

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
CONVERSE COUNTY WEED AND ) DOCKET NO. I.F.&R. VIII-95-382C  
PEST CONTROL DISTRICT )  
 )  
RESPONDENT )

ORDER

Under consideration is the motion to amend complaint after hearing, filed July 8, 1997. The complainant moves to amend the complaint after hearing to change the allegations in the complaint to conform to the hearing evidence.

On April 20, 1994, EPA inspector Michael Rudy conducted an inspection of Converse County Weed and Pest Control District, a pesticide dealer operating at 59 State Highway 59 in Douglas, Wyoming. The inspector found bags of the pesticide ZP Rodent Bait AG manufactured by Bell Laboratories which were allegedly misbranded under FIFRA § 2 (q) (1) (b) because they lacked the federal labels required by FIFRA § 25 c and had affixed an outdated Wyoming State Registration Section 24 (c) label. The original complaint alleged in its first two counts that respondent sold misbranded Rodent Bait AG to Michael Werner and Leo Stangle in violation of FIFRA § 12 (a) (1) (E). The proposed penalty for the violations cited was \$3,000 per count or \$6,000.

Complainant now proposes to amend the complaint to allege that respondent distributed, during 1992 and 1993, 414 bags of misbranded ZP Rodent Bait AG to customers and contractors. The complaint no longer alleges that respondent sold misbranded pesticide to particular customers. The violations of the agency's rules and governing statute are the same as those cited in the original complaint and the penalty sought is the same as in the original complaint.

The need for amending the complaint at this stage of the proceeding came about, complainant states, because respondent told EPA's inspector that the misbranded pesticide was sold to Werner and Stangle. When the inspector asked for invoices of the sales, the Converse County Weed and Pest Control District Supervisor Roy J. Reichenbach showed him ledger entries of sales of Rodent Bait AG to Werner and Stangle. Complainant relied on these ledger entries as evidence of sales of misbranded Rodent Bait AG in the original complaint. From the time of the inspection, April 24, 1994, until the complaint was issued, on September 29, 1995, complainant was under the misapprehension that both Stangle and Werner had been sold misbranded pesticide.

Complainant concedes that respondent's answer, filed on October 24, 1995, raised questions about the validity of the allegations in the complaint. Respondent in its answer denied it sold misbranded pesticide to Werner. Respondent stated that "the product provided to Mr. Werner was from the Shipment received November 3, 1992, which was properly labeled by the manufacturer." Respondent also denied in its answer any sale of misbranded pesticide to Stangle. Respondent claimed that "[m]ost of the mislabeled product was gone by this time; only a few sacks provided to Mr. Stangle were of the original sacks in question." Respondent appeared to confirm in its answer, however, that it had sold the misbranded shipment which had been identified by the inspector.

Complainant states that it found respondent's answer confusing because Reichenbach had shown the inspector the ledger entries for Werner and Stangle in response to the inspector's request that he identify sales of the misbranded pesticide and provide invoices for them. Despite the fact that it was unclear to complainant, after respondent filed its answer, that the sales alleged in the complaint violated FIFRA, complainant did not investigate the apparently inconsistent representations in respondent's answer. Defending its inaction, complainant points out that respondent withheld the fact that all of the misbranded pesticide had been distributed to its contractors and not sold.

Complainant states that at the hearing Reichenbach testified that the misbranded pesticide was distributed to respondent's contractors and not sold. Complainant characterizes Reichenbach's testimony as a "surprising change in admission" from his earlier representations to EPA's inspector. Complainant states that if it had known that the pesticide was distributed to contractors and not sold to Stangle and Werner, it would have

alleged in the original complaint that the misbranded pesticide was distributed to respondent's contractors.

Complainant urges that it should be permitted to amend the complaint with minimal restriction; in part, it claims because pleadings are "unimportant". Complainant argues that the complaint may be amended after the hearing as long as the respondent knew the issues and was provided with an opportunity to defend itself against them. Complainant states that respondent knew from the original complaint that complainant believed that two pallets of ZP Rodent Bait AG had been sold without the proper state and federal labels affixed to the pesticide package. The revised claim, complainant points out, alleges that the misbranded pesticide was distributed not sold. The complaint also eliminates any specific identification of respondent's contractors or customers. If these changes appear significant, complainant urges, it was respondent's fault because respondent knew from the outset that the pesticide was distributed, and who received it, but it failed to properly identify for complainant who received the pesticide.

Respondent agrees with complainant that whether the misbranded pesticide was sold or distributed is not material to its ability to defend against the complaint. Respondent believed that the thrust of complainant's case was that respondent had sold misbranded ZP Rodent Bait AG to Werner and Stangle. Since the complaint alleged no other sales or distribution, respondent assumed it had no obligation to defend against any other sales or distributions. Respondent maintains that if complainant had reviewed respondent's prehearing exchange when it was filed in January 1997, complainant would have known that the allegations involving the sales to Stangle and Werner were unsupportable.

Respondent argues that complainant unduly delayed its request to amend the complaint and, because of the delay, the respondent has been prejudiced by having to defend against allegations which complainant has now withdrawn. Respondent suggests that if it had known that complainant could not establish that sales were made to Werner and Stangle, it might have settled.

There is little question that complainant did not act diligently. Respondent's answer in 1995 and its prehearing exchange in early 1997 denied that the sales took place. Complainant, after it received the answer, apparently did nothing to confirm that the allegations of sales to Werner and Stangle involved misbranded pesticide. Complainant concedes that it relied on ledger entries pointed out by Reichenbach, even in

the face of respondent's later denials. Nevertheless, respondent is not without blame for the complainant's predicament. The hearing record reflects that the inspector asked Reichenbach for sales of the suspected misbranded shipment of ZP Rodent Bait AG. Reichenbach gave the inspector restricted use pesticide forms, invoices and identified ledger sheets of sales of ZP Rodent Bait AG which purported to be sales of the misbranded shipment. Compl. Ex. 2, Attach. 7. Respondent does not dispute that it gave the agency the wrong information.

Respondent's representation that it believed that complainant would make a showing at the hearing that there were sales to Werner and Stangle is unbelievable. Respondent supplied all the information that complainant had and it inferred in its answer in 1995 that that information was inaccurate. Respondent also knew from reviewing complainant's prehearing exchange that the only support for the allegations in the complaint was that supplied by Reichenbach. Under these circumstances, if respondent suffered prejudice, it was of its own making. Respondent appears to also suggest that Reichenbach was at times unclear about what was at issue at the time of the inspection. That seems improbable since the respondent had been informed by complainant and the manufacturer long before the 1994 inspection that the October 2, 1992 two pallet shipment of pesticide ZP Rodent Bait AG from Bell Laboratories, Inc. was misbranded. Attachment 7 to Complainant's exhibit 7 indicates that Bell Laboratories wrote to respondent on October 7, 1992 to tell Reichenbach that the shipment received on October 2, 1992 was improperly labeled. In fact, Reichenbach precipitated the letter from Bell Laboratories when he sent to Bell Laboratories, on October 5, 1992, a request for the correct labels for the October 2, 1992 shipment. Compl. Ex. 2, Attach. 10. Following the inspection, respondent received a stop sale order with regard to the shipment at issue. There should have been no doubt on respondent's part after that.

Respondent could have circumvented this long proceeding by informing the complainant that it had supplied the inspector with incorrect information. Furthermore, respondent has not claimed in its response to this motion that, if the amendment is granted, it would defend its actions differently. Because it became apparent to respondent during the hearing that complainant did not intend to introduce evidence of the sales to Stangle and Werner, respondent did not call Stangle or Werner to testify to the fact that they had not purchased misbranded pesticide. Furthermore, respondent in its brief has defended its actions on the basis of the current record. The respondent has

not disputed complainant's claim that granting the amendment will conform the complaint to the evidence received at the hearing. The amended complaint will be accepted. In light of respondent statement that if the amended complaint had been the original complaint it would have settled, the parties are urged to settle this proceeding. The complainant should file a status report by August 18, 1997 reporting steps that it has taken to settle the proceeding since the issuance of this order and assessing the likelihood of settlement.

ACCORDINGLY, IT IS ORDERED that the motion to amend complaint after hearing IS GRANTED and the amendment IS ACCEPTED.

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Edward J. Kuhlmann

Administrative Law Judge

August 5, 1997

Washington, D. C.