5/31/88

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of

JENSEN GRAIN COMPANY

Docket No. IF&R VIII 207 C

Federal Insecticide, Fungicide, and Rodenticide Act: §14(a)(2)(K).

Violation of 7 U.S.C. §136j(a)(2)(K), §14(a)(2)(K) of the Act, selling a carbon tetrachloride pesticide for which the registration had been cancelled: the appropriate penalty for one sale of $32, 60 days after the date on which sales were to end, was, under the particular circumstances of this matter, $2500.00

Dana Stotsky, United States Environmental Protection Agency, Region VIII, 999-18th Street, Suite 500, Denver, Colorado, for the complainant;

Steve Jensen, Jensen Grain Company, Plankinton, South Dakota, for the respondent;

Before: J. F. Greene, Administrative Law Judge

Decided May 31, 1988

This matter arises under 7 U.S.C. §136j(a)(2)(K), Section 14(a)(2)(K) of the Federal Insecticide, Rodenticide, and Fungicide Act. Respondent is charged with knowingly selling a carbon tetrachloride pesticide ("Deep Kill") in violation of an order of the U. S. Environmental Protection Agency, which cancelled the registrations of all carbon tetrachloride pesticide products and prohibited sales of any such product after existing stocks were used or after June 30, 1986, whichever occurred first. 1/ A civil penalty of $5000 was requested by complainant pursuant to Section 14(a) of the Act, 7 U.S.C. 136 (a)(1).

Respondent agrees that the sale occurred (on August 30, 1986). The issue presented by the motion for "accellerated decision," therefore, is whether the amount of penalty suggested by the complainant for the violation is appropriate. Respondent states that it believed the stock it had on hand could be sold, and argues further, in mitigation of the proposed penalty, that (1) the sale took place only 60 days after the date on which sales could no longer be made; (2) the sale involved only four gallons, at a total cost to the purchaser of $32; (3) the product was old, and, after it was learned that that the product had not been effective, a credit for the amount of the sale was given to the purchaser. Respondent notes that if the product had been sold on June 30, 1986, but not used until August 30, 1986, there would have been no violation, and finds it difficult to believe that $5000 could be an appropriate penalty for a $32 sale. No argument is made that respondent can not afford the proposed fine, and no

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1/ See 50 Federal Register 42997-42999, October 23, 1985, Intent to Cancel Registations of Pesticide Products Containing Carbon Tetrachloride, Carbon Disulfide, and Ethylene Dichloride. The notice provided, inter alia, that the "(E)xisting stocks may be used until June 30, 1986, or until existing inventories are depleted, whichever is earlier . . . ."

documents tending to support of such an argument have been submitted.

Complainant's position in support of the full $5000 penalty allowed by 7 U.S.C. 136 (a)(1), §14(a)(1) of the Act, is based upon the "knowledge" of the cancellation order that complainant says respondent admits. Respondent, who is representing himself in this matter, admits knowing from a supplier about a "stop sale" for June 30, 1986, but asserts that he believed the product he had on hand could still be sold. Accordingly, four gallons were sold on August 30, 1986, 60 days after the date noticed in the Federal Register for the end of sales. Respondent does not admit knowing he could not sell existing stocks after June 30, 1986. Although complainant is correct in pointing out that the term "knowingly violated" as used in law ordinarily refers to a situation where unlawful conduct is deliberate rather than accidental or inadvertent, and that civil penalties may be imposed where there was "no intent to violate and no awareness of wrongdoing," 2/ here the question is not whether a penalty may or should be imposed but how much penalty is appropriate. "Knowledge" in the context of the EPA's civil penalty policy calculation table (or "matrix") is ordinary knowledge, as its language makes clear: a $5000 penalty is provided for violations where respondents had "Knowledge of the [cancellation] Order," while $1000 is provided for violations where there was "No Knowledge of the Order". This is not the "knowledge" discussed at length in the well known criminal matter described in United States v. Thompson-Hayward Chemical Company, 446 F. 2d 583, (8th Cir. 1971), relied upon by complainant. In that case, the defendant had

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2/ Complainant's brief supporting the motion for accellerated decision, page 5.

3/ The penalty policy is set out at 39 Federal Register 27717, July 31, 1974.

been convicted of knowingly violating Interstate Commerce Commission regulations relating to the preparation of shipping papers and requiring the use of an exterior warning placard on shipments of battery acid. The parties stipulated most of the facts. The court noted that

> [Defendant] through its officers and employees were aware of the regulations in question, knew that they had the duty to placard the truck and prepare the shipping documents accordingly and acknowledged that this had not been done in this case. The driver of the truck contained battery acid, knew that he was required to placard the truck and that he had on previous occasions applied the placard under similar circumstances. The warehouse superintendent who was charged with supervising shipping and loading procedures knew of the regulation relating to the shippng documents, knew that [defendant] was required to describe the battery acid thereon as "Battery Electrolyte", and acknowledged that on this occasion the proper description was not used.
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> The only issue in dispute at trial was whether [defendant's] failure to comply with the regulations was "knowingly" done. Both the truck driver and the warehouse superintendent testified that their failure to placard the truck and properly prepare the shipping documents resulted from inadvertence or mistake, and that the failures were not intentional or deliberate. Thus it was necessary to decide . . . where these failures were "knowingly" done. 4/

The court concluded that "[none] of the . . . cases cited by either party deal directly with the question presented here involving a defendant who knows of the regulation, knows the shipment he is carrying requires him to act, but who claims he unintentionally neglected to comply. We are satisfied that if this case had been tried to the court without a jury, the evidence was sufficient to sustain a conviction." 5/

It is concluded that, while respondent had heard about a "stop sale" for

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4/ The statute under which defendant was charged provided that "(W)hoever knowingly violates any such regulation shall be fined not more than $1000 . . . . "

5/ 446 F. 2d at 585.

June 30, 1986, he did not know he could not sell existing supplies after that date. Since provisions for sales of existing stocks -- sometimes extensive and complex provisions -- are commonly made in EPA pesticide registration cancellation orders and notices, it is concluded further that there may have been confusion over these existing stocks provisions, clear though they may be when read in the Federal Register notice.

Nevertheless, it is troubling that respondent did not check further, having heard about a "stop sale" date, and relied solely upon his supplier. It is understandable that in the press of business reliance may have been misplaced on a supplier, but, in connection with a registration cancellation, a more extensive effort was called for. It is crucial to the pesticide regulatory schema and to the public interest that careful attention be paid to cancellation orders, including existing stocks provisions. Therefore, because the sale was only four gallons, for which respondent charged $32 -- hardly an amount to provide much incentive to violate a cancellation order, -- and because of confusing or erronous information gained from a supplier, it is concluded that $2500 -- not $5000 and not $1000 -- is an appropriate civil penalty for the violation found herein. This determination is based upon the particular facts here, and has no application to other matters where the facts may appear to be similar.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a "person" within the meaning of 7 U.S.C. 136(s), §2(s) of the Act, and is subject to regulation.

Respondent is and at all relevant times has been owner or operator of the Jensen Grain Company facility.

On August 30, 1986, respondent sold four gallons of "Deep Kill," a carbon tetrachloride pesticide, sales of which were prohibited after June 30, 1986.

Respondent violated §12(a)(2)(K) of the Act, 7 U.S.C. 136j(a)(2)(K), by making the August 30, 1986, sale, and is therefore liable for a civil penalty pursuant to 7 U.S.C. 136 (a)(1), §14(a)(1) of the Act.

It has not been established that respondent knew it was unlawful to sell existing stocks of "Deep Kill" after June 30, 1986. Consequently, it is found that respondent was unaware of the provisions of the cancellation order and should not be assessed the full $5000 penalty for "knowledge of the order," as provided by the EPA penalty policy "matrix".

A civil penalty of $2500 is reasonable and appropriate for this violation, taking into account the various circumstances set out above, including the amount of the sale, and the lack of knowledge about of existing stocks provisions of the cancellation order, and the obligation to inquire further that respondent had, since he knew there was a "stop sale". 6/

ORDER

A civil penalty of $2500 is hereby assessed against respondent for the

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6/ No weight is given to the alleged State violation mentioned by complainant since no copy of the material in question was provided.

violation found herein. Payment of $2500 shall be made within sixty (60) days of the date of service of this order by submitting a certified or cashier's check payable to the Environmental Protection Agency, and sent to the United States Environmental Protection Agency, Region VIII (Regional Hearing Clerk), Post Office Box 360859M, Pittsburgh, Pennsylvania 15251.

J. F. Greene
Administrative Law Judge

May 31, 1988
Washington, D. C.

Note: Any motion to reopen the hearing to take further evidence must be made no later than twenty (20) days after service of this decision on the parties, and shall state (1) the specific grounds upon which relief is sought; (2) briefly the nature and purpose of the evidence to be adduced; and must show (3) that such evidence is not cumulative, and (4) good cause why such evidence was not adduced prevously. The motion shall be made to the presiding judge and filed with with the regional hearing clerk. 40 CFR §22.28.

Any party may appeal from this decision by filing a notice of appeal and an accompanying appellate brief with the Hearing Clerk and upon all other parties within twenty (20) days after the decision is served upon the parties. The notice of appeal shall set forth alternative findings of fact, alternative conclusions regarding issues of law or discretion, and a proposed order together with relevant references to the record and the decision. The appellant's brief shall contain a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presneted for review, argument on the issues presented, and a short conclusion stating the precise relief sought, together with appropriate reverences to the record. 40 CFR §22.30(a).

This initial decision will become the final order of the Administrator of U. S. EPA within forty-five (45) days after its service upon the parties unless an appeal is taken by a party or unless the Administrator elects to review the decision sua sponte. 40 CFR §22.27(c).