

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of)
)
Finch Fuel Oil Company,) Docket No. II TSCA-PCB-82-
) 0104
Respondent)

1. Toxic Substances Control Act - PCBs - A distributor who purchases waste oil which had been diluted so as to reduce the concentration of PCBs below 50 ppm, does not violate the PCB rule, unless he knows or has reason to know that the oil had been diluted.
2. Toxic Substances Control Act - PCBs - Complaint against distributor of waste oil dismissed where facts do not show that oil purchased by the distributor was the same oil that had been tested six days before the distributor had made his purchase, and had been found to contain over 50 ppm PCBs.

Appearances:

Gregory T. Halpert, United States Environmental Protection Agency, Region II, New York, New York, for Complainant.

Victor F. DeVito, 591 Summit Avenue, Jersey City, New Jersey, for Respondent.

INITIAL DECISION

This is a proceeding under the Toxic Substances Control Act ("TSCA"), Section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties for violation of the rule entitled "Polychlorinated biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions" (hereafter "PCB rule"), 40 CFR Part 761.^{1/} The proceeding was instituted by a complaint issued on June 1, 1982, charging that Respondent Finch Oil Company had distributed in commerce oil containing PCBs in excess of 50 parts per million ("ppm") in violation of 40 CFR 761.30(c). A penalty of \$20,000 was requested. Respondent answered and denied the charges and also put in issue the appropriateness of the amount of the proposed penalty. A hearing was held in Newark, New Jersey on November 30, 1982. Following the hearing the parties submitted briefs on the legal and factual issues. On consideration of the entire record and the submissions of the parties, the complaint is dismissed. All proposed findings

^{1/} TSCA, Section 16(a) provides in pertinent part as follows:
(a) Civil - (1) Any person who violates a provision of section 15 shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 15.

Section 15 of the Act provides in pertinent part, "[i]t shall be unlawful for any person to - (1) fail or refuse to comply with . . . (C) any rule promulgated . . . under Section . . . 6" The PCB rule was promulgated under TSCA, Section 6(e), 15 U.S.C. 2605(e).

of fact inconsistent with this decision are rejected.

Findings of Fact

1. Respondent Clarence P. Finch II is engaged in the business of selling heating fuel oil to commercial customers. He began his business, known as Finch Fuel Oil Company, in 1975, and operates out of his home in Kearny, New Jersey. He maintains and has no fuel oil storage facilities. Transcript ("Tr.") 127, 130-31.
2. Finch purchases the fuel oil he sells primarily from the major oil companies. On occasion he also buys waste oil from other sources which he blends with the fuel oil. Tr. 14, 130.
3. For several years Finch has purchased waste oil from the Summit Metal Company of Jersey City, New Jersey. Tr. 153-56.
4. Summit salvages scrap metal that it obtains from various sources but primarily from transformers and other electrical equipment. Tr. 108-09.
5. Summit drains waste dielectric oil from transformers and other electrical equipment it purchases and stores the oil in two tanks, one having a capacity of about 800 gallons and the other a capacity of about 1,200 gallons. Waste oil collected from other sources such as diesel fuel and crankcase oil from scrapped trucks or motors was also stored in these tanks. Tr. 110, 112, 124.
6. On April 15, 1981, EPA employees conducted an inspection of Summit to determine compliance with PCB regulations. In

the course of that inspection, samples of waste oil were collected from each tank. Sample 57858 was collected from the 1,200 gallon capacity tank which at that time contained about 600 gallons of waste oil. Sample 57859 was collected from the 300 gallon tank which contained about 100 gallons of waste oil. Tr. 8, 11; Government's Exhibits 1, 2.

7. Both samples were taken to the EPA Multidisciplinary Laboratory in Edison, New Jersey, where they were analyzed for the presence of PCBs. Sample 57858, was found to contain PCBs at a level of 140 ppm, and sample 57859 was found to contain PCBs at a level of 2,400 ppm. Tr. 24-25, 67, 86-87; Government Exhibits 3-5.

8. On April 21, 1981, Finch purchased 2,600 gallons of waste oil from Summit. This oil was pumped from the two waste oil storage tanks described above. Summit had added waste oil to the tanks since April 15, 1981, bringing them to their estimated 2,000 gallon capacity, and at the time of delivery to Finch supplemented those 2,000 gallons by another 600 gallons obtained from transformers, drums or other storage containers at Summit. Tr. 111, 119, 129.

9. Between April 15, 1981 and April 21, 1981, Summit probably withdrew 50 to 60 gallons from the two tanks for use in its portable heating equipment and may have given away another 55 gallons or more to others. Tr. 117-120.

Discussion and Conclusions

The crucial and indeed only question in this case is whether the waste oil, which Finch purchased on April 21, 1981, contained PCBs at a concentration greater than 50 ppm. If it did, Finch's purchase of that oil and his subsequent resale of it was a distribution of PCBs in commerce in a non-totally enclosed manner in violation of 40 CFR 761.20(c).^{2/} On the other hand, if the waste oil contained less than 50 ppm PCBs at the time Finch purchased it, Finch would not have violated the PCB rule.

Complainant argues that even if the waste oil at the time it was purchased by Finch contained less than 50 ppm PCBs, Finch would still be in violation because dilution is expressly prohibited by 40 CFR 761.1(b).^{3/} The prohibition against dilution was explained in the preamble to the PCB rule as intended to prevent the deliberate dilution of concentrated PCBs to evade

^{2/} Finch does not question that his purchase of waste oil from Summit for resale to Meadowview Hospital was distribution in commerce. In view of the broad definitions of the term "commerce" and "distribution in commerce" in TSCA, Sections 3(3) and (4), 15 U.S.C. 2602 (3) and (4), it is understandable why he has not. It is also clear that transporting the waste oil by tank truck would not be a distribution in a "totally enclosed manner" within the meaning of the PCB rule. See 40 CFR 761.3(hh) and 761.20.

^{3/} Complainant's opening brief at 9, 21. 40 CFR 761.1(b) provides in relevant part that, "[a]ny chemical substances and combination of substances that contain less than 50 ppm PCBs because of any dilution, shall be included as PCB and PCBs unless otherwise specifically provided."

the more stringent disposal requirements that apply to such liquids.^{4/} Thus, the prohibition against dilution would seem to apply to one who actually dilutes the PCBs, and to those who act in concert with him for the purpose of evading the more stringent disposal requirements. Here there is no evidence that Finch knew that the waste oil in the tanks had been tested by the EPA previously and had been found to contain PCBs in concentrations greater than 50 ppm.^{5/} Assuming that Finch knew or should have known that some or all of the waste oil came from electrical transformers, it would have been prudent if not obligatory for him to test what the PCB concentration of the oil was at the time, but testing would not have disclosed whether oil with high concentrations of PCBs had been diluted by the addition of oil with low concentration of PCBs. In short, Complainant's position would require that liability be imposed on a distributor like Finch, even if he was blameless so far as diluting the oil was concerned, and had purchased the oil in the good faith

^{4/} See 44 Fed. Reg. 31518, 31521.

^{5/} Nor would Finch have been any more knowledgeable about the PCB content of Summit's oil, if he asked Mr. Brauer, the owner of Summit. Mr. Brauer was not told by the EPA of the results of the EPA's tests until May 15, more than three weeks after Finch had purchased the oil. Tr. 12. Brauer himself did not do any testing, and the last previous test of Summit's oil appears to have been one done by the State of New Jersey in January 1982. Brauer was never informed whether the test disclosed any PCBs. Tr. 126.

belief, corroborated by his own test, that the oil contained less than 50 ppm PCBs. Since under such a rule the distributor could never be sure that he was not distributing diluted waste oil, the effect would be to discourage if not stop entirely the distribution of all waste oil recovered from electrical transformers regardless of their PCB concentration, a result which I find no support for either in the PCB rule or the preamble. To the contrary, the preamble to the PCB rule expressly states that waste oils that contain concentrations of PCBs less than 50 ppm may be used as fuel or, indeed, for any purpose except as a sealant, coating or dust control agent.^{6/} Complainant's contention, therefore, that Finch should be found in violation of the PCB rule no matter what the concentrations of the PCBs in the oil he purchased is rejected. While Finch's test of the waste oil was not considered a reliable indicator of the PCB content of the oil (see infra at 7-8), still the record does not establish that Finch knew or should have known that the waste oil had been diluted.

For proof that the waste oil contained over 50 ppm PCBs when Finch purchased it, the EPA relies on the undisputed fact that Finch was the only one who purchased waste oil from Summit after the EPA's inspection of Summit on April 16, 1981. To this, Finch offers the defense that Complainant has not shown

^{6/} See 44 Fed. Reg. 31525.

that the oil tested on April 16, 1981, was the same oil that was purchased by Finch on April 21, 1981.

One contention made by Finch in its defense is that Summit had only 700 gallons in its tanks when the EPA inspected Summit on April 16th, while Finch took delivery of 2,600 gallons. As Complainant points out, however, even if it be assumed that the additional 1,900 gallons were free of PCBs, the oil would still contain 124 ppm PCBs.7/

A second contention made by Finch is that he had taken a sample of oil purchased from Summit which was tested and found to contain less than one ppm PCBs. If liability in this case turned on which test was the more reliable indicator of the PCB content of the oil, the decision would clearly be in favor of the EPA's test. The samples taken by the EPA were collected in a special container, were carefully marked, and records were kept accounting for them from the time of collection to the time of testing.8/ The tests themselves can be assumed to have been done in accordance with recognized procedures, since there is nothing in the record to the contrary. In

7/ See Complainant's opening brief at 9. The formula used to calculate the PCB content of the 2,600 gallons is as follows:

$$\frac{140(\text{ppm}) \times 600(\text{gal.}) + 2,400(\text{ppm}) \times 100(\text{gal.})}{2,600(\text{gal.})} = 124 \text{ ppm (for the } 2,600 \text{ gal.)}$$

8/ Tr. 24-25, 39-40, 47-48, 83-84; Government's Exhibits 1-5.

contrast, Finch took his sample in an ordinary jar, not for the purpose of testing for PCBs but in order to determine whether the oil had dirt in it. His only record consisted of marking the sample with a number - in the case of the oil purchased on April 21, it was number 5 - and also marking the invoice for the purchase with the same sample number. The samples, all of which were of waste oil purchased from Summit were then kept at Finch's house. He had them tested for PCBs after being visited by the EPA in September 1981.^{9/} While the tests themselves appear to have been done properly, the procedures followed by Finch offered no reasonable assurance either that the sample taken from one purchased quantity of oil could not have been confused with a sample from some other purchased quantity, or that a sample could not have been tampered with.

Another reason for questioning the reliability of Finch's test as an indication of the PCB content of the oil purchased on April 21, is that to reach the level of less than one ppm, Summit would have had to withdraw all 700 gallons of oil in its tanks between April 15 and April 21. According to Mr. Brauer's testimony it is highly unlikely that oil in such a large quantity was withdrawn.^{10/}

^{9/} Tr. 131, 133, 140-41.

^{10/} Mr. Brauer indicated that he may have withdrawn 50 to 60 gallons for his own use, and that he may have given away one or more 55 gallon drums. Tr. 115, 117, 119-120.

A third contention made by Finch, cannot so readily be dismissed. This is that Complainant has not really established what the concentration of PCBs was in the waste oil purchased by Finch because of the testimony by Julius Brauer, the owner of Summit, that during the period between April 15 and April 21, 1981, he may have used 50-60 gallons of waste oil for his outdoor heaters, and may have given away 55 gallons or more of waste oil, to people to whom he had regularly been giving waste oil for use as fuel. According to this evidence, a sufficient quantity of waste oil could have been withdrawn from the tank with the oil containing 2,400 ppm PCBs, to bring the level of concentration below 50 ppm PCBs, and Complainant's assumption that the violation would be established even if the other 1,900 gallons were free of PCBs would not hold up.11/

Complainant argues that Brauer's testimony is too speculative to be given any weight. Brauer testified on the basis of his recollection of what may have occurred 18 months previously and produced no written records. Yet, the testimony cannot be wholly discredited, which is what Complainant would

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Dr. Gervitz did testify that it was impossible to drain a tank completely. Nevertheless, it would be necessary to assume that about 20 gallons remained in the tank with the oil containing 2,400 ppm PCBs in order to bring the level of concentration of the 2,600 gallons to 50 ppm. Tr. 54. There is simply no basis for making that assumption on this record. For example, if all but 15 of the 100 gallons containing 2,400 ppm PCBs were withdrawn, the concentration of the 2,600 gallons would be 46 ppm. Using Complainant's formula (supra at 7 n. 9), the calculation would be as follows:

$$\frac{2,400 \text{ (ppm)} \times 15 \text{ (gal.)} + 140 \text{ (ppm)} \times 600 \text{ (gal)}}{2,600 \text{ gal.}} = 46 \text{ (ppm)}$$

like to do. It is not surprising that Brauer kept no written records of the relatively small quantities of waste oil he used himself or gave away to others. Nor, contrary to what Complainant argues, was Brauer's relationship to Finch such as to make it likely that it was in Brauer's self-interest to testify in favor of Finch. Finch has been only an occasional purchaser from Brauer.^{12/} Complainant argues that Finch could assert a claim against Brauer if Finch is found liable and a penalty is assessed.^{13/} For all that appears in the record, however, Finch may have purchased from Summit at his own risk. Complainant, certainly, has furnished no evidence as to the terms of sale to show the contrary, nor has he explained what the legal basis for Brauer's liability would be. In short, there is nothing in this record or Brauer's testimony to indicate that Mr. Brauer was not giving his honest recollection of what may have happened to some of the waste oil sampled by the EPA.

It is, of course, true that Brauer did not unequivocally state that waste oil was in fact withdrawn from his tanks and only gave rough estimates of the quantities that he was likely to have used or given away. If the testimony is subject to several different inferences, however, all of which appear to be equally possible, the consequences must be borne by Complainant and not by Respondent. Complainant's case rests

^{12/} Tr. 128, 153-56. Finch's normal sources of oil were the major oil companies. Tr. 130.

^{13/} Complainant's reply brief at 4.

on its establishing by the preponderance of evidence that Finch's distribution of PCBs violated the PCB rule.^{14/} Finch being the only purchaser from Summit does make a prima facie case in that the reasonable inference to be drawn is that the 700 gallons sampled by the EPA on April 15, were included in the 2,500 gallons purchased by Finch on April 21. The burden which shifts to Finch by the prima facie case, however, is the burden of coming forward with some credible evidence to rebut this inference. The burden of persuasion does not shift merely because Complainant_for its case-in-chief has produced enough evidence to justify a finding in its favor, if the evidence is left unexplained or unrebutted. Once Finch has come forward with rebutting evidence the entire record must be evaluated to determine whether Complainant has established by the preponderance of the evidence that Finch distributed oil containing PCBs at a concentration greater than 50 ppm.^{15/} Here, Brauer's testimony has created too many gaps between the EPA's inspection of Summit on April 15, and Finch's purchase on April 21, to draw the conclusion that Finch had purchased oil containing PCBs in excess of 50 ppm. I find, therefore, that Complainant has not sustained its burden and that the complaint should be dismissed.

^{14/} See 40 CFR 22.24.

^{15/} Complainant argues that it must prevail unless Finch shows that all 700 gallons of waste oil were no longer in the tanks on April 21. Complainant's opening brief at 13-14. This is apparently based on its argument that even if the 2,600 gallons contained less than 50 ppm PCBs, Finch would still be in violation because of the prohibition against dilution, which argument has been rejected. Supra at 6.

ORDER ^{20/}

It is hereby ordered that the complaint in this proceeding be dismissed.



Gerald Harwood
Administrative Law Judge

July 18, 1983

20/ Unless an appeal is taken pursuant to 40 CFR 22.30 or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 CFR 22.27(c).