UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Before the Regional Administrator

In the Matter of	)	
	)	
Sanico,	)	
	)	
	)	I. F. & R. Docket No. IX-234C
	)	
Respondent	)	
	)	
	)	

William Wick, Esq., Enforcement Division, Region IX, 215 Fremont Street, San Francisco, California 94105, for the Environmental Protection Agency; and Carita Reynolds, Paralegal Assistant, Enforcement Division, Region IX, 215 Fremont Street, San Francisco, California, for the Environmental Protection Agency, Complainant.

Leo S. Shephard, Esq., Suite 614 East Tower, 9100 Wilshire Boulevard, Beverly Hills, California 90212, for the Respondent.

(Decided October 24, 1979)

Before: J. F. Greene, Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arises under 7 U.S.C. § 136, et seq., the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereafter "the Act"), and regulations issued pursuant to authority contained therein, 40 C.F.R. § 168.01 et seq. In this civil action, the Environmental Protection Agency, the complainant herein, seeks assessment of civil penalties against the respondent, pursuant to 7 U.S.C. 136 l(a), § 14(a) of the Act, for certain alleged violations of the Act.

The complaint alleges that on or about August 16, 1978 the respondent held for sale or distribution in violation of § 12(a)(1)(E) of the Act, 7 U.S.C. § 136 j(a)(1)(E), the pesticide TW-30, which was misbranded as that

term is defined in 7 U.S.C. § 136(q), in two respects 1/ and was adulterated, as that term is defined in § 2(c)(1) of the Act, 7 U.S.C. § 136(c)(1), in violation of 7 U.S.C. § 136 j(a)(1)(E). A total civil penalty of $2400.00 was proposed by the agency for the adulteration charge ($1800.00) and one misbranding charge ($600.00). The respondent's answer denied that the product inspected and tested by the government had been held for sale or distribution, and indicated that the product was "not yet fully manufactured." In a subsequent expansion of its answer, the respondent contested the appropriateness of the amount proposed as a civil penalty. The principal issues presented for decision are whether the product was in fact being held for sale or distribution, and, if a violation of the Act is found, the appropriateness of the amount proposed by the government as a civil penalty.

The record shows that when the government inspector arrived at the respondent's Honolulu place of business and said he wanted to see and sample products that were being "held for sale," 2/ he was taken to the warehouse area by the respondent's Director of Operations 3/ and introduced to the warehouse manager, who showed the inspector cartons of TW-30 packed in labelled gallon bottles, six bottles in one plastic bag per labelled carton. 4/ The warehouse manager, also described in the testimony as being in charge of mixing the water-based chemicals that the respondent sells in Hawaii, 5/ assisted the inspector in taking down a full 6-gallon carton of TW-30 from a storage shelf; the inspector took his sample of the product from one of the bottles in that carton. The Director of Operations (no longer employed by the respondent) testified that he believed this product was ready to be sold, that he knew of no reason why it was not "ready to walk out the door," and that he had received no instructions to the contrary.

1/ It was alleged (1) that the label on the product failed to bear a statement of net weight or measure of content, in violation of 7 U.S.C. § 136 j(a)(1)(E); cf. 7 U.S.C. § 136 (q)(2)(C)(iii); and (2) that the product was found to contain less total chlorides than the label represented, in violation of 7 U.S.C. § 136 j(a)(1)(E); cf. 7 U.S.C. § 136 (q)(1)(A).

2/ TR 16-17

3/ Respondent's official who had overall responsibility for the Honolulu part of the business; the official to whom this official reported was in Los Angeles.

4/ TR 44

5/ This individual was described by the respondent's President as being "in charge of the plant" (i. e. in making the products, TR 64). See also TR 36-39, where the Director of Operations' testimony conforms to that description.

The respondent's evidence and argument on this point consist in large measure of (1) showing that neither its former Director of Operations nor the government inspector could prove that the packaged and labelled product had been sold or released for shipment, and of (2) suggesting that merely because the product was labelled, stored on shelves in the warehouse in shipping containers apparently ready to go, and merely because the two officials in charge thought it was ready to go, all this does not mean the product was in fact ready to go, i. e. was being held for sale or distribution. Respondent further argues that it is possible that the product was not ready to go because mistakes can happen and may be discovered and corrected before the product is sold, particularly where, as here, the product is formulated in the same general area as the warehouse. While it is possible that this is the case, the critical question is whether the product was in fact being held for sale or distribution in its (undiscovered) deficient state.

The weight of the evidence here, in the absence of a specific showing that the product was not waiting to be sold, is with the complainant. On this record, it is sufficient to show, as the complainant has done, (1) that the official in charge of the Hawaii operation and, by inference from his conduct, the warehouse manager, too, believed that the product from which the government's sample was drawn was being held for sale, and (2) that the individual containers were labelled, in plastic bags, in cartons that were also labelled, and were stored on shelves. Further, the former Director of Operations testified that if a purchaser had come to buy TW-30 on August 16, 1979, the stored TW-30 would "absolutely" have been used to make the sale. 6/ Respondent's evidence is insufficient to establish that this product, apparently being held for sale, was not in fact being held for sale; there is no evidence that anything further by way or additions or corrections was contemplated with respect to the stored TW-30, and there has been no showing that the respondent knew that it was deficient and was holding it back for this or any other reason. Further, if the respondent did not know there was a deficiency presumably it saw no reason to withhold the product from sale. The respondent seems to argue, in effect, that a deficiency is not or should not constitute a violation of the Act until the actual time of sale. However, the Act specifically provides otherwise. On the basis of the full record, therefore, it must be held that the TW-30 here in question was being held for sale or distribution.

6/ TR 52. See also In re Associated Chemists, Inc. I.F.R Docket X-17C (1975); In re Chemola Corporation, I.F.R. Docket VI-21C (1975), Notice of Judgment No. 1631, pp. 1114, 1119.

Turning to the appropriateness of the penalty proposed by the complaint, it is noted that the regulations issued pursuant to the Act provide for the consideration of the gravity of the violation, the size of the respondent's business, and the effect of payment of the penalty as proposed on the respondent's ability to continue in business. In connection with the gravity of the violation, numerous factors may be taken into account, including the scale and type of use or anticipated use of the product and evidence of good faith, or lack thereof, in the circumstances, 39 Federal Register July 31, 1974, pp. 27712, 27718.

Despite the respondent's pending suit against former employees in which it alleges severe loss of business 7/ the penalties proposed in the complaint cannot be found to be great enough to affect the respondent's ability to continue in business. Taking into account the facts (1) that failure of a product to conform to the strength represented on the label is not a minor violation of the Act, (2) that respondent consented in 1977 to an order which assessed a penalty of $1000.00 for the same violation in connection with another product 8/ and considering (3) the absence of evidence tending to establish that a health hazard might be created by the reduced strength of the product, and (4) that there is no clear evidence of knowledge of a violation or intent to violate the Act 9/, there remains only the question of whether the scale or use of the product might be substantial. The record contains no unit or dollar volume of sales or other evidence as to this; there is only the respondent's testimony that TW-30 was a "slow mover". Therefore, as to the adulteration violation, taking into account particularly the lack of evidence of substantial distribution or use, but being mindful of a previous violation of the Act, it is determined that the penalty proposed should be reduced by $100.00 to $1700.00.

However, in connection with the failure of the respondent's label to carry a net weight statement, 7 U.S.C. §136j(a)(1)(E), 7 U.S.C. §136(q)(2)(c)(iii), the proposed penalty will be reduced somewhat more, in view of the facts that (1) it is a much less serious violation 10/, (2) there is, again, no clear evidence of intent to violate the Act ("good faith"), and (3) taking into account the absence of evidence of substantial sales volume or use. It will be held, under these circumstances, that $200.00 is an appropriate penalty for the failure of the label to bear net weight or statement of contents.

7/ Respondent's Exhibit 1.

8/ I.F.R. Docket IX-165C, In re Sanico, (1977).

9/ Intent, of course, need not be established in an action for the assessment of civil penalties; cf. U.S. v Dotterweich, 320 U.S. 277(1943).

10/ See 39 Federal Register 27718, July 31, 1974.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The respondent Sanico is a corporation organized pursuant to the laws of the State of California, with places of business at 13143 Saticoy Street, North Hollywood, California, and 106 Puuhale Road, Honolulu, Hawaii, and at all relevant times has been engaged in the business of formulating and distributing industrial maintenance and sanitation chemicals, including the water based slimicide TW-30, which has been assigned the Environmental Protection Agency registration number 6190-7. Respondent's gross sales for the year 1978 were in excess of $1,000,000.00 and for the first six months of 1979 were about $400,000.00.

2. On or about August 16, 1979, a sample was taken from a one gallon bottle of the slimicide TW-30, which was being held for sale or distribution in the respondent's warehouse; analysis of the said sample revealed, and it has been stipulated, that the product contained 4.8 percent total chlorides, which is less than the amount represented on the label (9.25 percent) on the bottle from which the sample was removed. Neither did the label on the said bottle bear a net weight or measure of content statement.

3. The failure of the product to contain less total chlorides than represented on the product label constitutes "adulteration" as that term is defined in 7 U.S.C. § 136(c)(1), a violation of 7 U.S.C. § 136j(a)(1)(E) for which a civil penalty may be assessed, 7 U.S.C. § 136 l(a)(1).

4. The failure of the label on the product TW-30 to bear the net weight or measure of content constitutes "misbranding," as the term "misbranded" is defined at 7 U.S.C. § 136(q)(2)(C)(iii), in violation of 7 U.S.C. § 136 j(a)(1)(E), for which a civil penalty may be assessed, 7 U.S.C. § 136 l(a)(1).

5. The assessment of a civil penalty in the amount of $1700.00 for the violation found in paragraph 3 herein is fair and reasonable, taking into account all relevant factors set forth in the applicable regulations; the assessment of a civil penalty in the amount of $200.00 for the violation found in paragraph 4 herein is fair and reasonable, taking into account all relevant factors set forth in applicable regulations.

* * * * * *

FINAL ORDER

Accordingly, it is ORDERED, pursuant to § 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136 l(a)(1), and upon consideration of the above Findings of Fact and Conclusions of Law, and of the entire record herein, after evaluating the gravity of the violations and the appropriateness of the penalty proposed, that the respondent Sanico pay, within sixty (60) days of service upon it of the final order, the amount of $1900.00 as a civil penalty for violations of the said Act by forwarding to the Regional Hearing Clerk a cashier's check or a certified check for the said amount payable to the United States America.

J. F. Greene
Administrative Law Judge

October 24, 1979
Washington, D.C.

Note: This Final Order shall become the final order of the Regional Administrator unless appealed or reviewed as provided by 40 C.F.R. 168.51 of the Rules of Practice.

CERTIFICATE OF SERVICE

This is to certify that on this date a copy of Initial Decision and Order, I.F. & R. Docket No. IX-234C was hand-carried to:

Paul De Falco, Jr.
Regional Administrator, Region IX
U.S. Environmental Protection Agency
215 Fremont Street
San Francisco, California 94105

William D. Wick, Esq.
Air & Hazardous Materials Branch
Enforcement Division
215 Fremont Street
San Francisco, California 94105.

Also, on this date a copy of Initial Decision and Order, I.F. & R. Docket No. IX-234C was mailed to the following addressees:

Sol Herzfeld, President
Sanico
13143 Saticoy Street
North Hollywood, California 91605

Leo S. Shephard, Esq.
Suite 614, East Tower
9100 Wilshire Boulevard
Beverly Hills, California 90212.

Dated: [illegible]

Alfred M. Rosen, Attorney
Office of Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Before the Regional Administrator

In the Matter of)
)
Sanico,)
)
) I. F. & R. Docket No. IX-234C
)
Respondent)
)
)

William Wick, Esq., Enforcement Division, Region IX, 215 Fremont Street, San Francisco, California 94105, for the Environmental Protection Agency; and Carita Reynolds, Paralegal Assistant, Enforcement Division, Region IX, 215 Fremont Street, San Francisco, California, for the Environmental Protection Agency, Complainant.

Leo S. Shephard, Esq., Suite 614 East Tower, 9100 Wilshire Boulevard, Beverly Hills, California 90212, for the Respondent.

(Decided October 24, 1979)

Before: J. F. Greene, Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arises under 7 U.S.C. § 136, et seq., the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereafter "the Act"), and regulations issued pursuant to authority contained therein, 40 C.F.R. § 168.01 et seq. In this civil action, the Environmental Protection Agency, the complainant herein, seeks assessment of civil penalties against the respondent, pursuant to 7 U.S.C. 136 l(a), § 14(a) of the Act, for certain alleged violations of the Act.

The complaint alleges that on or about August 16, 1978 the respondent held for sale or distribution in violation of § 12(a)(1)(E) of the Act, 7 U.S.C. § 136 j(a)(1)(E), the pesticide TW-30, which was misbranded as that

term is defined in 7 U.S.C. § 136(q), in two respects 1/ and was adulterated, as that term is defined in § 2(c)(1) of the Act, 7 U.S.C. § 136(c)(1), in violation of 7 U.S.C. § 136 j(a)(1)(E). A total civil penalty of $2400.00 was proposed by the agency for the adulteration charge ($1800.00) and one misbranding charge ($600.00). The respondent's answer denied that the product inspected and tested by the government had been held for sale or distribution, and indicated that the product was "not yet fully manufactured." In a subsequent expansion of its answer, the respondent contested the appropriateness of the amount proposed as a civil penalty. The principal issues presented for decision are whether the product was in fact being held for sale or distribution, and, if a violation of the Act is found, the appropriateness of the amount proposed by the government as a civil penalty.

The record shows that when the government inspector arrived at the respondent's Honolulu place of business and said he wanted to see and sample products that were being "held for sale," 2/ he was taken to the warehouse area by the respondent's Director of Operations 3/ and introduced to the warehouse manager, who showed the inspector cartons of TW-30 packed in labelled gallon bottles, six bottles in one plastic bag per labelled carton. 4/ The warehouse manager, also described in the testimony as being in charge of mixing the water-based chemicals that the respondent sells in Hawaii, 5/ assisted the inspector in taking down a full 6-gallon carton of TW-30 from a storage shelf; the inspector took his sample of the product from one of the bottles in that carton. The Director of Operations (no longer employed by the respondent) testified that he believed this product was ready to be sold, that he knew of no reason why it was not "ready to walk out the door," and that he had received no instructions to the contrary.

1/ It was alleged (1) that the label on the product failed to bear a statement of net weight or measure of content, in violation of 7 U.S.C. § 136 j(a)(1)(E); cf. 7 U.S.C. § 136 (q)(2)(C)(iii); and (2) that the product was found to contain less total chlorides than the label represented, in violation of 7 U.S.C. § 136 j(a)(1)(E); cf. 7 U.S.C. § 136 (q)(1)(A).

2/ TR 16-17

3/ Respondent's official who had overall responsibility for the Honolulu part of the business; the official to whom this official reported was in Los Angeles.

4/ TR 44

5/ This individual was described by the respondent's President as being "in charge of the plant" (i. e. in making the products, TR 64). See also TR 36-39, where the Director of Operations' testimony conforms to that description.

The respondent's evidence and argument on this point consist in large measure of (1) showing that neither its former Director of Operations nor the government inspector could prove that the packaged and labelled product had been sold or released for shipment, and of (2) suggesting that merely because the product was labelled, stored on shelves in the warehouse in shipping containers apparently ready to go, and merely because the two officials in charge thought it was ready to go, all this does not mean the product was in fact ready to go, i. e. was being held for sale or distribution. Respondent further argues that it is possible that the product was not ready to go because mistakes can happen and may be discovered and corrected before the product is sold, particularly where, as here, the product is formulated in the same general area as the warehouse. While it is possible that this is the case, the critical question is whether the product was in fact being held for sale or distribution in its (undiscovered) deficient state.

The weight of the evidence here, in the absence of a specific showing that the product was not waiting to be sold, is with the complainant. On this record, it is sufficient to show, as the complainant has done, (1) that the official in charge of the Hawaii operation and, by inference from his conduct, the warehouse manager, too, believed that the product from which the government's sample was drawn was being held for sale, and (2) that the individual containers were labelled, in plastic bags, in cartons that were also labelled, and were stored on shelves. Further, the former Director of Operations testified that if a purchaser had come to buy TW-30 on August 16, 1979, the stored TW-30 would "absolutely" have been used to make the sale. 6/ Respondent's evidence is insufficient to establish that this product, apparently being held for sale, was not in fact being held for sale; there is no evidence that anything further by way or additions or corrections was contemplated with respect to the stored TW-30, and there has been no showing that the respondent knew that it was deficient and was holding it back for this or any other reason. Further, if the respondent did not know there was a deficiency presumably it saw no reason to withhold the product from sale. The respondent seems to argue, in effect, that a deficiency is not or should not constitute a violation of the Act until the actual time of sale. However, the Act specifically provides otherwise. On the basis of the full record, therefore, it must be held that the TW-30 here in question was being held for sale or distribution.

6/ TR 52. See also In re Associated Chemists, Inc. I.F.R Docket X-17C (1975); In re Chemola Corporation, I.F.R. Docket VI-21C (1975), Notice of Judgment No. 1631, pp. 1114, 1119.

Turning to the appropriateness of the penalty proposed by the complaint, it is noted that the regulations issued pursuant to the Act provide for the consideration of the gravity of the violation, the size of the respondent's business, and the effect of payment of the penalty as proposed on the respondent's ability to continue in business. In connection with the gravity of the violation, numerous factors may be taken into account, including the scale and type of use or anticipated use of the product and evidence of good faith, or lack thereof, in the circumstances, 39 Federal Register July 31, 1974, pp. 27712, 27718.

Despite the respondent's pending suit against former employees in which it alleges severe loss of business 7/ the penalties proposed in the complaint cannot be found to be great enough to affect the respondent's ability to continue in business. Taking into account the facts (1) that failure of a product to conform to the strength represented on the label is not a minor violation of the Act, (2) that respondent consented in 1977 to an order which assessed a penalty of $1000.00 for the same violation in connection with another product 8/ and considering (3) the absence of evidence tending to establish that a health hazard might be created by the reduced strength of the product, and (4) that there is no clear evidence of knowledge of a violation or intent to violate the Act 9/, there remains only the question of whether the scale or use of the product might be substantial. The record contains no unit or dollar volume of sales or other evidence as to this; there is only the respondent's testimony that TW-30 was a "slow mover". Therefore, as to the adulteration violation, taking into account particularly the lack of evidence of substantial distribution or use, but being mindful of a previous violation of the Act, it is determined that the penalty proposed should be reduced by $100.00 to $1700.00.

However, in connection with the failure of the respondent's label to carry a net weight statement, 7 U.S.C. §136j(a)(1)(E), 7 U.S.C. §136(q)(2)(c)(iii), the proposed penalty will be reduced somewhat more, in view of the facts that (1) it is a much less serious violation 10/, (2) there is, again, no clear evidence of intent to violate the Act ("good faith"), and (3) taking into account the absence of evidence of substantial sales volume or use. It will be held, under these circumstances, that $200.00 is an appropriate penalty for the failure of the label to bear net weight or statement of contents.

7/ Respondent's Exhibit 1.

8/ I.F.R. Docket IX-165C, In re Sanico, (1977).

9/ Intent, of course, need not be established in an action for the assessment of civil penalties; cf. U.S. v Dotterweich, 320 U.S. 277(1943).

10/ See 39 Federal Register 27718, July 31, 1974.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The respondent Sanico is a corporation organized pursuant to the laws of the State of California, with places of business at 13143 Saticoy Street, North Hollywood, California, and 106 Puuhale Road, Honolulu, Hawaii, and at all relevant times has been engaged in the business of formulating and distributing industrial maintenance and sanitation chemicals, including the water based slimicide TW-30, which has been assigned the Environmental Protection Agency registration number 6190-7. Respondent's gross sales for the year 1978 were in excess of $1,000,000.00 and for the first six months of 1979 were about $400,000.00.

2. On or about August 16, 1979, a sample was taken from a one gallon bottle of the slimicide TW-30, which was being held for sale or distribution in the respondent's warehouse; analysis of the said sample revealed, and it has been stipulated, that the product contained 4.8 percent total chlorides, which is less than the amount represented on the label (9.25 percent) on the bottle from which the sample was removed. Neither did the label on the said bottle bear a net weight or measure of content statement.

3. The failure of the product to contain less total chlorides than represented on the product label constitutes "adulteration" as that term is defined in 7 U.S.C. § 136(c)(1), a violation of 7 U.S.C. § 136j(a)(1)(E) for which a civil penalty may be assessed, 7 U.S.C. § 136 l(a)(1).

4. The failure of the label on the product TW-30 to bear the net weight or measure of content constitutes "misbranding," as the term "misbranded" is defined at 7 U.S.C. § 136(q)(2)(C)(iii), in violation of 7 U.S.C. § 136 j(a)(1)(E), for which a civil penalty may be assessed, 7 U.S.C. § 136 l(a)(1).

5. The assessment of a civil penalty in the amount of $1700.00 for the violation found in paragraph 3 herein is fair and reasonable, taking into account all relevant factors set forth in the applicable regulations; the assessment of a civil penalty in the amount of $200.00 for the violation found in paragraph 4 herein is fair and reasonable, taking into account all relevant factors set forth in applicable regulations.

* * * * * *

FINAL ORDER

Accordingly, it is ORDERED, pursuant to § 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136 l(a)(1), and upon consideration of the above Findings of Fact and Conclusions of Law, and of the entire record herein, after evaluating the gravity of the violations and the appropriateness of the penalty proposed, that the respondent Sanico pay, within sixty (60) days of service upon it of the final order, the amount of $1900.00 as a civil penalty for violations of the said Act by forwarding to the Regional Hearing Clerk a cashier's check or a certified check for the said amount payable to the United States America.

J. F. Greene
Administrative Law Judge

October 24, 1979
Washington, D.C.

Note: This Final Order shall become the final order of the Regional Administrator unless appealed or reviewed as provided by 40 C.F.R. 168.51 of the Rules of Practice.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Before the Regional Administrator

In the Matter of	)	
	)	
Sanico	)	
	)	
	)	I. F. & R. Docket No. IX-234C
Respondent	)	
	)	
	)	
	)	

ERRATA SHEET

Finding 3 of the Findings of Fact and Conclusions of Law in the Decision and Order issued October 24, 1979, in this matter should read as follows:

3. The Failure of the product to conform to the strength of total chlorides represented on the product label constitutes "adulteration" as that term is defined in 7 U.S.C. Sec. 136(c)(1), a violation of 7 U.S.C. Sec. 136j(a)(1)(E) for which a civil penalty may be assessed, 7 U.S.C. Sec. 136 l(a)(1).

It is so ordered.

J. F. Greene
Administrative Law Judge

October 31, 1979
Washington, D.C.