

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

DOCKET NO.TSCA-V-C-080-92

STANDARD FORGINGS CORPORATION
AND
TRINITY INDUSTRIES, INC.,

Respondents

PARTIAL ACCELERATED DECISION AND DECISION ON MOTION TO DISMISS 1/

Under consideration are respondents' motion to dismiss, received October 28, 1996 and complainant's motion for a partial accelerated decision, received October 28, 1996. The complaint in this matter was filed on September 22, 1992 and amended on November 17, 1993. The complaint states that Standard Forgings and its parent corporation Trinity Industries, Inc. own and operate a facility at 3444 Dickey Road, East Chicago, Indiana. Respondents' facility was inspected on June 20, 1991 and September 24, 1991 by complainant's inspectors to determine compliance with the PCB rule.

Respondents had three PCB transformers in use at the time of the inspection according to the complaint. As a result of the inspections, complainant determined that respondents had violated the PCB regulations regarding the record keeping, use, disposal, and marking requirements. The complaint asserts seven counts, all but Count VI - which complainant no longer asserts - are at issue in these filings. Count I alleges that respondents failed to dispose of PCBs in accordance with the applicable disposal requirements; Count II alleges that respondents failed to develop and maintain records and annual documents about their PCB transformers; Count III alleges that respondents failed to mark the access way to the substation containing a PCB transformer with the M_L label; Count IV alleges that respondents failed to conduct visual inspections of their PCB transformers and maintain records of such inspections in 1990; Count V alleges that respondents failed to conduct inspections of their PCB transformers and maintain records of such inspections in 1989; and Count VII

alleges that respondents failed to register the PCB transformers with fire response personnel by December 1, 1985. Complainant proposes a penalty of \$78,000 for the violations.

Respondents' Motion to Dismiss

WHETHER TRINITY INDUSTRIES IS AN APPROPRIATE PARTY IN THIS CASE

Respondents argue that all counts should be dismissed against Trinity Industries because it maintains no daily control over the operations at the facility. Respondents concede that Trinity Industries "assisted in the response to the Standard Forgings' inspections" that led to the complaint in this proceeding but they maintain that that is not enough to hold Trinity Industries liable. Respondents urge that there would have to be involvement by Trinity Industries in the business of Standard Forgings on a wide range of corporate matters. Respondents argue that general authority by a parent over its subsidiary is not enough and to so hold would discourage a corporate parent from participating in the environmental affairs of the subsidiary. Respondents also urge that to hold Trinity Industries liable just because it owns Standard Forgings would require a demonstration of fraud, which complainant has not made. The respondents imply, but do not demonstrate, that Standard Forgings is operated separately from its parent Trinity Industries. The only evidence that respondents point to to support their arguments is the Purchase and Sale Agreement. Jt. Ex. 3 and Stipulation of Fact #13).

Complainant argues that both Trinity Industries and Standard Forgings are liable for the violations because of the following relationships: Trinity Industries purchased 100 % of the capital stock of Standard Forgings in 1986. According to the complainant, Trinity Industries has involved itself in the condition of PCB Items at the facility. Complainant points out that when a transformer fire occurred, on November 30, 1990, at the facility that caused the leaking of dielectric fluid, Trinity Industries notified the Indiana Department of Environmental Management. The notification was made, on January 18, 1991, by Gary Raven, Trinity Industries' Environmental Director. Raven is being proffered in this proceeding as an expert witness on the preparation and maintenance of records under the Toxic Substances Control Act, details about the fire which occurred in November 1990, and the nature and condition of the transformers at the Standard Forgings facility. When a soil sample was taken during the first inspection, on June 20, 1991, Trinity Industries had respondents' split analyzed by Archem in Texas where Trinity Industries' home office is located. Nothing in Archem's report indicates that Archem reported

the results to Standard Forgings. Archem's report was sent to complainant by Trinity Industries' Raven.

After complainant inspected Standard Forgings in June of 1991, Karen Gutierrez, a Standard Forgings' employee, reported to Raven what had occurred. Raven was sent documents about the PCB items at the facility. Raven's approval was sought for a contract regarding pit # 5 (deep well) at Standard Forgings' facility and he was told by Guitierrez that she would keep him informed about activities at Standard Forgings. Guitierrez invited Raven to let her know what else he needed, implying that he was in charge of environmental matters at Standard Forgings. When complainant inspected the facility on September 24, 1991, Raven was present. He identified himself as the official responsible for compliance with the PCB rule at the facility. Raven executed the Notice of Inspection Form presented by the inspectors during the September inspection. He also executed the Inspection Confidentiality Notice Form presented at the same time. That form must be completed by a facility official. Raven certified that he had read the notice. Raven executed the Receipt for Samples and Documents Form presented by the inspectors at the time of the September inspection. The inspectors issued a Field Citation which cited respondents' failure to maintain annual PCB documents in violation of § 761.180. Raven executed the Field Citation as the official responsible at the facility. Raven was also the official with whom the inspectors corresponded about the violations after the September 1991 inspection.

Respondents have not demonstrated that the relationship between the parent Trinity Industries and the subsidiary Standard Forgings is not as complainant represents. The facts cited in the pleadings support the complainant's claim that both Trinity Industries and Standard Forgings are liable for the alleged violations. Respondents point to no evidence that rebuts complainant's showing about their relationship. Complainant maintains that the relationship between Trinity Industries and Standard Forgings is one in which Trinity Industries makes decisions about compliance with environmental regulations at Standard Forgings' facility. This was apparent when Raven held himself out as the person to contact about the alleged violations in this case and when he identified himself to complainant as the responsible official during the September inspection. Respondents have not disagreed with that view. Respondents have held him out as a key witness on the matters at issue. Raven works at the Dallas headquarters of Trinity Industries and is an official of the parent. The record indicates that he has participated when environmental issues have arisen at Standard Forgings in the past and there is no reason to expect that that will not be the case in the future.

The purpose of this hearing is to determine if there is liability for the violations alleged in the complaint and, if there is, to assess a penalty and formulate a remedy that will impress on the responsible parties the need to follow any environmental laws that may have been violated. Trinity Industries' close and controlling role when environmental issues arise at Standard Forgings, its complete ownership and its apparent control of environmental events arising at Standard Forgings, demonstrate that it is a necessary and appropriate party if there is to be a resolution of the matters raised in this proceeding. Respondents' motion to dismiss the complaint against Trinity Industries will be denied.

WHETHER COUNT VII IS BARRED BECAUSE THE CLAIM IS UNTIMELY

The complaint alleges that respondents failed to register their PCB transformers with fire personnel with primary jurisdiction as of December 1, 1985. The complaint states that on June 20, 1991, the inspectors found that respondents had not registered their three PCB transformers with fire response personnel. Respondents argue that the violation occurred on December 1, 1985 and that they cannot be held accountable because the complaint was not issued until September 21, 1992, more than five years from the date of the violation. Respondents point to 28 U.S.C. §2462 for support of their assertion that the complaint was untimely.

Complainant urges that while the violation began on December 1, 1985, it continued until respondent registered the transformers. To support its argument, complainant cites the analysis in Lazarus Incorporated, 1995 TSCA LEXIS 11, at 15 (ALJ May 25, 1995). Lazarus Incorporated states that the failure to register transformers with fire response personnel on December 1, 1985 is a continuing violation of 40 C.F.R. § 761.30 (a) (1) (vi) (1985). The opinion points out that it is a continuing violation because of the nature of the rule, which requires registration in order that fire personnel will know about the presence of PCBs when they are called to the facility. That danger remains when fire response personnel are called to the facility as long as the transformers are unknown to them. The opinion also relies on TSCA § 16 (a) (1), 15 U.S.C. § 2615 (a) (1). That section provides that a separate violation occurs each day that 15 U.S.C. § 2614 is violated. Lazarus Incorporated, citing United States v. ITT Continental Baking Co., 420 U.S. 223 (1975), concludes that the purpose of § 2614 is to deter violations of the notification rule because there is a continuing risk to human safety and health as long as there is noncompliance. The rationale of Lazarus Incorporated is equally applicable to this case. Accordingly, Count VII will not be dismissed.

WHETHER THE COUNTS INVOLVING VIOLATIONS OF THE RECORD KEEPING REQUIREMENTS
WARRANT DISMISSAL WHEN THERE HAS BEEN A FIRE AND COMPLIANCE AFTER INSPECTION

Respondents represent that due to a bomb explosion at the facility, in November 1990, they were required to "reconstruct" the 1990 annual PCB documents that are cited in Count II. Count II alleges that respondents did not have annual documents on the disposition of their PCB items for the calendar year 1990 in violation of 40 C.F.R. § 761.180 (a). Respondents were required to maintain records on the disposition of PCBs and PCB items which were to be the basis of the annual PCB documents. The annual PCB documents cited in Count II were to have been prepared at the facility by July 1, 1991 for the calendar year 1990.

According to the complaint, on September 24, 1991, respondents had not developed and maintained complete records and did not have annual PCB documents on the disposition of their PCB items for the calendar year 1990. Respondents do not claim that they had the required documents. Instead, they maintain that because they eventually "reconstructed" the annual PCB documents for 1990, they acted in good faith and Count II should be dismissed.

Complainant points out that respondents have already stipulated (Jt. Stip. 25) that they did not have any annual documents for 1990 on the disposition of their PCB items at the time of the inspection in June. Complainant explains that because of the bombing and fire, it did not cite respondents for missing annual documents for the years preceding 1990. But with regard to the 1990 annual documents, respondents were cited for not having them since they did not have to prepare them until seven months after the fire, on July 1, 1991. Complainant points out that respondents did not have the documents at the time of the September inspection and they did not submit them 30 days after the Field Citation as required. They were not submitted until November 21, 1991.

Counts IV and V allege that respondents did not have records for transformer inspections or maintenance history for the years 1989 and 1990 for their three PCB transformers. The complaint states that this violated 40 C.F.R. Part 761, Appendix B (III), Interim Measures Program; 40 C. F. R. § 761.30 (a) (1), and Section 15 of TSCA. Counts IV and V allege that respondents did not perform a visual inspection of their 3 PCB transformers and that on September 24, 1991, respondents did not have records of transformer inspections or maintenance history for the years 1990 and 1989.

Respondents imply that the quarterly inspection reports for 1989 and 1990 were given to EPA inspector Fonseca and that they should not be penalized for

quarterly inspection reports that were not there. Respondents represent that, at the September 1991 inspection, they gave inspector Fonseca all the required quarterly inspection reports. Respondents base their claim on the fact that Fonseca indicated on the inspection papers that she received from respondents quarterly reports from 1981 to the date of the inspection.

Complainant explains that Joint Exhibit 5 Attach. 3 represents the 54 pages of quarterly inspection records given to inspector Fonesca and that it does not include quarterly inspection records for 1989 and 1990. The inspectors have certified that Jt. Exh. 5 represents the documents that they were given. Both inspectors have stated in affidavits that Standard Forgings' employee Karen Gutierrez represented at the September inspection that none of the quarterly reports were destroyed in the November 1990 fire. Complainant points out that respondents do not aver that the 1989 and 1990 quarterly reports existed or exist.

Count VII alleges that respondents did not register their transformers with fire personnel with primary jurisdiction as of December 1, 1985. The registration was required by 40 C.F.R. § 761.30 (a) (1) (vi) and Section 15 of TSCA. Respondents allege that complainant has presented no "clear evidence" that respondents failed to register with fire personnel. Respondent argues that complainant has not presented evidence to support the violations.

Complainant states, with regard to the respondents' claim that no clear evidence exists that respondents did not register their transformers with the fire personnel, that respondents were unable to produce any record of such registration at the time of the inspections. Again, complainant notes that respondents have not averred that they did register the transformers.

The joint exhibits, joint stipulations and affidavits attached to the motions do not support respondents' claim that Counts IV, V and VII are without support or merit. The evidence cited by complainant refutes respondents' claims of the lack of support with regard the Counts IV, V, and VII. Respondents' have not established any legal rationale or equitable justification for dismissing Counts IV, V, and VII of the complaint.

Complainant's Motion for Partial Accelerated Decision

The arguments about whether the respondents are subject to liability for the alleged violations of the PCB rule have been considered in resolving the issues presented in respondents' motion to dismiss and will not be repeated.

Complainant requests that all the counts raised in the complaint, but Count VI (which it has withdrawn), be determined in its favor. It claims that no genuine issues of material fact remain on the allegations in each of the counts.

COUNT I

Complainant alleges in Count I that respondents disposed of PCBs in approximately 3.14 square feet of soil. This disposal of PCBs, complainant alleges, did not comply with the applicable disposal requirements of 40 C.F.R. § 761.60 and Section 15 of TSCA. Section 761.60 (a) requires that PCBs at concentrations of 500 ppm or greater be disposed of in an incinerator which complies with 40 C.F.R. § 761.70. On September 24, 1991, EPA's inspectors took samples from an oily spot in the soil, approximately two feet in diameter, outside the PCB transformer storage building. The sample showed the presence of PCBs at concentrations of 514 ppm. 40 C.F.R. § 761.60 (d) (1) provides that spills and other uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs. When respondent Trinity Industries had half of the sample tested the results showed 260 micrograms per gram. Another sample taken by EPA inspectors at the same location showed the presence of PCBs at concentrations of 1160 ppm. All of these facts have been stipulated to by the parties. There is no remaining genuine issue of material fact on Count I. Based on the stipulated facts, it is concluded that respondents' disposal of PCBs constitutes a violation of 40 C.F.R. § 761.60.

COUNT II

Complainant alleges in Count II that during the calendar year 1990, respondents were using three PCB transformers at the facility. On September 24, 1991, respondents, allegedly, had not developed and maintained complete records and did not have annual documents on the disposition of their PCB items for calendar year 1990. This alleged failure, the complaint states, is a violation of 40 C. F. R. § 761.180 (a) and Section 15 of TSCA. Section 761.180 (a) requires that each owner or operator of a facility using or storing at one time at least 45 kilograms of PCBs contained in PCB container(s), or one or more PCB transformers, develop and maintain records on the disposition of PCBs and PCB items. These records form the basis of annual PCB documents which are to be prepared by each facility by July 1, covering the previous calendar year. Owners and operators were to start this record keeping beginning on July 2, 1978.

Three transformers were located at the facility: (a) Kuhlman Transformer, Serial # D19990 (2,000 kVa), 802 gallons, PCB concentration 6,805 ppm; (b) G.E. Transformer, Serial # 7511606 (500 kVa), 415 gallons, PCB concentration 3,918 ppm; and (c) Ward Transformer, Serial # 6624379 (1500 kVa) 333 gallons, PCB concentration 7,500 ppm. Because each transformer contained more than 500 ppm PCB, they are classified as PCB transformers pursuant to 40 C. F. R. § 761.3. The three PCB transformers were stored at the facility through 1990 which made them subject to the record keeping requirements of 40 C. F. R. § 761.180 (a). At the June and the September inspection, respondents were unable to produce for the inspectors any PCB annual documents required by § 761.180 (a). The facts in this and the preceding paragraph were stipulated to by the parties.

On November 30, 1990, a bomb exploded at an office building at the facility. The bomb explosion caused a fire that destroyed part of the office building in which some of the facility's records were kept. Karen Gutierrez represents, in an affidavit attached to respondents' opposition to the motion for accelerated decision, that the November 22, 1990 fire destroyed many documents and records. She also represents that there had been vandalism at the facility. She claims that she was unable to locate annual documents and some quarterly inspection reports relating to the PCB transformers. She said that at the inspectors request she reconstructed the missing reports.

Complainant argues that the bomb explosion that occurred at the facility on November 22, 1990, does not excuse the lack of PCB annual documents for 1990 because the explosion occurred prior to the end of calendar year 1990 and more than seven months prior to the date (July 1, 1991) on which the records were due to have been developed and maintained at the facility. Complainant argues that respondent had ample time to develop and, if necessary, to reconstruct the PCB annual documents. Complainant points out that respondent eventually did prepare the annual PCB documents and submitted them to complainant on November 21, 1991. The parties stipulated that the PCB annual documents verify that the status of the PCBs and PCB items at the facility apparently did not change from 1981 through 1991.

The foregoing facts support complainant's claim that respondents violated § 761.180 (a) because they failed to develop and maintain PCB annual documents for calendar year 1990. There is no genuine issue of material fact remaining.

While respondents maintain that they should not be found to have violated the PCB rule because of the November 1990 fire, that is not a convincing argument where they had seven months to comply with the rule after the fire. The record

reflects that respondents ultimately prepared the annual PCB documents but they did not do so until November 21, 1991, nearly six months after the July 1, 1991 due date. Respondents argue that the bombing and fire in November 1990 destroyed documents, but there is no evidence from anyone that the PCB annual documents had been prepared at that time. They were not due to be prepared before July 1, 1991, more than six months later. Thus, even if the documents were destroyed by the fire (Gutierrez does not say in her affidavit that they were destroyed or that she or someone else prepared them before the fire), there was ample time to fully comply with the rule. Under these circumstances, the fire is not relevant to determining whether respondents complied with the requirement of § 761.180 (a), in preparing PCB annual documents by July 1, 1997. It is concluded that respondents violated 40 C. F. R. § 761.180 (a) when they failed to develop and maintain PCB annual documents for calendar year 1990. There is no genuine issue of material fact remaining on Count II.

COUNT III

The complaint alleges that on September 24, 1991, the gate to the substation containing respondents' PCB transformer, Kuhlman Transformer (serial #D1 9990), was not marked with an M_L label. The complaint states that this failure is a violation of 40 C. F. R. § 761.40 (j). The parties have stipulated that the Kuhlman Transformer was stored continuously at the facility, from at least 1981 up through the time of at least the September inspection. The Kuhlman transformer capacity was 802 gallons with a PCB concentration of 6,805 ppm. At the time of the inspections the Kuhlman transformer was located outside in a separate electrical substation that was fenced and locked. Because the Kuhlman transformer is a PCB transformer as defined in 40 C.F.R. § 761.3, respondents were required pursuant to 40 C.F.R. § 761.40 (j) to mark the means of access with the M_L label. Respondents have not disputed this violation. It is concluded that respondents violated § 761.40 (j) when they failed to mark the Kuhlman transformer with the M_L label. There is no genuine issue of material fact remaining on Count III.

COUNT IV AND V

From 1981 to 1991 and on September 24, 1991, respondents had three transformers in use. For the years 1989 and 1990, the complaint alleges that respondents did not perform a visual inspection of the transformers. The complaint alleges that, on September 24, 1991, respondents did not have records of transformer inspections or maintenance history for years 1989 and 1990. The PCB rule at 40 C. F. R. Part 761, Appendix B (III), Interim Measures Program, 46 Fed. Reg.

16090 (March 10, 1981) [codified as 40 C. F. R. § 761.30 (a) (1)] requires that a visual inspection of each PCB transformer in use or stored for reuse be performed at least once every three months. Records of the transformer inspections and maintenance history are to be developed and maintained at least three years after disposal of the PCB transformers.

The parties stipulated to the following facts: During 1989 and 1990, respondents' three PCB transformers were in use or in storage for reuse. The PCB annual documents submitted to complainant state that the PCB transformers were "Remaining In Service" at the end of the calendar years 1989 and 1990. Complainant states that because the PCB transformers were in use or storage for reuse, respondents were required to conduct quarterly inspections as provided in 40 C. F. R. § 760.30 (a) (1). During the June inspection, the respondents were unable to produce the records of quarterly transformer inspections or maintenance history for any of the previous years. At the September inspection, respondent Standard Forgings gave the inspectors records of quarterly transformer inspections for past years. All of the quarterly reports that were turned over to the inspectors are in Joint Exh. 9; Joint Stip. 29. No quarterly reports for 1989 and 1990 were provided to the inspectors. Respondent Standard Forgings told the inspectors that the records were not destroyed in the bombing incident that occurred at the facility in November 1990. Joint Exh. 5.

Respondents argue that the records were turned over to the inspectors and were signed for in September 1991. They imply that the missing years of quarterly inspections were present at the time the inspectors received the documents. They also appear to maintain that the quarterly reports were destroyed in the bombing and fire incident that occurred at the facility in November 1990. To support their arguments they point to the Gutierrez affidavit.

Gutierrez states that she was unable to locate some of the quarterly reports relating to the PCB transformers. Her statement confirms that not all of the quarterly reports were turned over to the inspectors in September 1991. While she states that she reconstructed documents for complainant, she does not say that she did so at the time of the September inspection. The record reflects that the reconstructed documents were turned over in November 1991. Gutierrez does not say that the bombing selectively destroyed only the 1989 and 1990 quarterly reports. Moreover, she does not dispute the claim that the quarterly inspections were not conducted in 1989 and 1990 and that quarterly records of those inspections were not maintained in 1989 and 1990. As complainant points out, even if the fire disrupted respondents' record keeping in November 1990, the documents could have been reconstructed by September 1991. The affidavit of

Gutierrez does not raise a genuine issue of material fact; her affidavit does not conflict with the factual claims of the complainant.

The burden was on respondents at the time of the inspections to produce the reports that would have demonstrated their compliance with the rule requiring quarterly inspections and reports of inspections of the transformers. Respondents' affidavit concedes that some of the quarterly reports were missing. It has not produced any evidence that the reports were made or the inspections carried out in 1989 and 1990. Respondents' failure to conduct inspections of their PCB transformers and maintain records of such inspections in 1989 and 1990 constitutes a violation of 40 C. F. R. Part 761, Appendix B (III), Interim Measures Program; 40 C. F. R. § 761.30 (a) (1), and Section 15 of TSCA. No genuine material issue of fact remains with regard to Count IV and V.

COUNT VII

The complaint alleges that at the time of the June 20, 1991 inspection, respondents had not registered their three PCB transformers with the appropriate fire response personnel. The PCB rule at 40 C. F. R. § 761.30 (a) (1) (vi) requires, as of December 1, 1985, registration of all PCB transformers with fire response personnel with primary jurisdiction. As already noted, there were three PCB transformers at the facility that were in use or in storage for reuse. The transformers were subject to the rule requiring registration. At the June and September inspections in 1991, respondents could not produce records of registration with fire personnel. Respondents state only that it is possible that the registrations were destroyed in the bombing and fire. Gutierrez represents that after the EPA inspections she provided the East Chicago Fire Department information relating to the facility's transformers as well as a fire evacuation plan. She does not state that the transformers had been previously registered as required by the rule or that evidence of the registrations was lost in the fire.

Respondents' failure to register the PCB transformers with fire response personnel by December 1, 1985 constitutes a violation of 40 C. F. R. § 761.30 (a) (1) (vi) and Section 15 of TSCA. No genuine material issue of fact remains with regard to Count VII.

ACCORDINGLY IT IS ORDERED that respondent's motion to dismiss IS DENIED.

IT IS FURTHER ORDERED that complainant's motion for a partial accelerated decision IS GRANTED on Counts I, II, II, IV, V, and VII.

Edward J. Kuhlmann
Administrative Law Judge

March 20, 1997
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on March 20,1997.

Shirley Smith
Legal Staff Assistant
For Judge Edward J. Kuhlmann

NAME OF RESPONDENT: Standard Forgings Corporation and Trinity Industries, Inc.

DOCKET NUMBER: TSCA-V-C-080-92

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1/ The complainant is represented by Timothy Chapman and Deborah Carlson and the respondents are represented by Thomas G. Yoxall and Frederick W. Addison, III.