5/31/74

ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	
Pearson & Company,	I.D. Nos. 88176, 88468, 90943
Respondent.	Initial Decision

Preliminary Statement

This is a consolidated proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended in 1972 (FIFRA 1972), 7 U.S.C. 136 et seq., for the assessment of civil penalties for violations of the Act. Three complaints [1/] were issued against the respondent on November 2, 1973, by the Director, Enforcement Division, Region IV, Environmental Protection Agency, charging violations of section 12 of the Act. With regard to each complaint the respondent filed an answer and requested a hearing. Pursuant to section 168.22(a) of the Interim Rules of Practice governing proceedings of this type (38 F.R. 26360, September 20, 1973), the Administrative Law Judge, on his own motion, ordered that the three proceedings be consolidated.

In substance, the allegations in the complaints are as follows:

I.D. No. 88176 On or about February 13, 1973, the respondent shipped the pesticide Gulf States 5% Rotenone (hereinafter Rotenone) from Mobile, Alabama, to Paducah, Kentucky; said pesticide was misbranded because it had less than 5% rotenone (7 U.S.C. 136(q)(1)(A)); it was adulterated in that its strength or purity fell below the professed standard or quality

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1/ The complaints were designated "Penalty Assessment and Notice of Opportunity for Hearing."

under which it was sold (7 U.S.C. 136(c)(1)). Proposed penalty assessment, $1,500.

I.D. No. 88468 On or about February 6, 1973, the respondent shipped the pesticide Azalea Petal Blight Dust (hereinafter Azalea Dust) from Mobile, Alabama, to Pensacola, Florida; said pesticide was not registered (7 U.S.C. 135(b)); it was misbranded because the label contained a registration number (7 U.S.C. 136(q)(1)(A)); it was misbranded because the label stated that it contained 3.25% of zinc ethylene bisdithiocarbamate whereas it had less than 3.25% of this ingredient and it contained an additional active ingredient (chlordane) which was not listed (7 U.S.C. 136(q)(1)(A)); it was adulterated in that its strength or purity fell below the professed standard or quality under which it was sold (7 U.S.C. 136(c)(1)); it was adulterated in that another substance (chlordane) had been substituted wholly or in part for the article (7 U.S.C. 136(c)(2)). Proposed penalty assessment, $4,750.

I.D. No. 90943 On or about January 30, 1973, respondent shipped the pesticide Poison Paste from Mobile, Alabama, to Shreveport, Louisiana; said pesticide was misbranded because the label did not bear a warning or caution statement which is necessary and, if complied with, adequate to protect health and the environment (7 U.S.C. 136(q)(1)(G)); it was misbranded in that the label of the product failed to bear the registration number assigned (7 U.S.C. 136(q)(1)(C)(V)). 2/ Proposed penalty assessment, $2,250.

2/ This statutory reference in the complaint is obviously incorrect -- there is no such subsection. It is apparent that the reference should have been to 7 U.S.C. 136(q)(2)(C)(v). The respondent has raised no question concerning this matter.

With respect to I.D. Nos. 88176 (Rotenone) and 88468 (Azalea Dust), the answers do not deny or contest the charges but rather attempt to explain how the violations occurred. The answers request cancellation or reduction of the proposed penalties. With respect to I.D. No. 90943 (Poison Paste), the answer denies both misbranding charges and urges that no penalty is assessable.

Upon the filing of answers and requests for hearing, the cases were forwarded to the Administrative Law Judge for further proceedings. After consolidating the three cases the ALJ corresponded with the parties for the purpose of accomplishing some of the objectives of a prehearing conference (see Rules of Practice, section 168.36(d)). This correspondence is included in the record.

A hearing was held in Mobile, Alabama, on February 19 and 20, 1974. The complainant was represented by James H. Sargent, Esq., Chief, Legal Support Branch, Region IV, EPA, and the respondent was represented by Kirk C. Shaw, Esq., of the law firm of Armbrecht, Jackson, and De Mouy, of Mobile.

Proposed findings of fact and briefs were filed by the parties and have been duly considered by the Administrative Law Judge.

After consideration of the entire record, the Administrative Law Judge makes the following

Findings of Fact

1. The respondent, Pearson & Company, located in Mobile, Alabama, is a partnership consisting of C. Ferrell Pearson and his wife, Gertrude R. Pearson. Mr. Pearson, age 68, manages the company. The company has been in business since 1930, and manufactures and distributes insecticides and legume inoculants. At present, the company has 54 pesticides registered with the Environmental Protection Agency.

2. On February 13, 1973, the respondent shipped a total of 600 pounds (20 cases each containing 4 bags of 7.5 pounds each) of the pesticide Gulf States 5% Rotenone from Mobile, Alabama, to Paducah, Kentucky.

3. The label on the bags of the pesticide referred to in Finding 2 stated that the pesticide contained as an active ingredient 5% rotenone. The pesticide was 18.06% deficient in rotenone and was less effective than it would have been if it contained 5% rotenone. On previous occasions, the respondent had been cited by enforcement officials regarding deficiences of rotenone in its products.

4. On February 6, 1973, the respondent shipped a total of 312 pounds (13 cases each containing 24 bags of 1 pound each) of the pesticide Azalea Petal Blight Dust from Mobile, Alabama, to Pensacola, Florida.

5. The label on the bags of the pesticide referred to in Finding 4 stated that the pesticide was registered under No. 728-25. The said pesticide had been registered in 1967 under this number but the registration of said pesticide had been cancelled effective May 5, 1971.

6. The label of the pesticide referred to in Finding 4 stated that it contained as an active ingredient 3.25% zinc ethylene bisdithiocarbamate. The said pesticide contained less than 3.25% of this ingredient, two samples showing an average deficiency of 22.6%. The label of said pesticide did not list chlordane as an active ingredient and it did contain chlordane as an active ingredient, two samples showing an average of 0.49%.

7. On January 30, 1973, the respondent shipped 36 tubes each containing two ounces of the pesticide Pearson's Poison Paste from Mobile, Alabama, to Shreveport, Louisiana. Each tube was in a cardboard box which measured 5-1/8" x 1-1/2" x 1". The label represented that the product contained as the active ingredient 2% phosphorus. Enclosed in each cardboard box was labeling consisting of a one page printed sheet. The labeling represented the product to be an insecticide and rodenticide.

8. The front panel of the tubes (i.e. the immediate containers) of Pearson's Poison Paste did not bear an antidote statement or a statement to see the antidote statement on the back panel. The said tubes did not bear the following statements: "May be fatal if swallowed", "For professional pest control operator and government agency use only", "Not for use in or around the home."

9. Prior to the above shipment of Pearson's Poison Paste on January 30, 1973, respondent was advised by officials of EPA that the certain warning statements were required to appear on the label:

(a) Letter of November 1, 1972, advised respondent that the statement "See antidote statement and other precautions on back panel" should appear on the front panel of the tube.

(b) The said letter of November 1, 1972, advised respondent that the tube must bear the statement "May be fatal if swallowed." Similar advise was given to respondent in letters of August 29, 1972, and December 14, 1972.

10. The product Pearson's Poison Paste contains phosphorus which is highly toxic to humans. Other pesticides containing this chemical have been involved in poisonings of children.

11. In using this product it is likely that the pasteboard container and accompanying literature will be discarded after the initial use and the absence of the warning statements in Finding 9 on the tube creates the potential for serious harm to human health.

12. In letters dated August 29, 1972, and December 14, 1972, pesticides enforcement officials of EPA advised respondent that statements "For professional pesticide control operator and government agency use only" and "Not for use in or around the home" must appear on the tube label. This requirement was based on the interpretation in 40 CFR 162.124, which was issued on March 22, 1969 (34 F.R. 5537). This requirement was beyond the scope of the statute and failure of the label to bear these statements did not constitute misbranding.

13. The respondent's gross sales in 1972 and 1973 were approximately $275,000 and $290,000, respectively. The number of its full-time employees varies from 9 to 12 depending on the busy season of the company.

14. Adverse weather conditions which affect growers are reflected in their reduction of purchases of products from respondent. During the past five years such weather conditions have resulted in a decline in

respondent's sales and profits. Improved seasonal weather conditions will favorably affect respondent's business. A forced move of respondent's business premises several years ago has contributed to a decline in its profits.

15. The respondent's net profit decreased from about $33,000 in 1967 to $540 in 1970. Net profit in 1971 was $2,300 and in 1972, $3,045; in 1973 there was a loss of $1,200. Despite this record of profits in recent years, the respondent has chosen to remain in business with the hope and expectation that business will improve.

16. In November 1972, the net worth of the respondent partnership, excluding the value of the home owned by the partners and four acres of land, was in excess of $400,000. The partners have equity in the home and four acres of land of approximately $200,000.

17. While there may have been some changes or fluctuations in the financial condition of respondent since November 1972, the penalties assessed, as hereinafter set forth, will not effect the respondent's ability to continue in business.

18. Between 1969 and 1972, 25 citations were issued against respondent in which violations were alleged relating to interstate shipments of pesticides. The respondent did not contest any of said citations. In December 1972, the Agency recommended criminal prosecution against respondent for alleged violations in connection with samples of five products. Enforcement by way of civil penalty having become available

under FIFRA 1972, the recommendation for criminal prosecution was withdrawn. Subsequently, the violations which are the subject of the instant proceedings were discovered.

19. With regard to the Rotenone product the same proof will support the charges of misbranding and adulteration relating to the deficiency of rotenone and a single penalty is imposed for these violations. An appropriate penalty is $500.

20. With regard to the Azalea Dust product this was a single shipment and caused by negligence of respondent's employees. The same proof will support the charges of misbranding and adulteration with regard to the zinc ethylene bisdithiocarbamate deficiency and a single penalty is imposed for these violations. An appropriate penalty is $500. Similarly, the same proof will support the misbranding and adulteration charges with regard to the presence of chlordane and a single penalty is imposed for this violation. An appropriate penalty is $500. With regard to the non-registration charge and the misbranding charge that the label bore a registration number, the violations are closely interrelated and a single penalty is imposed. An appropriate penalty is $1,000.

21. With regard to the Poison Paste product, which is highly toxic and which did not bear the warning and caution statements which were required and which respondent was advised should be on the tube as set forth in Finding 9, a single penalty is imposed for failure to bear the required statements. An appropriate penalty is $1,500.

Conclusions

1. On February 13, 1973, the respondent shipped the pesticide Gulf States 5% Rotenone from Mobile, Alabama, to Paducah, Kentucky. Said pesticide was adulterated and misbranded within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended. The respondent violated section 12(a) of said Act and is subject to the assessment of a civil penalty under section 14(a) of said Act. An appropriate penalty for the violations relating to this shipment is $500.

2. On February 6, 1973, the respondent shipped the pesticide Azalea Petal Blight Dust from Mobile, Alabama, to Pensacola, Florida. Said pesticide was not registered as required by Federal Insecticide, Fungicide, and Rodenticide Act, as amended and was misbranded and adulterated within the meaning of said Act. The respondent violated section 12(a) of said Act and is subject to the assessment of a civil penalty under section 14(a) of said Act. An appropriate penalty for the violations relating to this shipment is $2,000.

3. On January 30, 1973, the respondent shipped the pesticide Pearson's Poison Paste from Mobile, Alabama, to Shreveport, Louisiana. Said pesticide was misbranded within the meaning of Federal Insecticide, Fungicide, and Rodenticide Act, as amended. The respondent violated section 12(a) of said Act and is subject to the assessment of a civil penalty under section 14(a) of said Act. An appropriate penalty for the violations relating to this shipment is $1,500.

4. In assessing the above penalties, totaling $4,000, there has been taken into consideration the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violations.

As above noted, the respondent did not contest the charges with regard to the Rotenone product in which there was an 18.06% deficiency of rotenone. The complainant does not claim that this deficiency would present any potential harm to man or the environment. However, with such a deficiency the efficacy of the product is reduced and in this respect the purchaser is misled and defrauded. Further, this deficiency, which is substantial, is evidence of inadequate quality control by respondent. In this connection, it is also noted that on other occasions the respondent had been cited for deficiences in its rotenone products.

The deficiency of rotenone resulted in the product being both misbranded and adulterated. It is the policy of EPA enforcement officials to assess separate civil penalties for each independent and substantially distinguishable charge and to assess only a single penalty where one charge derives primarily from another charge cited in the complaint (see Ex. 8, Sec. V-B). This policy undoubtedly is derived from court rulings which hold that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Blockburger v. U.S., 284 U.S. 299, 304 (1932); Tesciona v. Hunter, 151 F. 2d 589, 591 (10th Cir. 1945).

With regard to the Rotenone product, the same evidence will establish the misbranding and adulteration violations without proof of additional facts in either instance and a single penalty is imposed for these violations.

Again, in the Azalea Dust product, the respondent did not contest the charges. The registration of this product had been cancelled in May 1971. Through negligence of one of respondent's employees, the cancellation was not listed in respondent's records and when an order for this product was received in February 1973, a total of 312 pounds was shipped. Thus, a non-registered product was shipped and its label bore a registration number. The product was 22.6% deficient in the active ingredient listed on the label which resulted in the product being adulterated and misbranded. It also contained an additional active ingredient that was not listed which also resulted in adulteration and misbranding.

As in the Rotenone product, the deficiency reduced efficacy and the purchaser was misled and defrauded. The deficiency and the presence of an unlisted ingredient again indicated inadequate quality control.

A single penalty is imposed for the adulteration and misbranding by reason of the deficiency and a separate civil penalty is imposed by reason of the presence of an unlisted ingredient. The non-registration charge and the misbranding charge that the label bore a registration number are so closely interrelated that a single penalty is imposed for these violations.

The respondent has contested the charges with respect to the Poison Paste product. The product was alleged to be misbranded because it did not bear certain required warning or caution statements. In particular, it is claimed that the front panel of the label on the tube did not bear the words "See antidote statement on back panel" and the label did not bear the following statements "May be fatal if swallowed", "For professional pest control operator and government agency use only", "Not for use in or around the home."

The respondent argues that section 4(d) of the Federal Environmental Pesticide Control Act of 1972 (FEPCA) precludes the assessment of civil penalties for failure of the label to bear the warning and caution statement which complainant charges resulted in misbranding. This section provides as follows:

> No person shall be subject to any criminal or civil penalty imposed by the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by this Act, for any act (or failure to act) occurring before the expiration of 60 days after the Administrator has published effective regulations in the Federal Register and taken such other action as may be necessary to permit compliance with the provisions under which the penalty is to be imposed.

It is apparent that the purpose of this provision is to give persons whose activities come within the purview of the statute reasonable notice of any new requirements so that they could conform their conduct and operations to such requirements.

The pertinent charge against respondent with regard to Poison Paste is misbranding as defined in 7 U.S.C. 136(q)(1)(G) -- failure of the label to bear the required warning or caution statement. This provision is a

new formulation of and, so far as here material, the same as misbranding as defined in the Act before amended, 7 U.S.C. 135(z)(2)(d). Explanatory regulations as to label requirements had been issued under this section, 40 CFR 162.9.

On January 4, 1973, the Administrator of EPA issued an Implementation Plan for FIFRA 1972. This was published in the Federal Register on January 9, 1973, 38 F.R. 1142. Under the heading of "Definitions" the Administrator stated:

> Insofar as explanatory regulations may be desirable to furnish guidance to the public, regulations presently in force will be continued where applicable.

The regulations as to label requirements are equally applicable under the pertinent definitions of misbranding in the Act before and after amendment and new regulations were not required to define misbranding in this regard. The notice in the Federal Register continued the effectiveness of these regulations which were "presently in force." Further, it is important to note that other action had been taken to permit respondent to comply with the label requirements. In the letter of November 1, 1972 (after the enactment of FIFRA 1972), the respondent was specifically advised that the statements in question were required on the label (Ex. 6). The respondent had personal notice of the requirements and ample opportunity to comply with them before making the illegal shipment in question.

It is respondent's contention that EPA is estopped from asserting the labeling violations with regard to Poison Paste because it failed to review the labeling it had submitted on November 27, 1972, and advise it of the results as promised in its letter of December 14, 1972. We find this argument to be without merit.

In considering this argument, we must recognize at the outset the difference between label and labeling. Section 2(p)(1) of the Act (7 U.S.C. 136(p)(1)), in pertinent part, defines label to mean written, printed, or graphic matter on, or attached to, the pesticide or any of its containers or wrappers. Section 2(p)(2) (7 U.S.C. 136(p)(2)) defines labeling to mean all labels and all other written, printed, or graphic matter accompanying the pesticide at any time.

The alleged misbranding violations in the complaint relate to the label of the product. In letters to the respondent prior to December 14, 1972, the pesticide enforcement officials of EPA had specifically pointed out its claim of inadequancies in the label. There was never any indication that EPA had changed its position as to these label requirements. The material that respondent submitted on November 27, 1972, which was to be reviewed was "package labeling". Failure of EPA to advise respondent of the results of the review of labeling does not excuse respondent from complying with proper and explicit requirements as to content of label. It is significant to note the letter of December 14, 1972, repeated the requirement that the label must bear the statement "May be fatal if swallowed."

As to the antidote statement, the applicable regulations require such statement on the front panel but reasonable variations are permitted in the placement of such statement if some reference to such as "See antidote statement on back panel" appears on the front panel. 40 CFR 162.9(b). The respondent was notified of this requirement by letter from EPA dated November 1, 1972. Failure to bear the proper antidote statement resulted in misbranding.

The respondent argues that 40 CFR 162.116(d) does not require the "fatal if swallowed" warning on products containing more than 1% phosphorus. (The product in question contained 2% phosphorus.) This section sets forth or indicates acceptable warnings, etc. and states "The manufacturer is obligated to use any added warning, caution or antidote statements which any special characteristics or uses of his formulation indicate to be necessary." Further, section 162.9 provides "The label of every economic poison shall bear warnings or cautions which are necessary for the protection of the public . . . as the Director may prescribe . . .". The Director in the letter of November 1, 1972, specifically notified respondent that the tube must bear the "fatal if swallowed" statement. Although the product was not supposed to be used in the home, the 2 ounce tube is particularly adaptable for home use and it was undoubtedly the view of the Director that the "fatal if swallowed" statement on such tube was necessary for the protection of the public. The respondent's failure to include this statement on the tube was in direct contravention of the Director's notification and resulted in misbranding.

We turn now to the "professional use" and "not for home use" statements. In Stearns Electric Paste Co. v. EPA, 461 F.2d 293 (7th Cir. 1972), a product containing phosphorus, similar to Pearson's Poison Paste, was involved. The registration of the Stearns product had been cancelled on the ground that phosphorus paste is too poisonous for use in the home except by commercial pest control operators. This cancellation followed the issuance of Interpretation 26 on March 19, 1969, (34 F.R. 5537) 40 CFR 162.124.

The court, after tracing the history and purpose of FIFRA, held in substance that a product of this composition, with adequate warnings and statements on the label, could not be banned from home use, and the court concluded that the cancellation order must be set aside. We are of the view that the court ruling supersedes the Agency interpretation. The purpose sought to be accomplished under Interpretation 26 may now be available under section 3(d) of FIFRA, as amended (7 U.S.C. 136a).

There was considerable evidence at the hearing regarding the Civil Penalty Assessment Schedule used by the Regional Offices of EPA. The complainant introduced this as an exhibit at the hearing.

The individual cases under the civil penalty enforcement program are handled by the appropriate Regional Offices of which there are ten. In the hope of achieving uniformity in the amount of penalty assessed in the various regions for violations of comparable gravity, the Pesticides Enforcement Division, in Washington, D.C., in collaboration with regional personnel developed the schedule. In determining the amount of the penalty, the statute requires the Agency to consider the appropriateness of the penalty to the size of respondent's business, the effect on his ability to continue in business, and the gravity of the violation.

The schedule was set up with a range of dollar amount penalties for the violations of various types. In setting up the schedule, primary consideration was given to two factors -- gravity of the violation and size of respondent's business. The third factor — the effect on respondent's ability to continue in business -- was considered to have some relationship to the size of respondent's business. A respondent is given the opportunity

at the regional level, before an administrative hearing is held, to contest the alleged violation and the appropriateness of the penalty. The respondent may also submit evidence on the three factors to be considered at a formal hearing, such as was held in this case.

The use of the schedule is not a covert operation by the regional officials and its use is readily acknowledged. It has not been published and, so far as we are aware, publication is not required. 3/ It is undoubtedly proper and desirable for the enforcement officials to be guided by the schedule. However, we are of the view that the Administrative Law Judge who hears the case is not bound by it. Section 14(a)(3) of the Act (7 U.S.C. 136 l (a)(3)), as we read it, contemplates an administrative hearing not only on the matter of violations, but also on the appropriateness of the penalty. The Administrative Law Judge who hears the case must make an independent judgment on both of these factors. He may look to the schedule to learn the basis on which the enforcement officials arrived at the amount of the proposed penalty. But, the evidence before him may be different from that which was before the enforcement officials or, if the same, he may not agree with their evaluation of it. Accordingly, if he finds a violation he may increase (within the limits of the statute) or decrease the amount of the penalty proposed by the enforcement officials.

Particular attention has been given to respondent's claim that a sizeable penalty will effect its ability to continue in business. The imposition of the penalties herein assessed will not effect respondent's

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3/ We are informed that a Civil Penalty Assessment Schedule will be published together with the final Rules of Practice.

ability to continue in business. There are other factors more important, e.g., improved business conditions, favorable weather conditions and Mr. Pearson's age. The imposition of the penalties may influence respondent in deciding whether it desires to continue in business, but it will not affect its ability to do so.

The penalties assessed herein are at variance with those set forth in the assessment schedule, but in our view, they are appropriate in light of the factors that must be considered.

The proposed Findings of Fact and Conclusions submitted by the parties have been considered. To the extent that they are consistent with Findings of Fact and Conclusions herein, they are granted, otherwise they are denied.

Having considered the entire record and based on the Findings of Fact and Conclusions herein, it is proposed that the following order be issued.

Final Order

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l (a)(1)), civil penalties totaling $4,000 are assessed against respondent Pearson & Company, Mobile, Alabama (C. Ferrell Pearson and Gertrude R. Pearson, co-partners), for violations of said Act which have been established on the basis of complaints issued on November 2, 1973.

Bernard D. Levinson
Administrative Law Judge

May 31, 1974

Certificate of Service

I hereby certify that two copies of this Initial Decision were sent by certified mail to the Regional Hearing Clerk, Region IV, EPA, and a copy was sent by certified mail to Kirk C. Shaw, Esq., Armbrecht, Jackson, and De Mouy, Merchants National Bank Building, P.O. Box 290, Mobile, Alabama, 36601 and to James H. Sargent, Esq., Chief, Legal Support Branch, EPA, 1421 Peachtree Street, N.E., Atlanta, Georgia, 30309.

Patricia M. Richards

Patricia M. Richards
Secretary to ALJ Levinson

May 31, 1974