ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In Re	)	I.F. & R. Docket No. VI-13C
	)	
Chemscope Corporation,	)	
	)	
Respondent	)	

INITIAL DECISION

of
Frederick W. Denniston
Administrative Law Judge

By complaint, dated November 26, 1973, the Director, Enforcement Division, Environmental Protection Agency, Region VI (Complainant), alleged that Chemscope Corporation (Chemscope) violated the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (86 Stat. 973, 7 U.S.C. 135) (FIFRA), by shipping the product "Garbage Can Spray & Deodorizer", an unregistered pesticide, from Dallas, Texas to Fayetteville, N.C., on or about July 6, 1973. By answer, dated December 15, 1973, Chemscope contended the product in question was properly registered but that it had been improperly labeled through error.

Hearing was held on October 8 and 11, 1974 in Dallas, Texas. Chemscope was represented by William Woodburn of Dallas, Texas and Complainant by Harless Benthul and Stan Curry, also of Dallas.

Findings of Fact

1. Respondent, Chemscope Corporation (Chemscope), of Dallas, Texas, is engaged in the manufacturer, sale and distribution of chemical products, including pesticides, and has 45 products registered with EPA under FIFRA. It, or a preceding partnership, has been in business for over 9 years.

2. On March 7, 1973 Cape Fear Janitorial Supplies Company of Fayetteville, North Carolina, by its Order No. 2984, ordered several products including, so far as here pertinent, "Private Label - 6/1 gal. Garb Spray."

3. An employee of Chemscope thereafter prepared an order form for truck shipment of the Cape Fear order, including "6-gal-3470L - Garbage Can Spray & Deodorizer - Chemscope." The shipment was made on July 6, 1973, on an invoice No. 12654, covering "6 gal. - Garbage Can Spray & Deodorizer."

4. On July 12, 1974, one day after the arrival of the shipment to Cape Fear, an EPA Inspector surveyed the Cape Fear establishment and obtained a one-gallon container from the shipment, herein called "sample", which bore an unregistered label. A Collection Report No. 886126 was prepared and ultimately this proceeding was instituted.

5. The sample label designated the product as "Garbage Can Spray & Deodorizer," with an ingredients statement as follows:

"0,0 -diethyl 0 -(2-isopropyl-4-methyl-6-pyrimidinyl) phosphorothioate* .500% Pyrethrins .050%. Technical Piperonyl Butoxide** .100% N-octyl Bicycloheptene Dicarboximide .167%. Petroleum Distillate 99.183%

*Known as Diazinon

**Equivalent to .080% (Butylcarbityl) (6-Propylpiperonyl) Ether and .020% of related compounds."

The labeling also stated "This product is a blend of deodorizing compounds and insecticides designed for the complete maintenance and cleaning of garbage cans and refuse storage areas . . ." In the directions for use it was stated, in part, "For insect infested areas, daily application may be necessary." Cautionary statements were included, but there was no identification of the manufacturer or distributor and no EPA registration number.

6. The record is undisputed that Respondent made the shipment in question with unregistered labels containing insecticide claims and directions for use, in violation of Section 3(a)(1) of FIFRA [7 U.S.C. 135a(a)(1)].[1/] The record does not disclose the exact nature of the contents of the sample and shipment, although Respondent's witness, Alan B. Hesker, assumed it was Chemscope's "Diazinon 500," a registered insecticide, hereinafter discussed, and Respondent so contended in its answer to the complaint.

1/ Pursuant to Section 4 of the Federal Environmental Pesticide Control Act of 1972 (86 Stat. 973), the registration provisions of the prior Act are still in effect.

7. Respondent contends the shipment in question was the result of mistake and has not been repeated. The mistake, in fact a series of mistakes, involved Chemscope's "Diazinon 500", a registered insecticide,[2/] and its "Garbage Can Spray & Deodorizer", an unregistered product.[3/]

8. Respondent had no copy of the original order by Cape Fear but a copy of the order in the files of the latter discloses the order of March 7, 1973 was for "6/1 gal. Garb Spray" as well as for items not here in issue; also included was a notation "Private Label." An employee of Chemscope transcribed this onto the order form previously noted as "6/1 GAL. Garbage Can Spray & Deodorizer" and added as"formula number -3470L." In addition, under "Label Design & Color" was noted "Chemscope."

9. In its card file of formulas, Respondent maintained two bearing the designation 3470L, for unexplained reasons, and apparently this was due to error. One was for its product "Garbage Can Spray & Deodorizer" a product which Respondent states is not required to be registered, and which according to the formula, contains oil of lemongrass, and IPA, among its active ingredients. The other is for "ATCO Garb Spray" which contains "Diazinon 4-S and Concentrate #1" and is

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2/ Dizainon is 0.0-diethyl 0-(2-isopropyl-4-methyl-6-pyrimidinyl) phosphorothioate.

3/ For purposes of this decision, it is assumed but not decided that Respondent's assertion that the product does not require registration, is correct.

registered as a supplementary registration under Chemscope Diazinon 500, EPA Registration No. 9143-22, with Atco Manufacturing Co. as the distributor.

10. A Chemscope employee, Alan B. Hesker, with the Company since February 1972, and now in charge of all labeling or graphic arts section, was a trainee in the labeling function under supervision of its then head of labeling, in the Spring of 1973, when the Cape Fear order was received. Working from the transcription of the order referred to in Paragraph 8 above, Hesker prepared a new "private" label for the Cape Fear shipment. His reason for doing so was not explained of record, since the order he worked from specified "Chemscope" label, which was already in existence and no identification of either Cape Fear or Chemscope was placed on the new label.

11. In constructing the new label, Hesker combined parts of the registered label of Chemscope's "Diazinon 500" and of the unregistered label of its "Chemscope Garbage Can Spray & Deodorizer." Thus, he used essentially the label of the latter product; added the ingredient statement of "Diazinon 500" (but not its EPA registration number); changed the description of the Garbage Can Spray from "This product is a blend of deodorizing compounds and cleaners . . ." to "This product is a blend of deodorizing compounds and insecticides" (underscoring supplied) and added a caution from the "Diazinon 500"

label: "Residual Type - Do not use as a space spray for effective control repeat as necessary." The name and address of Chemscope, which appeared on both the unregistered "Garbage Can Spray Deodorizer" and on "Diazinon 500", were removed, but, as noted, Cape Fear was not substituted in its place.

12. Hesker explained his actions as being because the customer specified the product Diazinon which he wanted as a Garbage Can Spray & Deodorizer even though the Cape Fear order did not confirm this assertion. The transcribed order had had the addition of formula 3470L added to it. But the formula of that number for Garbage Can Spray & Deodorizer was for a wholly different product containing no diazinon and the inexplicable duplicating number which did contain diazinon was a supplementary registration only for ATCO, and on its face was only for 55 gallon drums which were not involved in the Cape Fear order.

13. Chemscope labeling activities at the time of the Cape Fear order were under the supervision of Joseph Hutchinson, a partner and co-owner of Respondent, and continued until nearly the time of shipment 4 months later when Clifford Duke, the principal owner, exercized a buy-out agreement.

Conclusions

That a shipment was made in violation of the registration provisions of FIFRA is beyond question. The only question is whether the "mistake" claimed by Respondent should operate in bar of a penalty, and, if not, the appropriate amount of the penalty.

While the "mistake" in some circumstances might be accepted, here is an exceptional series of mistakes and unjustified assumptions by an employee just learning his duties, and apparently devoid of any supervision by responsible management of the company. It is self evident that to accept such as justification would be virtually to destroy the possibility of effective enforcement. In this case Respondent has approximately 45 registered products and had made a number of supplementary registrations. There has been correspondence between Chemscope and EPA or its predecessor USDA, since at least August 1970 on various aspects of registration. Respondent is fully knowledgeable as to FIFRA and EPA procedures for registrations and supplemental registrations. The attempts to put the blame on an unsupervised, inexperienced employee therefore merits neither condonation nor mitigation; nor does it exemplify "good faith" as contended by Chemscope.

Proposed Penalty: Chemscope contends the assessment proposed by the complaint of $2,800.00 is grossly out of proportion and that its

payment would have an adverse effect on its business, which it contends is insolvent.

Dealing with the latter issue first, the claim is unfounded. Its claimed insolvency is based on its accountant's statement indicating a net worth deficit of $2,761.35 as of June 30, 1973. This resulted from a "one-shot" transaction by which Clifford R. Duke exercised the right to buy out the other corporate owner Joseph Hutchinson, but instead of himself purchasing it, had the corporation do so as treasury stock, utilizing the corporate funds. The accounting report contained a note with respect to this transaction that included the statement: "In the opinion of management net income at the date of issue of report has increased retained earnings in an amount in excess of the impairment [of stated capital caused by the stock purchase] at statement date [September 18, 1973]." More significantly, while the 1974 annual report had been completed it was not offered in evidence nor were the results disclosed. Hence, the claim that Chemscope is insolvent must be rejected.

The next question is as to the amount of gross sales per year, as this is a factor in the determination under the guidelines adopted for purposes of uniformity. Sales of $1,000,000.00 or more are classified as Category III under those guidelines. Based on a Dun & 8radstreet report, which was its only specific information available to complainant. Chemscope had reported sales well beyond the $1,000,000.00 mark. Respondent took violent exception to such use of a Dun & Bradstreet report, even

though Chemscope itself obtains such reports on its own customers. Such reports are commonly used for such purposes and, lacking better data, would be acceptable evidence of financial information. Where, as here however, independently audited data is supplied, a more reliable source is provided and should take precedence.

The Certified Public Accountant who audits Chemscope supplied a letter dated December 6, 1973, stating that sales for the twelve months ending June 30, 1973 were $995,027.56, even though the audited annual statement that period indicated sales of $1,017,407.82. According to the CPA, the larger figure included freight charges billed to customers in the amount of $17,012.70, which in his opinion should be excluded from the sales figure; he also removed an amount of $5,377.56 from the sales figure as representing inter-company sales to Container Supply Incorporated, of which Clifford R. Duke is President and Jimmy Burns is Vice-President. Both are also employees of Chemscope. Container Supply, however, does not distribute any Chemscope products, and it does not appear in either the assets and liabilities or operating statements of Chemscope, nor does the record indicate any legitimate basis for excluding sales to Container Supply from the Chemscope statement. As the expenses associated with the sales of $5,377.56, amounted to $7,580.00, they are made at a substantial loss. Absent better justification, no valid reason appears to justify the exclusion of the Container Supply sales from Chemscope revenues. It is important to note moreover, that the CPA, while recommending the exclusion of the freight charges and Container Supply sales

from the 1973 sales figures, was unable to state whether this had been done for the 1974 figures which had already been audited. But even the exclusion of the so-called "inter company" sales reduces the figure only marginally below the $1,000,000.00 figure for Category III; nevertheless, as noted below, Respondent will be treated as in Category II.

The financial data fails to demonstrate that the payment of an assessment as much as $2,800.00 would affect Chemscope's ability to continue in business, even based on the 1973 data, but especially in the absence of the 1974 data which was available but was undisclosed. Its effect would, of course, be adverse but would not threaten continued operation.

Complainant determined the proposed penalty by classifying the offense as a Registration Violation, for non-registration with "Knowledge/no application submitted" which the schedule proposes for a Category III company, an amount of $2,800-3,200. Complainant selected the minimum of this range. For a Category II company, this amount would have been $1,900-2,300.

Merged into the construction of the schedule of penalties and reflected therein are the statutory elements of Section 14 of the Act, i.e., size of business, the ability to continue in business, and the gravity of the violation. Gravity consists of two elements, that of harm and of misconduct. Compare Amvac Chemical Corporation, I. F. & R.

Docket No. IX-4C.[4/] The potential harm to the public in this instance is non-existent, as the incorrect label reproduced not only the precautionary statements of the registered label for Diazinon 500, but an additional one.

As to gravity of misconduct, a different situation is presented. The distribution of products containing hazardous substances with improper or unregistered labels possesses the potential for great harm. Respondent's misconduct here must be gauged against the fact that it is a substantial organization, long experienced and knowledgeable in registration procedures. Yet it placed full responsibility for ensuring proper labeling in the hands of an inexperienced employee, without supervision. While Respondent acknowledges it cannot disclaim responsibility for its employees' actions, it in effect urges that the incident be considered "Mr. Hesker's unauthorized actions." The ultimate argument that the incident is of a "relatively minor nature" bespeaks a callous attitude toward the Act and justifies a substantial penalty.

In order to avoid further contention as to the measurement of the sales of Respondent for purposes of applying the penalty schedule, in spite of the considerations stated above, Respondent will be considered to be in Category II, but rather than selecting the bottom of the range

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[4/] Initial Decision July 11, 1974; adopted by Final Order of October 31, 1974.

specified, the facts here justify imposition of the maximum. Therefore, in the exercize of the discretion vested by 40 CFR 168.46 (b) of the Rules, the penalty will be fixed at $2,300.00.

PROPOSED FINAL ORDER[5/]

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [86 Stat. 973; 7 U.S.C. 136 l(a)], a civil penalty of $2,300.00 is hereby assessed against Respondent Chemscope Corporation.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America in such amount.

Frederick W. Denniston
Frederick W. Denniston
Administrative Law Judge

June 20, 1975

5/ Unless appeal is taken by the filing of exceptions pursuant to section 168.51 of the Rules (40 CFR 168.51), or the Regional Administrator elects to review this decision on his own motion, the order may become the final order of the Regional Administrator [See 40 CFR 168.46(c)].