 1992, Tower had serviced 14 MVAC's in its truck fleet and that it had not used a refrigerant recycler during this service. Respondent's counsel explained: "[Tower] was under the assumption that since the company was only doing work on its own vehicles, it was not doing work 'for consideration' and that this equipment was not mandatory. We have subsequently advised our client that the agency does include fleet service by in-house technicians in its definition of service 'for consideration.'" *Id.* at 1-2.

On February 8, 1994, Tower submitted to EPA an MVAC Recover/Recycle or Recover Equipment Certification Form. Jt. Ex. 1, Stips. 6 & 7.

It is against this background that EPA filed its three-count amended complaint and subsequently moved for accelerated decision. As discussed earlier, EPA's motion for accelerated decision was granted as to liability on Counts 1 and 3, but not as to Count 2. Again, in Count 2, EPA asserts that Tower violated Section 609(c) of the Clean Air Act because it allowed

an untrained and uncertified technician to service or repair MVAC's after August 13, 1992.

For the reasons that follow, Tower is held to have violated Section 609(c) of the Clean Air Act as alleged in Count 2. Furthermore, a civil penalty totaling $25,363 is assessed for the three Clean Air Act violations cited in Counts 1, 2, and 3 of EPA's amended complaint.

III. Discussion

A. Tower's Liability As To Count 2

In Count 2, EPA alleges that Rick West, an untrained and uncertified technician employed by Tower, performed service on the company's motor vehicle air conditioners, and that this service involved refrigerant. EPA submits that the MVAC service performed by West violated Section 609(c) of the Clean Air Act and 40 C.F.R. 82.34(a). Specifically, EPA charges:

Under 40 C.F.R. § 82.34(a), effective August 13, 1992, no person repairing or servicing motor vehicles for consideration may perform any service on a motor vehicle air conditioner involving the refrigerant for such air conditioner unless such person has been properly trained and certified by a technician certification program approved by the Administrator pursuant to 40 C.F.R. § 82.40.

Amend. Compl., ¶ 13.

Tower defends on the ground that there was no violation because West was supervised by Mike Walters, a certified technician. Tower also argues that, in any event, EPA failed to prove that it was West and not Walters who performed the prohibited MVAC service.

Curiously, neither EPA nor Tower called the key participants, West and Walters, to testify.[(2)] In fact, the evidence introduced on this issue by both parties was minimal. Nonetheless, even though the evidence was limited, it was still enough for EPA to establish a prima facie case that Tower violated Section 609 as alleged. Tower, in turn, failed to rebut complainant's prima facie case.

EPA's case against Tower is based upon Complainant's Exhibits 4, 5, 6, 7, 8, and 9. These exhibits are company repair orders for motor vehicle air conditioner service performed on the

respondent's truck fleet. Tower provided these repair orders to EPA in response to the Agency's Section 114 information request letter. Of these exhibits, Numbers 5 and 6 bear the initials of both West and Walters, while Numbers 4, 7, 8, and 9 bear the initials of West only. It is undisputed that Walters was a trained and certified technician for purposes of performing MVAC service involving refrigerant. It also is undisputed that West was not. Tr. 35, 44-48; Compl. Ex. 2 at 2.

EPA is correct in arguing that the repair orders furnished by Tower establish the violation charged in Count 2. In that regard, even assuming that Walters alone performed the MVAC service identified in Exhibits 5 and 6, as Tower suggests,[(3)] Exhibits 4, 7, 8, and 9 still establish that MVAC service was performed by West, an uncertified technician. Exhibits 4, 7, 8, and 9 show that West performed service on motor vehicle air conditioners which involved the use of Freon, a refrigerant. This is a violation of Clean Air Act Section 609(c).

For example, Exhibit 4 shows that on September 4, 1992, West replaced an air conditioner hose that had a hole in it. Exhibits 7 and 8 show that on July 7, 1993, West replaced the condenser and side hose on one air conditioner, and the compressor clutch and belt on another air conditioner. Finally, Exhibit 9 shows that on April 19, 1993, West replaced the condenser on an air conditioning unit. In each of these four instances, West used more than three pounds of the refrigerant Freon in servicing the MVAC.

West is *not* a certified technician. Yet, a plain reading of Complainant's Exhibits 4, 7, 8, and 9 show that he serviced MVAC's with refrigerant. Unlike Complainant's Exhibits 5 and 6, there are no certified technician's initials on the repair orders in addition to West's initials. The only reasonable conclusion, therefore, is that West alone performed the services identified in Exhibits 4, 7, 8, and 9. It bears repeating that this constitutes a violation of Section 609(c).

While Tower argues that it was certified technician Walters who performed the work listed on the repair orders identified as Exhibits 4, 7, 8 and 9, as he purportedly had done with respect to Exhibits 5 and 6, it offers little to support this theory. *See, e.g.,* Resp. Br. at 6. Obvious sources of such support would have been the testimony of West and Walters, the very individuals who performed the work. Yet, for whatever reason, neither individual was called to testify.

In advancing its defense, Tower submits that it was Walters who either performed or supervised the MVAC work at issue in this case and that because Walters was a salaried employee, there was no need for him to sign or initial the repair orders identified as

Exhibits 4, 7, 8, and 9. Resp. Br. at 6-7. This argument is simply not convincing, particularly in light of the fact that Walters' initials appear on the work orders listed as Exhibits 5 and 6.

What the repair orders show on their face are the types of motor vehicle air conditioner repair or service work performed, as well as the individual who performed it. Taking into account all the repair orders, it is clear that Walters performed some of the work, but not all. The work that Walters did not perform is listed in Exhibits 4, 7, 8, and 9.

Accordingly, the evidence submitted as to Count 2 is sufficient for EPA to establish a prima facie case that Tower violated Section 609(c). Because Tower failed to rebut this prima facie case, this Clean Air Act violation is upheld.[(4)]

B. Civil Penalty Assessment

Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), provides for the assessment of a civil penalty for a violation of the Act. EPA proposes a civil penalty totaling $33,423 for the three Section 609 violations found in this case. EPA breaks down its penalty calculations in Complainant's Exhibit 15. The Agency's underlying penalty rationale is set forth in Complainant's Exhibit 12 (Clean Air Act Stationary Source Civil Penalty Policy) and

Exhibit 13, Appendix IX to the Penalty Policy (Revised Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving 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).

Tower challenges EPA's proposed penalty in part arguing that the penalty proposal process is arbitrary because the Agency fails to take into account facts unique to the respondent. *See* Resp. Br. at 4, 10. At least for purposes of a penalty assessment by this court, Tower's concern over the manner in which EPA calculates a proposed penalty is misplaced. The fact of the

matter is that EPA's penalty proposal is just what it says it is. It is a proposal only. As explained to counsel prior to the taking of testimony, any civil penalty assessed by the court in this case will be based upon the record evidence as measured against the statutory penalty criteria of Section 113(e)(1) of the Clean Air Act. Tr. 8-9. At the hearing Tower was afforded the opportunity to submit into the record any evidence relevant to the statutory penalty criteria, including evidence unique to the respondent's company.

Section 113(e)(1) sets forth the penalty factors to be considered in determining an appropriate penalty. It provides in part:

In determining the amount of any penalty to be assessed ... the Administrator ... 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 (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1).

In measuring the facts established at the hearing against this Section 113(e)(1) penalty criteria, EPA's proposed penalty assessment of $33,423 is not far from the mark. As discussed below, civil penalties totaling $25,363 are assessed against Tower for the three violations found in this case. Of this amount, $10,000 each is assessed for Counts 1 and 2, and $5,000 is assessed for Count 3. In addition, the penalty is increased by $363 due to the economic benefit derived by Tower by its failure to comply with the regulations at issue.

1. Penalty Criteria Common to All Three Counts

With the exception of the "seriousness of the violation," all the penalty criteria of

Section 113(e)(1) apply to each of the three counts involved and can be treated together.

a. Size of the Business

As for the size of business criterion, the evidence shows that Tower is somewhat of a small company. It employs approximately 45 to 50 persons and is considered a small business by EPA. Tr. 62, 116. In addition, the 1993 Dun & Bradstreet report used by EPA to calculate the proposed penalty shows that at that time the respondent had a net worth of $624,447. Compl. Ex. 14. A 1997 Dun & Bradstreet report did not contain updated information on the company's net worth. Compl. Ex. 16. It did, however, project company sales of $4,200,000 for 1997.

Tower's president, Thomas Ostasiewski, provided a less rosy picture of the respondent's financial health. In challenging the 1997 projected sales figure published in the Dun & Bradstreet report, Ostasiewski testified that a strike at the Wheeling-Pittsburgh Steel Corporation, apparently one of Tower's chief customers, resulted in a 40% to 45% reduction in the respondent's revenues during the years 1995 and 1996. Ostasiewski further testified that this loss in business resulted in Tower's gross sales dropping to approximately $2,200,000. Tr. 116-118.

Tower, however, provided no documentation to substantiate its claim of revenue losses. Regarding this matter, EPA attached to its post-hearing brief two Wheeling-Pittsburgh Steel news releases stating that the strike at the company ended in August, 1997. Respondent has not challenged this assertion.

The size of Tower's business was considered in the penalty assessment process in terms of evaluating the reasonableness of the assessed penalties.

b. Economic Impact of Penalty

The economic impact of the penalty on the respondent's business criterion involves consideration of the company's financial picture as described above. In addition, the testimony of EPA's witness, Daniel Lucero, and Tower's president, Thomas Ostasiewski, regarding the company's financial position were taken into account. *See* Tr. 64-66, 116-118, 148, 150-151. Although the evidence on this issue is limited, it is sufficient to support a finding that the impact of the penalty assessed in this case will neither put Tower out of business, nor threaten its ability to continue in business.

c. History of Compliance and Good Faith Efforts to Comply

As for Tower's history of compliance, EPA concedes that there were no previous compliance problems with respondent. Compl. Br. at 26. It stands to reason, therefore, that Tower did not previously pay a penalty for violations similar to those at issue in this case.

A related issue here is, despite the findings of violation, Tower's good faith efforts to comply with Section 609 of the Clean Air Act. EPA's observation that Tower's good faith efforts to comply were "mixed" is an accurate one. *See* Compl. Br. at 26. In that regard, Tower had some, but not all of its MVAC technicians certified. Moreover, it did obtain the necessary refrigerant recycling equipment after being cited by EPA, and it eventually provided the required certification to the Agency.

d. Duration of the Violations

With respect to this penalty criterion, EPA has established that in 14 instances Tower failed to use certified technicians to service MVAC's, as well as refrigerant recycling equipment. Also, while the respondent eventually did send the requisite recycling equipment certification to the Agency, it did not do so until 404 days after it was due.

Nonetheless, as argued by Tower, the types of violations established in this case were such that the duration of the violations penalty criterion did not have a significant impact upon the assessed penalties.

e. Economic Benefit of Noncompliance

Tower agrees with EPA that the economic benefit received by respondent as a result of its noncompliance with the Clean Air Act in this case was $363. Resp. Br. at 12.

f. Other Factors as Justice May Require

In its brief, Tower argues that EPA failed to consider any factors under the statutory penalty criterion, "in addition to such other factors as justice may require." Resp. Br. at 4. One of the items cited by respondent for consideration under this category is a memorandum issued by President Clinton, as well as statements made by the President, concerning the assessment of civil penalties upon small businesses. *See* Resp. Exs. 1 & 2. Tower cites these sources for the proposition that they call for "reasonableness and leniency" in the assessment of penalties in this case. Resp. Br. at 9, 11.

Replying to this argument, EPA submits that Respondent's Exhibits 1 and 2 relate to President Clinton's Executive Order of March 16, 1995, directing federal agencies "to implement policies which would allow for the mitigation or waiver of penalties for small businesses who made 'a good faith effort to comply with applicable regulations.'" Compl. Reply Br. at 8, citing Resp. Ex. 2. EPA further submits that in response to President Clinton's Executive Order the Agency already has issued its "Policy on Compliance Incentives for Small Businesses." Moreover, EPA points out that in this case Tower has previously, and unsuccessfully, relied upon this Small Business policy in challenging the Agency's prehearing motion for accelerated decision. *See* Order dated April 14, 1997, at 4.

EPA is correct in its argument that Respondent's Exhibits 1 and 2 do not support either a waiver, or mitigation, of the civil penalty in this case. The themes advanced in President Clinton's Executive Order already have been implemented by EPA. There is no need to consider them further in this case.

The second "main factor" which Tower requests be considered under the "other factors as justice may require" category is the company's assertion that it honestly didn't believe that the subject regulations applied to its in-house MVAC service and repair. Resp. Br. at 11. This argument is more appropriately addressed in the "seriousness of the violation" discussion which follows.

2. The Seriousness of the Violation Criterion

For purposes of the penalty assessment in this case, the seriousness of the violation penalty criterion carries the most significant weight. This penalty criterion includes any harm resulting from the violation, either real or potential, to persons and to the environment. It also includes consideration of the respondent's negligence in committing the violations.

Daniel Lucero testified on behalf of the complainant as to the seriousness of the violations committed by Tower. Lucero is EPA's Region III coordinator for the Stratospheric Ozone Protection Program. Tr. 16. In other words, Lucero is the Regional "CFC" Coordinator. The term "CFC" stands for chloroflurocarbon, a major constituent of ozone-depleting substances. Tr. 17.

Lucero first became interested in Tower's operation after receiving a "citizen's tip" that the company was repairing motor

vehicle air conditioners, even though it didn't own refrigerant recovery equipment. Tr. 27-28. This tip prompted Lucero to send the Section 114 information request letter which ultimately led to this litigation.

In response to the Section 114 letter, Tower provided EPA with work repair orders previously identified as Complainant's Exhibits 3 through 9. Also, as mentioned earlier, Exhibits 4, 7, 8, and 9 show that Rick West, an uncertified technician, performed MVAC service involving refrigerant. In fact, each of these exhibits show that West used 3 1/2 pounds of "Freon" in working on the particular motor vehicle air conditioner. Freon is Du Pont's trade name for "R-12" or "CFC-12." It is a refrigerant, which is a Class I controlled substance under the Clean Air Act. Tr. 37-38.

Lucero explained that the environment is harmed when Freon is released into the atmosphere. He testified:

The simplest way to describe this is how the public generally views it, which is the hole in the ozone layer. Ozone-depleting substances such as CFC's, when released into the atmosphere, diffuse throughout the global atmosphere. In the upper atmosphere or the stratosphere, the CFC molecule is hit by high intensity solar radiation. That radiation breaks the molecule releasing ions, and these ions begin to skew the natural production and destruction of ozone in the stratosphere toward destruction. So as destruction becomes more prevalent than production, there's a thinning of the ozone layer, and therefore the name many people commonly refer to as a hole in the ozone layer.

Tr. 25-26.

Having identified the harm that CFC's cause to the ozone layer, Lucero went on to explain the health and environmental dangers which could then occur as a result of the depleted ozone. He explained that the stratospheric ozone layer is the earth's shield against harmful levels of ultraviolet radiation emanating from the sun. Tr. 57. Lucero further explained that as the ozone layer is depleted, more ultraviolet radiation reaches the earth. According to Lucero, ultraviolet radiation has been linked to damage to the human immune system, skin cancers, cataracts, as well as damage to crops and to marine micro ecosystems. *Id.*

Even though each Freon release recorded in Exhibits 4, 7, 8, and 9 involved only 3 1/2 pounds, Lucero testified that each

individual action has a cumulative effect. Tr. 57. According to this EPA witness, "[t]hese chemicals have a very long atmospheric life, over 100 years." Tr. 58. Moreover, Lucero stated that international scientific research has shown that each CFC molecule which enters the atmosphere can damage as many as 100,000 molecules in the ozone layer. Tr. 96.

The testimony of Region III CFC Coordinator Lucero, regarding the health and environmental hazards presented by dispersing the refrigerant Freon into the atmosphere, is quite compelling and is accorded substantial weight. Moreover, this testimony went unchallenged by Tower's sole witness, Thomas Ostasiewski.

As noted, in addition to health and environmental harm, the seriousness of the violation criterion includes a consideration of the respondent's negligence. Here, Tower generally defends on the ground that it is a trucking company aware that it was subject to Department of Transportation ("DOT") regulations, but unaware that it also was subject to the EPA regulations relating to servicing MVAC's with refrigerant.

Tower's argument that it was not negligent in this case is not convincing. In that regard, the company president, Ostasiewski, when asked on cross-examination as to the types of environmental regulations to which the company was subjected, answered, "[s]torm water runoff [and] underground storage tanks." Tr. 140. This answer shows that Tower was aware that some EPA regulations applied to its operation. It certainly is not unreasonable to expect that respondent know all of the EPA regulations which apply to its operation. *See In The Matter of Riverside Furniture Corp.*, EPCRA-88-H-VI-406S at 4 (September 28, 1989), citing *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947)("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the federal register gives legal notice of their contents").

Moreover, as pointed out by EPA, in responding to the Agency's Section 114 letter, Tower did not state that it was unaware of the subject MVAC regulations. Rather, respondent stated that it did not believe that the regulations were applicable to its in-house servicing of its truck fleet. *See* Compl. Br. at 11, citing Compl. Ex. 2, ¶¶ 3 & 7.[(5)] Indeed, "Tower was under the impression that the Clean Air Act provisions that required certification, the use of recycling equipment and certified technicians did not apply to them since they were repairing their own vehicles without consideration." Resp. Br. at 3.[(6)]

Accordingly, Tower cannot now argue for a penalty mitigation on the ground that it was unaware of the existence of the regulations which it was found to have violated. Tower was aware of them and it should have known that the regulations applied to the company's in-house MVAC service and repair.

Nonetheless, even if the company's ignorance of EPA regulations could be overlooked because the company was for the most part subject to DOT regulations, the record evidence still supports a finding that Tower was negligent in not complying with Section 609. That evidence centers on the fact that some of Tower's technicians were certified to perform MVAC service with refrigerant.

In that regard, Ostasiewski testified that Tower employees attended a certification program for air conditioning servicing that was conducted by one of Tower's vendors.

Tr. 138. *See* Tr. 125-126 and Compl. Ex. 2 at 2, for list of certified technicians. Ostasiewski stated that he talked to the technicians upon their return from the air conditioner certification program. According to Tower's president, "[the technicians] indicated that they didn't learn a whole lot about how to repair air conditioners, *but that it was more to do with the regulations.*" *Id. (Emphasis added).*

Despite the fact that Ostasiewski was in charge of the mechanics' training at Tower (Tr. 120), he did not inquire about these regulations. Ostasiewski simply states, "I didn't get into that level with them." Tr. 139. All that he did was to put the certification cards in the technicians' personnel files when the cards were received in the mail. *Id.*

The above facts clearly establish that Tower should have known about the Clean Air Act provisions which are at issue in this case, prior to the time that the company committed the Section 609 violations. The company's failure to be aware of the MVAC requirements is the result of moderate negligence.

3. The Penalty Assessment

Based upon the civil penalty criteria discussed above, Tower is assessed a $10,000 penalty for Count 1, for servicing MVAC's involving refrigerant without using equipment approved pursuant to 40 C.F.R. 82.36. Tower also is assessed a $10,000 penalty for Count 2, for using a technician to service MVAC's who was not trained and certified as required by 40 C.F.R. 82.34(a).

Finally, Tower is assessed a $5,000 penalty for Count 3, for servicing MVAC's without submitting to EPA the certification required by Section 609(d)(1) of the Clean Air Act, and by 40 C.F.R. 82.42. Also, the sum of $363 is added to this amount as the economic benefit received by respondent as a result of its noncompliance.

Regarding this penalty assessment, the penalty for Count 2 is greater than that requested by EPA because, like Count 1, this violation presented a serious threat to human health and to the environment. Because Count 3, failure to provide certification, did not present the level of harm as did Counts 1 and 2, a lesser penalty is assessed than that proposed by the complainant. As to Count 3, EPA is correct in arguing that a failure to certify is not a paperwork violation, but a work practice requirement which may cause a company to take positive action. Given this fact, a $5,000 penalty is deemed appropriate. While EPA requested a substantially higher penalty as to Count 3, it simply failed to put in enough evidence to sustain the requested amount.[(7)]

ORDER

Accordingly, it is held that Tower Central, Inc., violated Section 609 of the Clean Air Act as alleged by the U.S. Environmental Protection Agency in Counts 1, 2, and 3 of the amended complaint. As set forth above, a civil penalty totaling $25,363 is assessed for these three violations.

Payment of the civil penalty shall be made within 60 days of the date of this order by mailing, or presenting, a cashier's or certified check made payable to: Treasurer of the United States of America, U.S. EPA Region III (Regional Hearing Clerk), Mellon Bank, P.O. Box 360515, Pittsburgh, Pennsylvania, 15251.[(8)]

Carl C. Charneski

Administrative Law Judge

1. Section 114(a) authorizes the Administrator of EPA to require any person who owns or operates any emission source, or who is subject to any requirement of the Clean Air Act, to maintain certain records relating to compliance with the Act, and to provide such records to EPA upon request.

2. Nor did the EPA investigator, Daniel Lucero, interview either individual in his investigation for possible Section 609 violations. Tr. 78.

3. Lucero admits that he could not say that it was West who added the Freon on the repair orders listed as Exhibits 5 and 6. Tr. 81-82.

4. Given this holding, it is unnecessary to address the issue as to whether Section 609(c) of the Clean Air Act is violated if MVAC service involving refrigerant is performed by an uncertified technician, while under the supervision of a certified technician.

5. As noted earlier, by order dated April 14, 1997, this court rejected respondent's position and held that in-house MVAC service fell within the ambit of Section 609 of the Clean Air Act.

6. This argument likewise was rejected in the April 14, 1997, order.

7. EPA requested a civil penalty of $15,000 for Count 3. Lucero, the EPA environmental engineer who calculated the proposed penalties in this case, testified that the penalty proposal for Count 3 was *not* based upon harm. Rather, "all failures to certify are given a consistent figure of $15,000." Tr. 95. Lucero cited "national consistency" for this rigid application of the penalty policy guidelines. As noted at the outset of the civil penalty discussion, there must be an evidentiary basis to support a penalty assessment. Unlike Counts 1 and 2, Lucero's testimony does not provide such an evidentiary basis to support the requested penalty as to Count 3.

8. Unless this decision is appealed to the Environmental Appeals Board ("EAB") in accordance with 40 C.F.R. 22.30, or unless the EAB elects to review this decision *sua sponte*, it will become a final order of the EAB. 40 C.F.R. 22.27(c).