UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	TSCA VI-81C
GULF SHORE ELECTRIC	)	
	)	
Respondent	)	

Resource Conservation and Recovery Act - Record Keeping - Since the regulations do not specify any particular format for such records, in a case where the records regularly prepared and maintained by a facility contain all the information required, no penalty should be assessed.

Resource Conservation and Recovery Act - Penalty Assessment - Nominal penalties assesed for failure to prepare annual documents and failure to mark a PCB storage area.

Appearances:

Michael C. Barra, Esquire
Carlos A. Zequeira-Brinsfield, Esquire
U.S. Environmental Protection Agency
Dallas, Texas
For the Complainant

John E. Swain, Esquire
Denson and Swain
Houston, Texas
For the Respondent

INITIAL DECISION

This proceeding under Section 16(a) of the Toxic Substances Control Act (14 U.S.C. 2615(a)) was commenced on September 22, 1983 by the issuance of a Complaint charging Respondent, Gulf Shore Electric, with violations of the Act and the regulations promulgated pursuant thereto. Upon motion and the granting thereof by the Court, the Complaint was amended on February 19, 1987 and an Answer thereto was filed by the Respondent.

Specifically, the Complaint charges the Respondent with four violations, as follows: (1) the failure to mark one small PCB transformer with the M_L PCB label; (2) with storing 18 PCB containers in a storage area which was not marked with the M_L PCB label and the 18 PCB containers were not dated as to when they were placed in storage for disposal; (3) that one open head drum of PCB contaminated rags was stored outside the PCB storage area and that this drum did not meet the DOT specifications; and (4) the failure of the Respondent to develop and maintain the required documents for its PCBs and the preparation of annual documents on its PCBs.

The Complaint suggested a penalty of $625 for failure to mark the one PCB transformer, a penalty of $4,500 for the improper storage of PCBs, and a penalty of $12,500 for the failure to develop and maintain records and prepare annual documents.

The Respondent in its Answer neither admitted nor denied the allegation concerning the failure to mark the small PCB transformer, but suggested that any transformers within its shop facility were properly marked. The Respondent denied that the storage area was not marked with the M_L PCB label as alleged in the Complaint. The Respondent denied that it stored any PCB contaminated material in a non-DOT specification drum. The Respondent also

denied the allegation concerning the failure to develop and maintain the required records for its PCBs in accordance with 40 C.F.R. 761.180(a). A hearing on this matter was held in Houston, Texas on February 25, 1987. Following the hearing, the parties submitted their post-hearing proposed findings of facts and conclusions of law, all of which have been considered by the Court and any arguments, contentions or suggestions contained therein not specifically addressed herein are hereby rejected.

Background

The Respondent company was established in October 1979 and is engaged in the primary business of electric repair. There are four major segments that the company is involved in--that is, motors, generators, transformers and switch gear. The switch gear has to do with locomotives. The part of their business which gives rise to the action which is the subject of this decision has to do with the transformer repair business.

The President of the corporation, Mr. Charles Snyder, Jr., described that portion of their business as follows. A customer calls for service and the company either does the repair on site or if a transformer or other possible PCB containing device is brought to the shop it is immediately tested for the presence of PCBs by using a gas chromotograph and if the transformer contains more than 50 ppm of PCBs it is considered to be PCB contaminated and if it contains more than 500 ppm of PCBs the owner of the equipment is called and asked whether he wishes to take the equipment back and dispose of the contaminated electric fluid or have it disposed of by the Respondent company. If the equipment contains less than 500 ppm, and the owner thereof wishes the Respondent to repair it, it is flushed and the contaminated dielectric fluid is stored in a drum which is marked with the job number assigned to the piece

of equipment which tells the Respondent when the PCBs were placed in storage for disposal, the amount thereof, and who the owner of the equipment is. Each barrel is designated with a job number which identifies the name of the customer and only the oil associated with the transformers which he sent to the shop are placed in that barrel so that when the contaminated fluid is ultimately shipped off-site for disposal, the customer is only charged for that amount of oil which his equipment brought to the facility and no more. Mr. Snyder described that the whole operation of his facility is driven by job numbers and job orders which are assigned a specific number and that this number follows the equipment and what happens to it throughout its existence at the facility and the same holds true for all PCB contaminated materials and transformers and the fluid drained therefrom.

The facility was inspected on April 8 and 26, 1983 by a representative of EPA and at the time of the initial inspection it was observed that one small PCB transformer had not been marked with the M_L PCB label and that the storage area, which consists of a curbed area where the aforementioned drums of contaminated fluid are stored and stacked, although marked with a large ribbon, yellow and black in color with the word caution printed thereon, it did not display the M_L label. The drums stored in the aforementioned area were, however, all appropriately marked with the M_L label. It is the failure of the area itself to be marked with the M_L label which forms the basis for one of the storage violations. The other portion of the storage violation has to do with the Agency's allegations that the date that the drums were placed in storage were not displayed thereon. The drums were marked with the appropriate job number which according to the Respondent tells it when the drum was placed in storage since the analysis of the transformers is done the day they arrive on the premises and if they are found to be contaminated they are

immediately drained and the contaminated fluid stored in the drums as described above, on the same day that they are received and tested at the facility. It is therefore the Respondent's contention that the job number appearing on the drums at the time of the inspection tells the owner of the facility exactly what day the drum was placed there for storage for disposal. There is some dispute between the parties as to whether or not the pans that the drums are stored on were in fact marked with the M_L label. Based on the evidence before me it appears that the pans themselves were not marked at the time of the first inspection, but were marked by the time the inspector came back on the 28th to finish his inspection and take samples and photographs of his observations made on the previous visit.

As to the drum containing the PCB contaminated rags the Agency's position is that the inspector tilted the drum up and observed its bottom and failed to see any DOT label thereon and thus charged the Respondent with storing PCB materials in a non-DOT specification drum. As to this charge, it is Respondent's postion that in fact all the drums that it purchases are DOT specification drums. It only has two sources of supply for its drums and they only supply DOT specified drums. The Respondent also takes the position that following the inspection it examined the drum in question and did observe the DOT label thereon and suggested that such label is not as readily discernible as the witness for the Complaint would suggest and that it sometimes requires that a piece of chalk be rubbed over the impression to discern the DOT label thereon.

Discussion and Conclusion

Based on the record before me, I conclude that the Respondent did violate the first count in the Complaint appearing in Paragraph 8 which is failure to mark PCB transformer with the M_L PCB label and that the $625 penalty assessed

therefor is appropriate under the circumstances in this case. A more detailed discussion of the penalty portion of this matter will be discussed below.

As to the improper storage of PCBs that violation is broken down into two parts--one being the failure to have the PCB contaminated rags in a DOT approved container and the other is the failure of the facility to have a M_L warning mark in the area where the storage of the PCB containing drums is located. As indicated above, the drums themselves all have prominently appearing on their surface the approved M_L label and the inspector was readily able to discern the fact that PCBs were stored in the area by observing the M_L label at a distance from their actual location and in addition thereto there was a waist high plastic ribbon surrounding the storage area with the words "CAUTION" printed thereon in large letters. There is some dispute as indicated above between the parties as to whether or not the pans upon which these PCB containing drums were placed had the M_L label thereon at the time of the inspection or whether such label was placed thereon between the time of the first and second inspection. My review of the record in this matter suggests that the M_L label was not in fact in place at the time of the April 8th inspection but was placed thereon shortly thereafter and appeared on the pans at the time of the April 28th inspection. Therefore, the Respondent did violate the letter of the law in this regard. I am, however, of the opinion that the violation is not a serious one in that the area was plainly marked with a cautionary banner and although said banner did not contain the information required by the regulations, it did alert persons coming into the area that they needed to proceed with caution in approaching the area and when in close proximity thereto could plainly see the M_L labels on the drums stored therein. I am, therefore, of the opinion that although this failure constitutes a violation the seriousness thereof is extremely low and for that reason a minimal penalty should be appropriately assessed.

As to the allegation that the PCB contaminated rags were not stored in a DOT specification drum, I am of the opinion that this allegation has not been proved. The company President testified that the only purpose for which he buys drums is to store PCB materials and that he therefore only purchases DOT drums. Given his additional testimony that the DOT mark is not always readily observable, I find his testimony on this issue to be credible.

In regard to the failure to date the drums, I find that the job numbers placed thereon by the Respondent satisfies this portion of the regulations since it tells the facility owner and anyone else who examines its PCB log exactly when the drums were placed in storage. Additionally, the Respondent is now also placing a date on all drums along with the job number.

The failure to develop and maintain records and prepare annual documents provides the largest portion of the penalty proposed in the Complaint--that being $12,500--out of a total of $17,625. As to this violation, it is the Respondent's position that the documentation it routinely maintains at its facility provides all of the information required by 40 C.F.R. § 761.180(a) and that therefore no penalty should be assessed for this violation. Hearing the testimony of the Respondent's sole witness, the President of the corporation involved, and reviewing the exhibits provided in association with said testimony, I am of the opinion that the record keeping kept by the Respondent does in fact provide all of the information required by the regulations and it provides sufficient data to prepare the annual documents which the regulations require. The Respondent did, in fact, subsequent to the inspection prepare annual reports for the years in question and provided a copy of an example of one of those at the hearing. Given that situation, I am of the opinion that no violation of the record keeping portion of this count has been shown.

The testimony of the Agency witness who prepared the penalty calculations, which are reflected in the Complaint, did not break down the two aspects of the record keeping violation--that is, the failure to maintain the records, and the failure to prepare annual documents. Given the fact that I find no violation of the record keeping aspect of this count, and the fact that the Respondent was able to very quickly prepare the annual documents in question from the records he has in hand at the facility, the only possible violation arising from this count is the failure to have prepared such annual documents at the time of the inspection. In view of all of the above, it occurs to me that a minimal fine for the failure to prepare the annual documents would be appropriate.

The Penalty Calculations

As indicated above, I have no problem with the penalty associated with the failure to mark one of the transformers which was calculated in a manner consistent with the EPA penalty policy appearing in F.R. 45, No. 177, dated September 10, 1980. In this regard, the Agency expert determined that the circumstances related to this violation would be in the Level 5 category and that the extent of potential damage would be minor arriving at a figure of $500 when one makes reference to the matrix contained in the aforementioned penalty policy. Inasmuch as the Respondent had a previous violation for which a compliance order was issued and a settlement arrived at there is an adjustment called for in the penalty policy for an increase of 25 per cent and multiplying $500 by 25% we come up with a figure of $625, which I find appropriate for this violation.

As to the storage violations for which the Agency has suggested a penalty of $4,500, I find that a nominal penalty should be assessed. Since the job orders contained on the drums in question allowed the facility operator to

know exactly when the drums were placed in storage that, in my judgement, satisfies the requirements of the regulations. Inasmuch as all of the drums in the storage area where plainly marked with the M_L label, a fine in the amount of $200 would be appropriate. Since the Respondent had been guilty of a prior violation involving storage the penalty policy calls for an upward adjustment of 50 per cent and applying that upward adjustment to the $200, I find that a penalty in the sum of $300 is appropriate for the aforementioned storage violations.

As to the record keeping violations, I find that a Level 6 assessment in the circumstance column of the matrix and a minor amount in the extent of potential damage would be appropriate, arriving at a figure of $200 for the failure maintain and prepare the annual documents. Once again given the fact that this company had a prior violation the penalty policy suggests an upward adjustment of 25 per cent. Multiplying the $200 figure from the penalty matrix by 25%, one arrives at a figure of $250 which I find appropriate for the record-keeping violations as described in the Complaint.

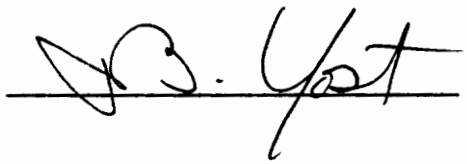
The other factor which in my judgement mitigates against the assessment of anything other than a minor penalty for the violations noted above is that in every instance the descreptancies noted by the inspector on the April 8th initial inspection were taken care of by the time the inspector returned on April 28th. This suggests a willingness and a spirit of cooperation on the part of the Respondent as well as an indication of the seriousness which with the Respondent views the requirements of the regulations in question. For all of the above reasons, I am of the opinion that the penalties hereinabove assessed are appropriate under the circumstances in this case.

ORDER[1]

Respondent, Gulf Shore Electric, having violating the Act and the regulations and the particulars herein before recited, is assessed a penalty of $1,175 in accordance with § 16(a) of the Act. Payment of the penalty shall be made by mailing a cashiers' or certified check in the amount of $1,175.00 payable to the Treasurer of the United States of America and mailed to:

EPA- Region 6
(Regional Hearing Clerk)
Post Office Box 360582M
Pittsburgh, PA 15251

DATED: September 21, 1987



[1]Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this Decision on his own motion, the Decision shall become the Final Order of the Administrator. See 40 C.F.R. § 22.27(c).

IN THE MATTER OF

GULF SHORE ELECTRIC
Respondent

TSCA VI-81C
Initial Decision

CERTIFICATION OF SERVICE

In accordance with 40 CFR §22.27(a) of the Consolidated Rules of Practice (40 CFR 22), I hereby certify that a copy of the foregoing Initial Decision issued by Honorable Thomas B. Yost, was served by Inter-office mail to Mr. Lee M. Thomas, Administrator, by Certified Mail, Return Receipt Requested to Mr. John E. Swain, Attorney for Respondent and that a copy was hand-delivered to counsel for Complainant.

Dated in Dallas, Texas this 25th day of September, 1987.

C. Lopez

Carmen A. Lopez
Regional Hearing Clerk

Enclosure

cc: Honorable Thomas B. Yost