5/7/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Ray Birnbaum Scrap Yard,	)	**Docket No. TSCA-PCB-VIII-91-01**
	)	
Respondent	)	

Toxic Substance Control Act - PCB Penalty Policy - Ability to Pay - Evidence

Evidence held to sustain Respondent's contention that he had the ability to pay only a small percentage of penalty proposed by Complainant for violations of the Act.

Appearance for Complainant:

Charles L. Figur, Esq.
Office of Regional Counsel
U.S. EPA, Region VIII
Denver, CO

Appearance for Respondent:

Steven J. Lies, Esq.
Lies, Bullis & Grosz
Attorneys at Law
Wahpeton, ND

INITIAL DECISION

This is a civil penalty proceeding under section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615. The proceeding was commenced by a complaint signed by the Director, Air and Toxics Division, U.S. EPA, Region VIII, on December 28, 1990, charging Respondent, Ray Birnbaum Scrap Yard (Birnbaum) with violations of TSCA and EPA regulations relating to the use,

storage, disposal and marking of polychlorinated biphenyls (PCBs), 40 C.F.R. Part 761.

The complaint alleged (Count I) that Birnbaum had failed to properly mark a 2,000 gallon aboveground tank (the Tank) containing 426 gallons of fluid with a PCB concentration of greater than five hundred parts per million (ppm) in the manner required by 40 C.F.R. § 761.40; Count II, that the Tank was leaking and that Birnbaum had failed to dispose of the leaking PCBs in the manner specified by 40 C.F.R. § 761.60. Counts III and IV alleged that Birnbaum had failed to comply with the requirements of 40 C.F.R. § 761.65 relating to storage for disposal of PCBs in the tank and of the tank itself. The complaint further alleged (Count V) that Birnbaum failed to properly mark a PCB large high voltage capacitor (Large Capacitor) containing approximately 1.1 gallons of Inerteen, a trade name for PCB dielectric fluid, as required by 40 C.F.R. § 761.40(a)(3). The large capacitor was allegedly removed from use on the date of inspection.

Additionally, the complaint alleged (Count VI) that Birnbaum had failed to conduct tests for PCB concentrations and to dispose of 51 transformers ("the 51 transformers") as required by 40 C.F.R. § 761.60; Count VII, that Birnbaum failed to meet any of the requirements of 40 C.F.R. § 761.65 regarding storage for disposal for four transformers ("the Four Transformers") containing more than 20 gallons of PCB fluid each; Count VIII, that one of the Four Transformers was leaking PCBs which were not disposed of as required by 40 C.F.R. § 761.60; and Count IX, that Birnbaum failed

to properly make and keep records of PCB disposal activities as required by 40 C.F.R. § 761.180(a). Each of the above allegations was said to constitute a violation of section 15 of TSCA, 15 U.S.C. § 2614 (TSCA section 15). Based on the above allegations, Complainant proposed to assess Respondent a penalty of $111,000.

On January 22, 1991, Birnbaum filed an answer admitting that the "Tank" was not marked in compliance with regulations, admitting its failure to properly make and keep records as required by 40 C.F.R. 761.180(a), asserting that Counts III and IV were duplicative and essentially denying all other violations alleged in the complaint. Birnbaum contested the proposed penalty as being excessive, duplicative, unreasonable, and unfair and requested a hearing.

By a letter, dated May 11, 1992, the parties have jointly moved for an accelerated judgment on the issue of liability, leaving only the amount of an appropriate penalty for resolution. Birnbaum admitted Counts I, III, VII and IX, partially denied Count II and denied Counts IV, V, VI and VIII. Complainant agreed that Birnbaum had submitted documentation showing that he had completed actions which remedied all of the alleged violations.

Complainant stipulated to the admission of financial documentation submitted by Birnbaum in a letter, dated May 18, 1992, in support of his claimed inability to pay the proposed penalty. Birnbaum argued that a penalty of $2,000 or less would be fair and appropriate. Under date of May 20, 1992, Complainant proposed a revised penalty of $16,236 in the light of Birnbaum's

financial condition. On June 10, 1992, Complainant filed a response to Birnbaum's brief and argument on the issue of an appropriate penalty, asserting that, while the revised penalty was substantial, it was neither harsh nor unfair and rejected Birnbaum's contention that remedial costs should be considered a mitigating factor.

Based on the record, including the pleadings, stipulations, briefs and arguments of the parties, I make the following:

FINDINGS OF FACT

1. Raymond J. Birnbaum owns and operates Ray Birnbaum Scrap Yard at a facility in or near Hankinson, North Dakota (the Facility). The scrap yard is operated as a sole proprietorship. Ray Birnbaum is a person within the meaning of 40 C.F.R. § 761.3, and is thus subject to the PCB regulation, 40 C.F.R. Part 761.

2. At the time of an inspection of the facility referred to in finding 1, conducted on June 8, 1990, Birnbaum maintained a white, aboveground, 2,000-gallon tank (the Tank) which contained approximately 426 gallons of fluid having a PCB concentration of greater than 500 ppm. The Tank was not marked with the M_L label illustrated in 40 C.F.R. § 761.45.

3. Count II of the complaint alleges that, at the time of the June 8, 1990, inspection, "the Tank" referred to in finding 2 was leaking PCBs having a concentration of greater than 500 ppm onto the tank and into the soil. Although Birnbaum has

denied this allegation in part, particularly the PCB concentration of the fluid, he has acknowledged that the facts admitted are sufficient to subject him to a penalty.

4. At the time of the inspection referred to in the preceding findings, PCBs in "the Tank" were not being stored in accordance with the storage for disposal requirements of 40 C.F.R. § 761.65, which require, inter alia, that PCBs be marked with the date placed in storage and removed from storage and disposed of within one year; that roofing and walls be adequate to prevent rainwater from reaching stored PCBs, that flooring have a minimum six-inch curb and that for PCB containers the size of "the Tank," a Spill Prevention Control and Counter-measure (SPCC) Plan be prepared and implemented.

5. At the time of the inspection on June 8, 1990, "Four Transformers," deemed to have a PCB concentration of between 50 ppm and 500 ppm and, therefore, "PCB contaminated" as defined in 40 C.F.R. § 761.3, were not being stored in accordance with the storage for disposal requirements of 40 C.F.R. § 761.65.

6. At the time of the June 8, 1990, inspection, Birnbaum was not maintaining records on the disposition of PCBs and PCB items as required by 40 C.F.R. § 761.180.

7. Birnbaum has denied the remaining counts of the complaint, Counts IV, V, VI and VIII.

8. Birnbaum has completed actions, including removal of PCB contamination, which remedy the violations alleged in the complaint. The record does not disclose the cost of the remedial work.

9. Raymond Birnbaum's sole and only business is operation of the scrap yard referred to in finding 1. Income is generated by the difference between what he pays for the scrap and the price which he is able to obtain for salvageable metal. He is unable to control either the availability of scrap or the price received for salvageable metal. Salvageable metal is trucked to the Twin Cities, Minneapolis-St. Paul, in Minnesota.

10. Mr. Birnbaum's annual gross sales during the past five years have averaged slightly over $451,300, and gross costs [of goods sold] (purchases) have averaged in excess of $339,300, resulting in an average annual gross profit of approximately $112,000 (Affidavit of Raymond Birnbaum, dated May 16, 1992). Other business costs average approximately $73,000, resulting in a net profit of just over $39,000. From this figure, Mr. Birnbaum must pay Federal taxes of over $8,000, State taxes and personal and living expenses.

11. Mr. Birnbaum is 52 years old at present, and employs no permanent, full-time employees at his scrap yard. In 1989, he broke his neck in a truck accident, limiting his ability to turn his head, and making it unsafe to operate a truck in heavy traffic. Therefore, he must hire part-time employees in

order to deliver salvageable metals to the Twin Cities, a distance of approximately 230 miles.

12. A personal financial statement of Raymond J. Birnbaum, dated April 15, 1992, shows total assets of approximately $133,000, liabilities in excess of $100,000 and a net worth slightly over $32,000. Mr. Birnbaum points out, however, that the statement includes assets such as the homestead jointly owned with his wife Marilyn and that she is not a party to this action (Affidavit at 2). If his wife's half interest in such assets were deducted, his net worth is less than $20,000. Mr. Birnbaum argues that the Agency's practice of basing a penalty upon a percentage of sales is arbitrary as applied to him, because even though gross sales in a particular year may increase, costs and expenses may be such that his net profit actually decreases. He contends that the penalty should not exceed $2,000.

13. An affidavit by Marilyn Birnbaum states that she is the wife of Raymond Birnbaum, Respondent in this action, that the couple have four children, the youngest being 14 years of age, three of whom reside at home and one of whom is in college, and that all of the children receive full or partial support from Respondent. Mrs. Birnbaum further states that she has reviewed Respondent's financial statement attached to his affidavit and that the same is true and correct to her own best knowledge and belief. She asserts that the value of her

half interest in joint property included in said statement is approximately $13,000.

14. Complainant's recalculation of the penalty based on Respondent's claimed inability to pay was based on four percent of Respondent's average gross sales for the years 1987 through 1990 as taken from Schedule C of his Federal income tax returns for those years. (Memorandum, dated May 20, 1992, C's Exh 3). The average thus derived was $405,910 which resulted in a revised penalty calculation of $16,236. This calculation assumed that all of the violations alleged in the complaint have been established.

C O N C L U S I O N S

1. Respondent has admitted the violations alleged in Counts I, III, VII and IX, and sufficient of the allegations in Count II as to support the imposition of a penalty.

2. The stipulation is to the effect that Respondent denies the allegations in Counts IV, V, VI and VIII. Accordingly, these allegations have not been proven and these counts will be dismissed.

3. An appropriate penalty for the violations found herein is the sum of $1,700.

D I S C U S S I O N

The statute contemplates that a penalty for violation of the Act be determined in two steps.[1/] The first step is to consider the "nature, circumstances, extent and gravity" of the violation or violations. This results in a so-called "gravity based penalty" (GBP). The next step is to consider any adjustments to the GBP based on the situation of the violator, i.e., ability to pay, history of prior violations, degree of culpability and such other factors as justice may require.[2/] Applying the foregoing principles here, the "Tank" contained approximately 426 gallons of fluid having a PCB concentration in excess of 500 ppm at the time of inspection. The "Tank" was not marked with the M_L label illustrated in 40 C.F.R. § 761.45 as required by section 761.40. The quantity of PCBs places this non-disposal, marking violation in the "significant extent" category. Because there was no indication or warning to anyone approaching that PCBs were present, the

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[1/] Section 16(a)(2)(B) of the Act (15 U.S.C. § 2615) provides:

> (B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, and history of prior such violations, the degree of culpability, and such other matters as justice may require.

[2/] See, e.g., 3M Company (Minnesota, Mining and Manufacturing), TSCA Appeal No. 90-3, Final Decision (February 28, 1992).

circumstances level of this violation is Level 2 resulting in a GBP of $13,000.

Count II of the complaint alleged that the "Tank" referred to in Count I was leaking at the time of inspection. Although Respondent initially denied that the "Tank" contained PCBs at a concentration in excess of 500 ppm, he has since admitted Count I which specifically alleged the PCB concentration exceeded 500 ppm. Respondent has admitted that a film of oil was present on a "valve of the Tank." Accordingly, his continued denial of portions of Count II is considered to be a denial that PCBs from the "Tank" were leaking into the soil. It is therefore concluded that the disposal violation in Count II is of a "minor extent," involving five gallons or less of PCBs. This results in a Circumstances Level 3 disposal violation and a GBP of $1,500.

The violation alleged and established in Count III is the improper storage for disposal of PCBs in the "Tank." The quantity of PCBs places the extent in the "significant category" and because, it does not appear that a significant portion of the PCBs would be contained in the event of an accident, the Circumstances Level is "major." Accordingly, the GBP for this violation is $17,000.

Count VII involves the improper storage for disposal of four transformers, each containing approximately 20 gallons of PCB fluid. The quantity of PCBs places the extent in the "minor category" and, because it does not appear that a significant portion of the PCBs would be contained in the event of a spill, the

Circumstances Level is "major." This results in a GBP of $5,000. Complainant has indicated, however, that the PCB concentration in these transformers was between 50 ppm and 500 ppm. A concentration adjustment of 30 percent is therefore applicable (Penalty Policy at 8), resulting in a GBP for this violation of $3,500.

Count IX, which Respondent has admitted, alleges the failure to keep records on the disposition of PCBs and PCB items as required by 40 C.F.R. § 761.180(a).[3/] The quantity of PCBs shown here 506 gallons (426 + 80) places the quantity in the "significant extent" category. The Circumstances Level is Level 4, significant recordkeeping, resulting in GBP of $6,000.

The total GBP is thus:

Count I	$13,000
Count II	1,500
Count III	17,000
Count VII	3,500
Count IX	6,000
Total	$41,000

This brings us to the situation regarding the violator or adjustments to the GBP. There is no indication or allegation of prior violations by Respondent and only two adjustment factors warrant discussion here, that is, "ability to pay or to continue in business," which are sometimes considered as one factor, and "attitude of the violator," the latter being considered under the rubric "other factors as justice may require." The Penalty Policy

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[3/] Although § 761.180(a) is not applicable to "commercial storers," Respondent does not appear to meet the definition of such a storer in § 761.3.

states that the Agency does not intend to seek a civil penalty which exceeds the violator's ability to pay and, therefore, to continue in business. In view of Mr. Birnbaum's age, the state of his health due to his neck injury, the uncertainties of his business and his net worth of less than $20,000, which includes his half interest in the residence occupied by himself and his family, there can be little doubt that the penalty of over $16,000 proposed by Complainant, which was calculated based on four percent of average gross sales during the period 1987-1990 inclusive, greatly exceeds Respondent's ability to pay and is simply arbitrary. It is, therefore, concluded that the upper limit of Respondent's ability to pay is $2,000 as Respondent contends.

It should be emphasized that, in accordance with Rule 22.24 of the Consolidated Rules of Practice, Complainant has the burden of establishing the appropriateness of the proposed penalty, which includes some showing of ability to pay. Where, as here, Respondent has shown that he is in severe financial stress or has very limited financial resources and the Agency has not rebutted that showing, a very large reduction in a proposed penalty is appropriate. See, e.g., Kay Dee Veterinary, Division of Kay Dee Feed Company, FIFRA Appeal No. 86-1 (Order, October 27, 1988) (reduction in penalty from $30,000 to $1,200, where respondent demonstrated it was in severe financial stress and Agency failed to rebut that showing). Accordingly, the penalty will be reduced to $2,000, because the evidence shows that sum is the limit of Mr. Birnbaum's ability to pay.

Mr. Birnbaum has completed actions, including removal of PCBs, which remedy the violations herein (finding 8). Accordingly, it is concluded that the "attitude of the violator," which is considered under the rubric "other factors as justice may require" in the statute, entitles him to a 15 percent downward adjustment in the penalty. See the PCB Penalty Policy at 17. The penalty will, therefore, be $1,700. This sum is considered to be appropriate and will be assessed.

O R D E R[4/]

Counts IV, V, VI and VIII of the complaint are dismissed.

It having been determined that Raymond J. Birnbaum, d/b/a Ray Birnbaum Scrap Yard, a sole proprietorship, has violated the Act and applicable regulations as set forth above, a penalty of $1,700 is assessed against him, in accordance with section 16(a) of the Toxic Substances Control Act (15 U.S.C. § 2615(a)). Payment of the penalty shall be made within 60 days of receipt of this order by

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[4/] Unless appealed in accordance with Rule 22.30 (40 C.F.R. Part 22) or unless the Environmental Appeals Board elects sua sponte to review the same as therein provided, this decision will become the final decision of the Environmental Appeals Board in accordance with Rule 22.27(c). See 57 Fed. Reg. 5320 (February 13, 1992).

mailing a cashier's or certified check in the amount of $1,700 payable to the Treasurer of the United States to the following address:

Regional Hearing Clerk
U.S. EPA, Region VIII
P.O. Box 360859M
Pittsburgh, PA 15251

Dated this 7th day of August 1992.

Spencer T. Nissen
Administrative Law Judge