

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Eastern Electric Apparatus

TSCA Docket No. VII-93-T-334

Repair Co., Inc. and  
Westinghouse Electric  
Corporation

Respondents

ORDER ON MOTION TO DISMISS

and

ORDER SCHEDULING HEARING

The Region 7 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a Complaint against the Eastern Electric Apparatus Repair Company, Inc. ("Eastern Electric" or the "Respondent") on March 30, 1993. The Complaint alleged that Eastern Electric improperly disposed of polychlorinated biphenyls ("PCBs") in violation of the Toxic Substances Control Act ("TSCA") §15(l), 15 U.S.C. §2614(l), and 40 CFR §761.60 (a) . Pursuant to an order of the former Administrative Law Judge, the Region filed an Amended Complaint on or about February 24, 1994, that

made the same allegations but added an additional respondent, the Westinghouse Electric Corporation ("Westinghouse" or the "co-Respondent"). In their Answers, the respondents denied the material allegations of the Amended Complaint. Both Respondents raised defenses that in effect blamed each other for any violations.

Eastern Electric conducts an electrical apparatus repair business at an industrial facility in St. Louis, Missouri. Eastern Electric has leased the premises from the owner, Westinghouse, since July 1986. From 1950 to 1986, Westinghouse conducted electrical equipment repair operations at the facility. The Complaint alleges that the Region, during an inspection in November 1992, sampled oil from a sump at the facility. Laboratory analysis found that the oil contained 300 parts per million ("ppm") of PCBs. The regulations require that substances containing PCBs of greater than 50 ppm be disposed of in the prescribed manner, generally in an approved hazardous waste incinerator or chemical waste landfill. 40 CFR §761.60(a).

Eastern Electric filed a Motion for Accelerated Decision and/or Motion to Dismiss on March 22, 1995. Westinghouse filed a response in opposition to that motion on April 5, 1995. Further proceedings were suspended for a time due to a tentative settlement in principle among the parties that finally was not consummated. The Complainant then filed its response in opposition to Eastern Electric's motion on September 19, 1996. Eastern Electric has filed replies to Westinghouse's and the Complainant's responses, with the latter reply filed October 10, 1996.

This order denies Eastern Electric's motion to dismiss on the basis that a genuine issue of fact remains as to whether Eastern Electric contributed to the uncontrolled discharge of PCBs at the facility.

#### Standard for Accelerated Decision

The EPA Rules of Practice, at 40 CFR §22.20 (a), empower the Presiding Officer to render an accelerated decision "without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." In addition, the Administrative Law Judge may dismiss an action on motion of the respondent "on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 CFR §22.20(a).

Numerous decisions by the EPA Office of Administrative Law Judges and the Environmental Appeals Board have noted that this procedure is analogous to the motion for summary judgment under Section 56 of the Federal Rules of Civil Procedure. See, e.g., *In re CWM Chemical Serv.*, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995). The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. *Adickes v. Kress*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. *Cone v. Longmont United Hospital Assoc.*, 14 F. 3d 526, 528 (10th Cir., 1994). The

mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) . The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits, and other evidentiary materials submitted in support or opposition to the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 40 CFR §22.20(a); F.R.C.P. §56(c).

## Discussion

Eastern Electric contends in its motion that only the prior occupant of the facility, Westinghouse, could be responsible for the alleged violation of improper disposal of PCBs at the oil sump. Eastern Electric supports its motion with several affidavits of its employees, two of whom formerly worked at the facility for Westinghouse. The movant has also submitted documentary evidence, including transformer logs and correspondence with the Missouri Department of Natural Resources ("MDNR") and EPA, in support of its contention that it never serviced transformers with a PCB content of greater than 50 ppm at the facility. Pursuant to 40 CFR §761.60(a), the PCB disposal requirements only apply to substances containing more than 50 ppm of PCBs.

These evidentiary materials do indicate that Eastern Electric did generally follow a policy of not servicing transformers containing PCBs of greater than 50 ppm. However, the transformer log also indicates that on at least several occasions, such transformers were received at the facility and sampled or stored before being returned to the customer. (Eastern Electric's Motion, Ex. C) . The plant manager in 1987 stated to the MDNR that Eastern Electric "infrequently" serviced transformers with PCBs of more than 50 ppm. (Westinghouse Response, Ex. C) . Eastern Electric also stored transformer bushings containing PCBs of more than 50 ppm for a time. (Id., Exs. D and E). Although Eastern Electric's affiants deny "using" the sump where the PCBs were found, the presence of fresh oil dry and a cigarette butt in the sump indicates some activity there since Westinghouse left the facility in 1986. Eastern Electric does admit that it regularly sweeps materials from the adjacent shop floor into the sump area, where the sweepings can enter the sump through a small hole in the cover. (Id., Ex. D, p.3) . Eastern Electric also manifested PCB waste in 1993, that it asserts it voluntarily cleaned out of the sump after the November 1992 inspection (Id., Ex. F).

Eastern Electric provides explanations for the above circumstances that seek to show how it could not have contributed to the PCB contamination found in the sump. However, on a motion for an accelerated decision of dismissal, they do not remove all reasonable inferences that can be drawn in favor of the opposing parties. Eastern Electric simply had too much opportunity in the six years it actively handled PCB-containing electrical apparatus in the facility before the discovery of the alleged violation to preclude any issue of fact concerning whether it contributed to the PCB contamination. An accelerated decision cannot be granted on the basis of self-serving statements on factual issues in these circumstances. Only Eastern Electric knows what really took place at the facility from 1986 to 1992. In these circumstances, the observations and evidence of its witnesses

must be tested by cross-examination and the completion of the record in order to resolve the factual issues.

Following are some examples of remaining factual issues based on reasonable inferences that can be drawn against the moving party. What exactly did the plant manager mean when he said the facility infrequently serviced transformers with more than 50 ppm of PCBs? What was the exact procedure followed when such transformers were received and returned? Eastern Electric's own affidavits indicate that any PCB contamination is likely derived from casual spills during sampling, repair and storage of transformers (Motion, Exs. A and B) Even if Eastern Electric did not repair transformers with more than 50 ppm PCBs, it did sample them and store them. (Transformer Log, Motion, Ex. C) . How exactly were the bushings that admittedly contained more than 50 ppm of PCBs stored, and for how long? The transformer log itself is incomplete on its face with regard to many dates and activities. Its completeness and accuracy may be at issue. Could PCBs have leaked from transformers containing less than 50 ppm PCBs? What took place on the shop floor surrounding the sump? What exactly was swept by Eastern Electric into the sump hole and when? Do the former Westinghouse employees who supplied affidavits have any reason to be biased against their former employer? At hearing, Eastern Electric may well satisfactorily supply answers to all these questions, but they cannot be answered by the papers filed in support of the motion to dismiss.

These questions illustrate that, while Eastern Electric has successfully raised enough facts to challenge the presumption of the current occupant's liability, the evidence cannot be weighed on the current record to resolve the ultimate factual issue in Eastern Electric's favor. A hearing will be required in order to weigh all the evidence from all parties to determine whether each respondent caused or contributed to the improper PCB disposal at the facility.

Eastern Electric relies heavily, indeed too heavily, on the holdings in the case of *In re City of Detroit Public Lighting Department, et al.*, 5 EAD 514, TSCA Appeal No. 89-5, February 6, 1991. In *City of Detroit*, the Chief Judicial Officer ("CJO") clarified the presumptions and burdens of proof that apply when an uncontrolled discharge of PCBs is found in violation of TSCA. The CJO enlisted the use of the rebuttable presumption that the present owner caused the uncontrolled discharge of PCBs found on its property. The property owner, or, in this case, the lessee, 1 could then rebut the presumption by producing evidence that it was not responsible for the discharge. The Complainant thus bears the initial burden of production to establish a prima facie case. The burden of production then shifts to the respondent, the possessor of the property, to rebut the presumption or prima facie case. The ultimate burden of persuasion remains with the Complainant, and is determined by weighing all the evidence. *City of Detroit*, 5 EAD 529-531.

In its motion and replies, Eastern Electric confuses the standard for prevailing on a motion for accelerated decision with the burden of persuasion required to ultimately prevail at hearing in a case alleging the improper disposal of PCBs. The CJO in *City of Detroit* further explains by stating that:

"The present owner can rebut the presumption by showing that it is more likely or equally likely that another person or other persons caused the uncontrolled discharge. . . . In that event, the Region will lose unless it can show by other evidence that the present owner caused (or contributed to the cause of) the discharge that deposited PCBs on the property." 5 EAD 530.

The CJO made these points in the context of "weighing the evidence." *Id.* at 531. After a hearing, the City of Detroit successfully rebutted the presumption that it, as the current property owner, was responsible for the deposition of PCBs on the property. The evidence showed that the prior owner, Chrysler, was responsible for the discharge of PCBs.

However, in this motion for accelerated decision, the evidence is not complete and is not weighed at all. The materials submitted with the motions are only assessed for the existence of material issues of fact. Unlike in the City of Detroit case, the current occupant of the facility did bring numerous possible sources of PCBs into the facility during the six years of its tenure preceding the discovery of the PCB discharge. As discussed above, a genuine issue of fact remains as to whether Eastern Electric contributed to the PCB discharge here.

This proceeding does not necessarily present a situation of either/or with respect to the liability of the two respondents, as appears to have been the case in City of Detroit. The evidence there indicated that only one party could have caused the discharge. This led the CJO to frame the weighing of the evidence in terms of whether it was "equally likely" that a person other than the current owner caused the discharge. In this case, the sump where the PCBs were found was in an active portion of an industrial facility used by both respondents -- the former and current occupants. Both respondents brought sources of PCBs into the facility, although Eastern Electric followed a policy not to service transformers with a PCB content of greater than 50 ppm. If the evidence shows that both respondents contributed to causing the contamination, they would both be liable. To the extent one respondent could show it was relatively less responsible, the amount of the civil penalty assessed against that respondent could be adjusted in accordance with the factors cited in TSCA §16(a)(2)(B), 15 U.S.C. §2615(a)(2)(B).

Order

Eastern Electric's motion for an accelerated decision of dismissal is denied.

Order Scheduling Hearing

The parties have already filed prehearing exchanges. Therefore, this proceeding is ready for scheduling the hearing.

The hearing in this matter will be held beginning at 9:30 A.M. on April 15, 1997 in St. Louis, Missouri, continuing if necessary through April 18, 1997. The parties will be notified of the exact location and of other hearing procedures after the arrangements are made by the Regional Hearing Clerk.

Andrew S. Pearlstein  
Administrative Law Judge

Dated: January 9, 1997  
Washington, D.C.

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CERTIFICATE OF SERVICE

I certify that the foregoing Order on Motion to Dismiss and Order Scheduling Hearing, dated January 9, 1997, was served by regular mail on the addressees listed below:

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Dated: January 9, 1997  
Washington, D.C.

1        Although Eastern Electric is the lessee of the property here, it is in the same position as the "present owner" for the purposes of applying the presumption. It is undisputed that Eastern Electric has had full occupancy and possession of the property since it was vacated and leased by Westinghouse in June 1986.