Decisions & Orders
About the Office of Administrative Law Judges
Statutes Administered by the Administrative Law Judges
Rules of Practice & Procedure
Environmental Appeals Board
Employment Opportunities

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	
The Burlington Northern and Santa Fe Railway Company,	Docket No. TSCA-10-99-0051
RESPONDENT	

ORDER ON MOTIONS

This proceeding under Section 16(a) of the Toxic Substances Control Act, 15 U.S.C.§ 2615(a), was commenced on February 2, 1999, by the filing of a complaint by the Manager Solid Waste and Toxics Unit, U.S. EPA, Region 10, Seattle, Washington, charging Respondent, The Burlington Northern and Santa Fe Railroad Company (BNSF or Burlington), with a violation of the Act and of the PCB rule (40 C.F.R. Part 761). Specifically, the complaint alleged, inter alia, that BNSF was the owner of real property located at N. 6401 Freya Street in Spokane, Washington, that in March of 1992, this property was leased to one Larry D. Biggs, formerly doing business as Raecorp, Inc., that approximately two months later Raecorp subleased the property to Gene Brower Machinery Company (Brower), that Brower's primary business was the buying and selling of used mining equipment, that among equipment transported to the property by Brower was a Westinghouse transformer containing mineral oil dielectric fluid having a PCB concentration of 414 ppm, that in August of 1994 approximately 700 gallons of dielectric fluid from this transformer leaked or was spilled onto the ground, and that this spill constituted the disposal of PCBs, by a method other than authorized by 40 C.F.R. § 761.60. For this alleged violation, it was proposed to assess BNSF a penalty of $25,000.

BNSF answered, admitting ownership of the property identified in the complaint at the time of the spill, admitting that the property was leased to Raecorp but alleging that the lease expressly prohibited Raecorp from assigning its interest in the property or subleasing the property without the express written consent of BNSF, denying that any such consent had been given, denying knowledge of the sublease, denying knowledge of Brower's use of the property and denying knowledge of the presence of the transformer on the property until sometime after August 4, 1994. BNSF alleged upon information and belief that the spill was the result of vandalism, denied responsibility therefor, denied violating TSCA, denied that any penalty was appropriate and requested a hearing.

By a letter-order, dated June 10, 1999, the parties, failing settlement, were directed to exchange pre-hearing information on or before July 16, 1999. Information Complainant was directed to provide included a memorandum supporting the apparent contention that BNSF as owner of the property upon which the spill occurred was strictly liable for improper disposal of PCBs, notwithstanding that it appeared that BNSF neither owned nor controlled the transformer which was the source of the PCBs. Complainant did not comply with this directive, but asserted, inter alia, that the liability issue would be resolved either by a motion for an accelerated decision it planned to file or by a motion to dismiss it anticipated BNSF may file (Prehearing letter, dated July 15, 1999, at 3). Thereupon, the ALJ directed that dispositive motions be filed on or before August 20, 1999. BNSF filed a motion to dismiss under date of August 19, 1999, and Complainant filed a motion for an accelerated decision on August 20, 1999. For the reasons hereinafter appearing, the motions are denied and this matter will be scheduled for a hearing.

BNSF's Motion to Dismiss

Relying upon an accompanying statement of undisputed facts with which counsel for Complainant has allegedly agreed, BNSF says that the complaint should be dismissed with prejudice because it played no role in the disposal or storage of the PCBs, BNSF did not own the source of the PCBs or the PCB-transformer and BNSF did not control or operate the facility or the transformer (Motion).

Allegedly undisputed facts relied upon by BNSF include the fact that BNSF owned the property identified in the complaint from the early 1900s until it was sold to Brian Biggs in November 1998, and that on March 18, 1992, BNSF entered into a lease of the property with Raecorp, Inc., which lease was signed by Larry D. Biggs, President of Raecorp.[(1)] Among other things, the lease prohibited the lessee from permitting the existence of any nuisance on the premises; prohibited the lessee from creating or permitting any condition on the premises which could present a threat to human health or the environment; provided that the lessee shall comply with all federal, state, local, and police requirements, regulations, ordinances and laws respecting the premises and activities thereon; provided that the lessee shall indemnify and hold Burlington harmless from any suit or claim growing out of any damages alleged to have been caused, in whole or in part by any unhealthful, hazardous, or dangerous condition caused by, contributed to, or aggravated by lessee's presence on or use of the premises or lessee's violation of any laws, ordinances, regulations, or requirements pertaining to solid or other wastes, chemicals, toxic, corrosive, or hazardous materials; and prohibited the lessee from assigning the lease or any interest therein or from subletting without the express, prior, written consent of Burlington. In addition, paragraph 14 of the lease provided that either party may cancel the lease at will on thirty days advance written notice, in which case the lessee was to remove all property or improvements not owned by Burlington.

On May 20, 1992, Raecorp sublet a portion of the property to Gene Brower Machinery Company without BSNF's knowledge or consent. There appears to be no doubt that the sublease to Brower was without BNSF's consent. BNSF, however, asserts that it learned of the sublease at the same time it learned of the spill, that is, on October 3, 1994, while Complainant alleges that BNSF was aware of the sublease for years (Complainant's Response to Motion to Dismiss at 2). Brower subsequently transported transformers and other equipment to the property for storage and resale

without BNSF's knowledge. These transformers were not owned by BNSF and were not used to supply power to the property.

On August 3, 1994, one of Brower's transformers was vandalized and fluid in the transformer released onto the ground.[2]. On October 3, 1994, Larry Biggs contacted David Smith of BNSF regarding Gene Brower, the transformer and the spill. Among other things, Biggs informed Smith that Raecorp's tenant, Gene Brower, owned a transformer which it kept on the property; that Brower was currently in bankruptcy;[3] that Biggs had hired two environmental contractors (Roar Tech and Bovay NW) to cleanup the spill; that the contractors had already excavated and stockpiled the contaminated soil on a liner with a plastic cover; and that Raecorp was awaiting the results [of analyses] of soil samples taken from the stockpile. BNSF was also informed that the spill had been reported to Ecology on September 24 and that Raecorp would work on the spill in consultation with Ecology. According to BNSF, this call was the first time BNSF was informed that a transformer had been stored on the site, that Brower had other property stored on the site and that Brower was in bankruptcy (Prehearing Letter, dated July 16, 1999; Declaration of David Smith, dated September 7, 1999, In Opposition to Region Ten's Motion for Accelerated Decision).

By a letter, signed by Larry Biggs, dated December 30, 1994, addressed to Ken Carlson, property manager, Raecorp provided Burlington with a report on the status of the PCB spill at 6401 N. Freya (Declaration, Exh 2). The letter stated that Raecorp had isolated the problem, excavated 350 cy of PCB-contaminated material, filled the hole with clean material, stockpiled and covered the contaminated material, and obtained quotes for disposal. Burlington was informed that, to date, Raecorp had expended over $20,000 on the cleanup, and that, "as you know," neither Raecorp nor myself (Biggs) has the resources to pay for the remainder of the cleanup. Biggs stated that, based upon past discussions, he understood BNSF would be the generator of record,[4] and that Burlington would dispose of the material at an approved disposal facility. In a telephone call on January 9, 1995, Ken Carlson of Burlington informed Biggs that his letter of December 30, 1994, misrepresented their discussions. Biggs was told that Burlington refused to pay for the cost of the cleanup or to credit rent due from Raecorp toward the cost of cleanup. Burlington insisted that Raecorp was responsible for the cleanup under the terms of the lease. Biggs reportedly agreed that he had taken "liberties" with their prior discussions. In mid-February 1995, Biggs called David Smith of Burlington, informing him that he (Biggs) had filed suit against other parties to obtain funds for the cleanup, but was uncertain how long this litigation would take.[5] Smith reiterated BNSF's refusal to pay for the cleanup.

The stipulated facts show that in a telephone conversation with David Smith of BNSF on April 18, 1995, Biggs again stated that he did not have the money to pay for the disposal of the contaminated soil, but that lawsuits to recover these costs were pending. Smith, asked Biggs to keep BNSF apprised of the situation. Also in April 1995, Raecorp provided Smith of BNSF with an October 17, 1994, cost estimate prepared by Roar Tech for the excavation and disposal of the contaminated soil at either Chem-Security, Arlington, Oregon or at Environmental Systems, Inc. (ESI) in Grandview, Idaho (Letter, dated October 17, 1994, from Roar Tech, Inc. to Lukins & Annis, attorneys for Raecorp (C's Exh G). The lowest of the estimates was $100,500 for the disposal of 315 cubic yards of contaminated soil at ESI, Grandview, Idaho. Other estimated costs in connection with the cleanup bring the total to $128,000.

In October of 1995, Biggs met with Dave Smith of BNSF and Larry Seyda and Richard Stafford of Catellus, a property management firm for BNSF, regarding the status of the MTCA lawsuit and the [latest] estimate of cleanup costs. Biggs asked for a contribution of $25,000 toward the cost of the cleanup and a long-term lease. BNSF refused to make any contribution toward the cost of the cleanup, but indicated that it would consider a long-term lease. By a letter, dated December 28, 1995, addressed to Larry Seyda (Burlington), Biggs referred to their October 1995, meeting and enclosed a copy of a proposal from TechCon, Inc., dated November 17, 1995, by which an estimated 400 tons of contaminated soil would be disposed of at the ESI facility in Grandview, Idaho, necessary documentation and a closure report

prepared for the sum of $114,459. Biggs opined that the cost proposal appeared realistic, asked for BNSF's comments and stated that, in any event, it was a firm proposal and would be accepted, if the money were available. Biggs' letter stated that actual and tentative agreements for contributions toward cleanup costs had been obtained from parties to the MTCA lawsuit and pointed out that Raecorp's only asset was the lease of the Burlington Railroad land. Biggs asked for a cash contribution of $30,000 from Burlington toward the cost of the cleanup or, alternatively, reduced charges on the lease, and that Burlington act as generator of record. Burlington apparently made no response to this letter.

On March 12, 1996, Biggs called BNSF (Smith) and informed him that Raecorp had commitments for cleanup costs totaling $75,000 from other parties to the lawsuit and asked for a meeting. Biggs met with BNSF (Smith) and Catellus (Seyda) on March 15, 1996. Biggs asked for a long-term lease so that he could finance the rest of the cleanup, pay delinquent rent to BNSF and pay back property taxes. On March 18, 1996, Burlington and Raecorp executed a 15-year lease for the property (Declaration, Exh 4). Among other things, the lease provided that Burlington could terminate the lease upon six months notice to Raecorp, if use of the property were necessary for railroad purposes. Although the circumstances under which this long-term lease was executed indicate that, among other things, its purpose was to enable Raecorp to finance disposal of the contaminated soil, Complainant points to the renewed lease as additional evidence that BNSF contributed to the improper disposal and was not a responsible property-owner (C's Memorandum at 9; C's Reply at 7).

A letter labeled "draft" from Roar Tech, Inc. to Raecorp, dated September 20, 1996, concerning the disposal of excavated soils from the N. Freya Street property in Spokane, states that on August 29th and 30th, 1996, the impacted soil from the previous remediation was loaded and transported by Western Refuse to Sanifill Northwest in Medical Lake, Washington.[(6)]

Material excavated at the site and transported to Sanifill included approximately 40 cubic yards of soil stained with non-PCB mineral oil which had reportedly leaked from one of two small transformers. Analyses of soil samples taken from three different points in the stained area revealed mineral oil concentrations which were described as "slightly greater than MTCA standards". Nevertheless, Roar Tech opined that the majority of the contamination had been removed and that the small amount of residual mineral oil was of no further consequence. Roar Tech stated that enough documentation exists to support a request [to Ecology] for a letter of "No Further Action Required." Ecology, mistakenly according to Complainant, issued such a letter on September 27, 1996 (Prehearing letter, Encl A). Complainant argues that this letter is not relevant to any issue in this proceeding, because regulation of PCBs is strictly a federal matter.

Sanifill, Inc. invoices in the record reflect that 896.21 tons of material were accepted from Raecorp during the period August 29, and 30, 1996, at a total price of $20,726.53 (C's Exh T). An additional 73.55 tons of material were delivered to Sanifill by Raecorp during the period September 10-12, 1996, at a cost to Raecorp of $916.54.[(7)] By a letter, dated October 7, 1996, Raecorp provided Burlington with a copy of a summons issued in an action instituted by Burlington for unpaid rent and back taxes and with a copy of the "No Further Action" letter from Ecology (C's Exh U). Among other things, the letter informed Burlington that the cleanup was now complete and had been accomplished for some $500,000 to $600,000 less than the BNSF estimate.

Arguments of the Parties

BNSF asserts that, because there is no indication or even suggestion that it spilled or disposed of PCBs or had any control over the transformer or the cleanup, this case is controlled by a line of administrative decisions beginning with Suburban Station, Docket No. TSCA-III-40, 1984 EPA ALJ LEXIS 4 (ALJ, September 4, 1984) (BNSF Memorandum at 4, 5). In Suburban Station, SEPTA, the owner of the property, which had licensed the City of Philadelphia to construct improvements at the Station, was held not to be jointly and severally liable for violations of PCB

storage regulations committed during a cleanup of PCBs controlled by the City where SEPTA was not involved in the construction and did not participate in the cleanup in any manner. The decision includes a specific finding that "...there was no reason for SEPTA to believe that there was any need for action on its part .. [assuming] its right of oversight gave it any authority to act." Under all the circumstances, Judge Harwood held that SEPTA's conduct could not be considered a contributing factor to the violations and that in order to impose strict liability on SEPTA for the wrongs committed by its licensee, there must be an indication that Congress intended such a result. Because there was no indication that either Congress in TSCA, or the Agency in its implementing regulations, intended such a result, the complaint as to SEPTA was dismissed.

BNSF relies heavily on City of Detroit, et al., TSCA Appeal No. 89-5, 3 E.A.D. 514 (CJO, February 6, 1991), asserting that the decision is factually on point and controls the outcome of the instant case (BNSF Memo at 5, 6). In City of Detroit, the City was held not to be subject to the PCB disposal requirements, because it did not cause the uncontrolled discharges at issue and the preponderance of the evidence indicated that the discharges occurred prior to the time the City assumed possession and control of the property. The CJO observed that there was no indication that Congress intended to impose liability on a mere owner of property upon which PCBs were spilled. BNSF argues that in Detroit, as in the instant case, the Agency is seeking to impose penalties merely because of a person's status as a landowner (BNSF Memorandum at 6).

BNSF says that it is undisputed that it played no active role in the disposal and did not own or control the PCB source. The actual spill was caused by an unknown third party's act of vandalism and thus, BNSF contends that the facts refute the presumption established in Detroit [based on the premise that the landowner has superior access to the evidence] that a landowner caused PCB contamination found on his property. BNSF asserts that the Agency has the burden of demonstrating that BNSF caused or contributed to the discharge, and because it cannot meet that burden, the complaint should be dismissed.[(8)]

The foregoing contentions notwithstanding, BNSF finds it necessary to argue that it had no legal basis and no reason to get more actively involved in the [cleanup] work than it did. BNSF asserts that it acted reasonably throughout (BNSF Memorandum at 6-7). Like the City of Philadelphia in Suburban Station, BNSF says that Raecorp was attempting to comply with the regulatory requirements and with the terms of its lease. According to BNSF, there was no reason for BNSF to believe that it was necessary to force Raecorp off of the property and take over the cleanup. BNSF emphasizes that in its initial conversations with Raecorp [Larry Biggs], BNSF was informed that Raecorp had retained two qualified and reputable contractors, that these contractors had already done much of the work [excavating, stockpiling on polyvinyl sheeting, and covering the contaminated soil], and importantly, that Raecorp would work on the cleanup in consultation with Ecology. According to BNSF, these are the kinds of steps it would have taken had it been in charge of the cleanup.

BNSF contends, however, that it could not simply have taken control of the cleanup, because the March 1992 lease did not give BNSF carte blanche authority to enter the property (BNSF Memorandum at 7). BNSF asserts that it would have had to terminate the lease and take possession of the property before it had any right to assume cleanup responsibility. Moreover, BNSF points out that it has extensive real property holdings throughout the country, which are leased to third parties, and that BNSF expects its tenants to comply with TSCA and to conduct any cleanup work on the leased premises. BNSF asserts that it is not reasonable to expect BNSF to get actively involved in all the cleanup work conducted on leased property unless the tenant abandons the property or there is some other indication that the tenant is proceeding in a reckless manner. BNSF reiterates that there was no indication that Raecorp had abandoned the property or was proceeding in a reckless manner. To the contrary, BNSF contends that the facts establish that it attempted to determine the progress of the cleanup and Raecorp's efforts to raise money from potentially responsible parties. Given the fact that Raecorp was proceeding with the cleanup and was working with Ecology, and given the large number of sites owned by BNSF and

leased to third parties, BNSF argues that it was reasonable for BNSF to monitor, but not to take control of, the cleanup efforts. Alleging that Complainant is seeking penalties based upon BNSF's mere ownership of the property, which is not sufficient to support a violation of the regulations, BNSF argues that the complaint should be dismissed.

Complainant's Response

Complainant's Memorandum in Support of Its Motion for Accelerated Decision sets forth its theory of BNSF's liability. Complainant begins by pointing to TSCA § 15, 15 U.S.C. § 2614, providing in pertinent part that: "(1) It shall be unlawful for any person to-(1) fail or refuse to comply with....(C) any rule promulgated or order issued under section 2604 or 2605 of this title,....." (C's Memorandum at 2, 3). The PCB regulations (40 C.F.R. Part 761) are issued under TSCA § 6(e), 15 U.S.C. § 2605(e). Complainant points out that BNSF as a corporation is a person as defined in 40 C.F.R. § 761.3 and thus is required to comply with the PCB rule. Complainant recognizes that some sections of the regulation specifically refer to "owners or operators" as persons to whom the regulation applies [e.g., § 761.35 "Storage for reuse"; § 761.180 "Records and monitoring"], and that § 761.60, "Disposal requirements", is written in the passive voice and does not specify the persons to whom the regulation applies.[(9)]

Complainant says that a logical conclusion from the passive voice approach is that there is a class of persons in addition to "owners or operators" to whom the regulation is intended to apply, and thus, broad range [or the broadest possible range of] liability is intended. Complainant asserts that this conclusion is consistent with case law addressing regulations written in the passive voice, citing Moreco Energy, Inc. v. Penberthy-Houdaille, 682 F.Supp. 933 (N.D. Ill. 1988) (§ 761.65 of PCB regulation "Storage for disposal", written in passive voice, held applicable to generators of PCB wastes as well as to owners and operators of any facilities storing PCB contaminated items or materials for disposal, holding based in part on court's stated belief that broad range liability was intended) and Virginia Department of Emergency Services, TSCA-III-579, 1993 EPA ALJ LEXIS 145 (ALJ, March 2, 1993) (marking requirement of PCB regulation, § 761.40, written in passive voice, held to suggest broad range liability).

Because the disposal regulation is written in a manner that provides an extensive array of persons who may be liable, Complainant contends that it is reasonable to interpret the regulation as being applicable to owners [and/or] operators, as well as to others. This interpretation follows, according to Complainant, from recognition of the fact that other sections of the regulation that are narrower in scope [as to the persons responsible for compliance] limit their application to owners [and/or] operators. Being more extensive in scope [as to the persons responsible] than these other regulations, Complainant argues that it is reasonable to conclude that the disposal regulation subsumes the more limited categories of owners and operators and includes other persons who may be liable (C's Memorandum at 4). Following this reasoning, Complainant says that it would be fair to conclude that a property owner, such as BNSF, may be held to the broad-range liability of the disposal regulation.

Complainant derides BSNF's characterization of itself as "merely a titleholder" and a blameless property owner who had no knowledge of damaging events at the property, and no opportunity or obligation to participate in the prevention or correction of this damage (Complainant's Response to Respondent's Motion to Dismiss, (C's Response) at 2). Rather, Complainant alleges that BNSF was aware for years of the improper [unauthorized] subleasing of the property to Brower and failed to take any action to terminate the unauthorized use. Complainant speculates that, if BNSF had enforced the lease, the PCB-contaminated transformer would not have been on the property and the release of PCBs would not have occurred. Thus, Complainant avers that BNSF failed to act as a responsible property-owner (C's Memorandum at 5).

Additionally, Complainant alleges that BNSF was aware for years of the improper disposal of PCBs and of the funding problems encountered by Raecorp in attempting to accomplish proper cleanup and disposal of the PCBs (C's Response at 2, 3). Complainant emphasizes that the obligation to cleanup and properly dispose of

spills and other improperly disposed of PCBs is a continuing one, citing Lazarus, Incorporated, Docket No. TSCA-V-32-93, 1995 EPA ALJ LEXIS 11 (ALJ, May 25, 1995), affirmed on other grounds, Lazarus, Incorporated, TSCA Appeal No. 95-2, 7 E.A.D. 318 (EAB, September 30, 1997). BNSF failed to take any action to alleviate the environmental harm even though what Complainant characterizes as an "extraordinarily long period" of improper disposal allegedly could have been eliminated or significantly shortened had BNSF participated in funding a proper cleanup (C's Response at 3). According to Complainant, the in-depth knowledge of BNSF, along with its refusal to act, casts BNSF as a person who "caused and/or contributed" to the improper disposal of PCBs [and thus, a person liable for improper disposal of PCBs as alleged in the complaint].

Complainant contends that BNSF was immersed in events that formed [or caused] a long-term violation of the disposal regulation, and had a vastly greater degree of involvement in the release or disposal of PCBs than the City as the property owner in City of Detroit, supra. Therefore, Complainant asserts that BNSF was more than a mere titleholder to property upon which a PCB spill occurred and that City of Detroit is not controlling (C's Response at 3). Complainant argues that a standard of liability [based on a failure to act under the circumstances present here] is consistent with City of Detroit, supra; Suburban Station, supra; Mexico Feed & Seed Company, Inc., and Jack Pierce d/b/a Pierce Waste Oil Service, Inc., TSCA Docket Nos. VII-84-T-312 and VII-84-T-324, 1985 EPA ALJ LEXIS 6 (ALJ October 25, 1985) (TSCA does not contemplate the assessment of a civil penalty against a non-participatory and non-negligent lessor), affirmed on other grounds, TSCA Appeal No. 85-2, 2 E.A.D. 510 (CJO, February 28, 1988); George J. Huth d/b/a Huth Oil Company and Joyce Nichols, Docket No. TSCA-V-C-196 (ALJ, June 2, 1986) (the evidence fails to establish that she...[Nichols]....contributed in any way to the violations..); and Gilroy Associates, supra, note 8 (Agency's prima facie case must include a nexus between respondent [the property owner] and the violation).

Complainant points out that in the cited cases, the decision turned on whether the property owner caused or contributed to the violation (C's Memorandum at 9). While taking issue with the observation in George J. Huth, supra, that TSCA is not a strict liability statute, Complainant apparently regards liability under TSCA as analogous to tort liability. It asserts that in the State of Washington an actionable claim of negligence is premised upon a duty, breach of duty, injury, and causation or the breach of duty that caused the injury (C's Memorandum at 10). According to Complainant, a duty existed obligating BNSF to prevent the conditions that resulted in the discharge of PCBs from the transformer and a second duty existed obligating BNSF to respond to the discharge by undertaking the proper disposal of the PCBs. BNSF allegedly breached these duties by not performing any preventive or responsive action (Id.). Additionally, Complainant emphasizes that under the law of torts liability can result from an omission or failure to act as well as from acts [negligently performed] and that it has been held that where a wrongful act is a failure to perform a duty, and performance of the duty would have prevented a harm, causation is established. Applying that reasoning here, Complainant argues that the refusal of BNSF to play an "active role" in preventing or alleviating the improper disposal of PCBs is the basis of its liability because, absent this failure, the violation would have either been prevented or alleviated in a timely manner (C's Memorandum at 11).

Concerning BNSF's acknowledgment that had the tenant acted in a "reckless manner", there would have been a basis for requiring involvement by BNSF [and liability for failing to alleviate or expedite the cleanup], Complainant points out that BNSF has not identified the source of this liability standard (Response at 5). And, without agreeing that this is the relevant legal standard, Complainant asserts that Raecorp violated its lease with BNSF by subleasing the property for several years to a party in bankruptcy, that PCBs were left on the property in a state of improper disposal for many more years, and that Raecorp ignored the advice of a consultant to the effect that the PCB-contaminated soil had to be disposed of in a chemical waste landfill. According to Complainant, this conduct could be viewed as "reckless" necessitating the involvement of BNSF under the standard it articulated.[(10)]

BNSF argues that negligence is not the standard and that, even it were, BNSF was not negligent (BNSF's Response at 4). Relevant here is when BNSF learned of the unauthorized sublease, of the presence of used mining equipment, which might include the PCB-contaminated transformer, of the spill, and of Raecorp's action in disposing of the contaminated soil in an unlicensed landfill. BNSF has denied knowledge of the fact that Raecorp had subleased the property prior to October 3, 1994 (Declaration of David Smith, dated September 7, 1999, attached to BNSF's Response to Region Ten's Motion for Accelerated Decision). BNSF has also denied knowledge of the disposal of the material in a landfill not authorized to accept such material until after the fact (Reply Brief at 5).

BNSF says that the question presented by its motion is whether a landowner who learns of a PCB spill by its tenant must step-in and take over the cleanup or risk a fine because the tenant may not comply with the Act (Reply Brief at 1). In order to answer this question in the affirmative, BNSF asserts that the TSCA liability threshold must be "watered-down" and the Detroit line of cases overruled. This is so, according to BNSF, because, under EPA's view, knowledge equals duty and liability under TSCA. BNSF argues that this is not the law. In short, BNSF contends that its knowledge and subsequent acts do not [and cannot] equate to "causing or contributing to the disposal" of PCBs (Reply Brief at 2). Moreover, BNSF alleges that it did not have any reason to believe that it needed to assume control of the cleanup from its tenant, even if hindsight shows that Raecorp did not follow all of the TSCA rules.

Discussion

There can be no doubt that BNSF as a corporation is a person as defined in 40 C.F.R. § 761.3 and thus, like any other person, subject generally to TSCA and the PCB rule. This is merely a beginning and not an ending point for determining BNSF's liability, because, as noted previously, some sections of the PCB rule apply to "owners" of PCB sources, other sections of the rule apply to "owners and/or operators", and, in still others, e.g., the disposal rule at issue here, the person responsible for compliance is not identified. Although no issue can or need be taken with Complainant's contention that this "passive voice approach" is consistent with broad based liability, evidence to supply the nexus between BNSF as the owner and the violation is lacking or disputed. For example, when did BNSF learn of the unauthorized sublease to Brower and is there any evidence that BNSF was aware that Brower brought used mining equipment, which might include transformers, to the property prior to the spill.

One problem with Complainant's argument that a failure to act can be the basis for BNSF's liability for violation of the PCB disposal rule is that "disposal" as defined in the regulation, 40 C.F.R. § 761.3, connotes action:

> *Disposal* means intentionally or accidently to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs as well as actions relating to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB items.

Consistent with the view that "disposal" requires action, the CJO in City of Detroit held that the PCB disposal regulation applied to those who dispose of PCBs. This, of course, is also consistent with the view that the disposal regulation, being written in the passive voice, connotes broad range liability, because liability is not limited to owners and/or operators of PCBs and PCB sources. In this regard, Complainant avers that a duty existed obligating BNSF to prevent the discharge of PCBs from the transformer and that a second duty also existed requiring BNSF to respond by undertaking proper disposal of PCBs. BNSF's duty to prevent discharge of PCBs from the transformer, assuming it exists at all, cannot exist absent a showing that BNSF was aware at a minimum of the presence of used mining equipment, which might include the PCB-contaminated transformer, on the leased property.

As to the alleged duty to undertake proper disposal of the PCBs, BNSF's contention that it could not take over the cleanup without terminating the lease may not as

readily be disregarded as Complainant apparently believes, because relationships arising from such contracts are recognized for TSCA purposes.[(11)] It is true that the available evidence indicates that Raecorp requested that BNSF be the generator of record of the contaminated soil and suggests that Raecorp would have welcomed BNSF's participation in the cleanup. BNSF, however, could hardly participate in the cleanup without assuming responsibility for the fact that it be properly accomplished, which in turn seemingly would require control of the property.

The definition of disposal was at issue in Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, Order Affirming Initial Decision in Part and Vacating and Remanding in Part, 6 E.A.D. 735 (EAB, February 11, 1997), a decision not cited by either party. In Group Eight, EPA charged a building owner (Group Eight) and an insurance company (Wausau), which had issued a policy of insurance covering fire risks at the building, with improper disposal of PCBs. The building was damaged by fire and, at the time of the fire, there were seven electrical transformers at the site, at least one of which was a PCB transformer, containing PCBs at a concentration in excess of 500 ppm. PCBs at such a concentration are required to be disposed of by incineration. Fluids from the transformers were, however, commingled and transported by a disposal contractor to an oil recycling facility not equipped to handle PCBs at such levels.

The charge of improper disposal against the insurance company was based upon the activities of an agent for Wausau who had solicited a cost estimate for disposal of PCBs from a disposal contractor, guaranteed payment, if the work were accomplished in accordance with the proposal and actually paid the disposal contractor. Although the EAB recognized that the definition of disposal was extraordinarily broad, it emphasized that it was Wausau's conduct that was at issue and upheld the ALJ's decision dismissing the complaint against Wausau upon the ground that the Agency had not shown that Wausau disposed of PCBs as defined in the regulation. Regarding the Agency's argument that Wausau's actions recited above were "actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs" within the definition of "disposal", the EAB pointed out that "(t)he regulatory language sweeps broadly, but there must be some reasonable basis for applying the regulatory language to the conduct the Region seeks to penalize." 6 E.A.D. at 748. The EAB noted that in City of Detroit, supra, the Chief Judicial Officer (CJO) had recognized the ambiguity as to the scope of the PCB disposal regulation and had limited the scope of TSCA penalty liability under the regulation to parties having actual influence over the disposal activity (such as by direct involvement in the activity) or the ability to exert such influence (such as would arise, for example, from ownership of a PCB source).

In the immediate aftermath of the fire, Wausau determined that three other transformers required removal from the site in order to protect the public from the possibility of a release of their contents and engaged a pollution control contractor of its own choosing for that purpose. The EAB noted that this activity "... may well have at least approached the threshold of engaging in TSCA-regulated activity, if not crossed it" (6 E.A.D. at 750), but held that it was unnecessary to decide that question, because these particular transformers did not contain regulated levels of PCBs and no unauthorized disposal resulted.

BNSF's liability, as expounded by Complainant, turns on BNSF's alleged duties to prevent the spill and to assume responsibility for the cleanup once it was aware of the spill and of Raecorp's difficulties in financing a proper cleanup. These alleged duties raise issues such as whether BNSF was negligent and whether Raecorp acted recklessly. A requirement for granting an accelerated decision is that there be no dispute as to material fact and issues such as negligence and recklessness are singularly inappropriate for resolution on a motion for accelerated decision where the facts are disputed or in doubt. Group Eight establishes that ownership or control of a PCB source is not the sole path to liability for violations of the PCB rule, and because Complainant may be able to establish a predicate for BNSF's liability under the standard of Group Eight, i.e., BNSF's ability or obligation to prevent the spill and influence or control the disposition of the contaminated soil, BNSF's motion to dismiss will be denied.

It is my conclusion that this proceeding should be scheduled for a hearing in which the following factual matters, among others, may be fully explored:

1. The long-term relationship between BNSF and Raecorp inasmuch as it appears that Raecorp had leased the property continuously since 1981 and subleased it beginning in 1990 (supra, note 1). Whether prior leases prohibited subletting without BNSF's consent.
2. When BNSF learned of the sublease to Brower, of the presence on the property of used mining equipment, which might include transformers, of the presence of the PCB-contaminated transformer, and of the spill.
3. The circumstances under which BNSF sought and obtained estimates for the disposal of the contaminated soil and the source of the estimates that disposal would cost $500,000 to $600,000. BNSF's involvement, if any, in the disposal within the standard of Group Eight. When BNSF learned that Raecorp had disposed of the PCB-contaminated soil at Sanifill's Medical Lake facility for approximately $21,000.
4. Raecorp's obligations under the lease assuming that BNSF accepted responsibility for cleanup of the property.

Order

BNSF'S motion to dismiss and Complainant's motion for an accelerated decision are denied.[(12)]

Dated this 23rd day of November 1999.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge

1. Statement of Undisputed Facts (SOF), Memorandum in Support of Respondent's Motion to Dismiss, hereinafter BNSF Memorandum, at 2 et seq. Lease, Exhibit 1, to Declaration of David Smith, hereinafter Declaration, in Support of Motion to Dismiss. A more expansive statement of facts appears in a BNSF Statement of Facts, dated July 16, 1999 (Stipulation), Exh B to Complainant's Motion for Accelerated Decision. The Stipulation reflects that the property of concern was originally leased to Raecorp in 1981 and that these leases were routinely renewed or extended until the lease in effect at the time of the spill was executed in March of 1992. A report of a Raecorp, Inc., TSCA/PCB Investigation, dated February 17, 1998 (C's Exh A), quotes Larry Biggs as stating that he operated a business on the property [apparently a lumber business] until 1990 when he began to "lease it out" (Id.9).

2. SOF at 3. The report of the Raecorp, Inc. TSCA/PCB Investigation (supra note 1), indicates that approximately 700 gallons of dielectric fluid drained onto the ground, that this occurred on August 2, or 3, 1994, and was discovered on August 4, 1994, by John Bottjer of Roar Tech, Inc., who had been sent by the bankruptcy court (probably the trustee for Gene Brower Machinery, Inc.) to conduct an environmental

assessment of the transformers. Mr. Bottjer's report to Richard George, attorney for the trustee in bankruptcy, dated August 4, 1994 (C's Phx A), reflects that he discovered the spill when he arrived on the site on August 3, 1994, that he immediately notified Jeff Dill of the Washington Department of Ecology (Ecology) and Richard George of the release and that he later took steps to fence and secure the area. Mr. Bottjer drew a sample of oil from each of the four transformers at the site and what he described as a "three point surface soil composite" soil sample from the stained area. The oil sample from the transformer from which the release occurred, when analyzed, showed a PCB concentration of 414 ppm and the soil sample showed a PCB concentration of 19 ppm.

3. The Report of Investigation (supra note 1) states that Gene Brower Machinery Company was incorporated in the State of Washington in 1982, that its primary business was the buying and selling of used mining equipment and that it filed for bankruptcy in March of 1992, prior to subletting the property at issue from Raecorp. The report also indicates that Raecorp held the transformer from which the PCBs had leaked on consignment, the actual owner being an Ohio corporation, Universal Equipment Company, Inc.

4. The apparent purpose of the request that BNSF be the "generator of record" is that BNSF's credit and stature would ensure acceptance of the material at a licensed landfill and that BNSF would be responsible, if the material were subsequently determined to be unacceptable for any reason.

5. Raecorp, Inc. filed a complaint for damages and declaratory relief against Gene Brower Machinery Company, Inc., Universal Equipment Company, an individual named F. William Niggemeyer (apparently an agent for, or principal of, Universal Equipment Company, Inc.), and ITT Hartford, an insurance company, under Washington's Model Toxic Control Act ("MTCA") in the Superior Court of the State of Washington, Spokane County, on January 17, 1995 (C's Exh K).

6. C's Exh H. Sanifill's Medical Lake facility was a "limited purpose landfill" and not a "chemical waste landfill" authorized to accept PCBs at concentrations of up to 500 ppm in accordance with 40 C.F.R. § 761.60. Analyses of soil samples, apparently from the stockpile, show PCB concentrations far below the regulatory limit of 50 ppm. While Complainant asserts that these samples are not representative of the stockpile, the fiction created by the anti-dilution rule (40 C.F.R. § 761.(b)(5)) requires the assumption that the soil onto which PCBs were spilled contained the same concentration as the spilled PCBs, that is, 414 ppm. It is understood that the Agency instituted enforcement proceedings against Raecorp, Western Refuse, and Sanifill for violations of the PCB disposal rule and that these proceedings either have been, or are in the process of being, settled.

7. The Roar Tech proposal (C's Exh G) contains an estimate that a cubic yard weighs 1.5 tons.

8. Id. BNSF also cites Nello Santacroce & Dominic Fanelli d/b/a/ Gilroy Associates, TSCA Appeal No. 92-6, 4 E.A.D. 586 (EAB March 25, 1993) (although respondents owned the property upon which a PCB transformer was located, they were not responsible for violations of PCB regulations where the evidence failed to establish that they owned or operated the transformer).

9. C's Memorandum at 3. Other provisions of the regulation designate only the "owner" as the person responsible for compliance, e.g., § 761.30(a)(1)(xi), requirement for reporting by owner of PCB transformer involved in a fire related incident; § 761.30(h)(1), requirements for marking, reporting, and inspection by owner of voltage regulator.

10. Complainant quotes the definition of "reckless" in Black's Law Dictionary, 5th Ed. (1979): According to circumstances, it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent. For conduct to be "reckless" it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended. This definition is long-standing. See Black's Law

Dictionary, 3rd Ed. (1933).

11. Complainant cites Virginia Department of Emergency Services, supra, for the proposition that a private contract may not be used as a shield [to avoid] responsibility for compliance with federal regulations (Complainant's Reply to BNSF's Response to Region Ten's Motion for Accelerated Decision at 7). While undoubtedly true as a general proposition, this statement is not meaningful taken out of context. For example, among issues in the cited case was compliance with the marking requirement of the PCB regulation, 40 C.F.R. § 761.40, which, like the disposal regulation, is written in the passive voice. Respondent, the owner and operator of a facility and of PCBs located thereon, had contracted for cleanup of the site. Responsibility for compliance with the PCB regulation had already attached and respondent clearly could not transfer that responsibility to the contractor. In other contexts, however, legal relationships arising from contracts relating to ownership or control have been recognized. Suburban Station, supra. See also Gilroy Associates, supra.

12. In the near future, I will be in telephonic contact with counsel for the purpose of scheduling a hearing on this matter which will be held in Seattle, Washington.