

12/10/80

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

ARTHUR NOLAN RHOADES

)
)
)
)
)

Docket No. I.F.&R. VII-363C

Marvin E. Jones
Administrative Law Judge
324 East 11th Street
Kansas City, Missouri 64106

INITIAL DECISION

By complaint filed March 7, 1980, the U. S. Environmental Protection Agency, Region VII (hereinafter "EPA" or "Complainant") charges the Respondent Arthur Nolan Rhoades, Route 1, Excello, Missouri with violations of Section 12^{1/} of the Federal Insecticide, Fungicide and Rodenticide Act (hereinbelow referred to as the "Act") in that

(A) Sample NO. 180809 - Sodium Cyanide - loaded .38 caliber cartridges were being held for sale or distribution at Respondent's residence on January 15, 1980, and

(B) Sample NO. 180807 - Sodium Cyanide - loaded .38 caliber cartridges were sold by Respondent on or about December 24, 1979.

The violations specified as to both charges were:

1. Not registered under Section 3 of the Act in violation of Section 12(a)(1)(A).

2. Misbranded in that the product contains a substance in quantities highly toxic to man and fails to bear required symbols or statements, pursuant to Section 2(q)(2)(D), in violation of Section 12(a)(1)(E) of the Act.

Said complaint proposes civil penalties totaling \$10,704.00 specifying that a \$352.00 penalty should be assessed in each of the alleged instances where the subject cartridges were held for sale and sold when not registered; a \$5000.00 civil penalty is proposed for each of the alleged instances for the reason that the subject cartridges were

^{1/} Parallel citation to the United States Code is attached hereto.

misbranded, as that term is defined in the Act.

Respondent on Mar 18, 1980 requested an Adjudicatory Hearing on the allegations contained in said complaint.

An Adjudicatory Hearing was convened in the Circuit Court Room in the Macon County Court House in Macon, Missouri on October 10, 1980, beginning at 9:00 A.M. Richard C. Thomas, Esquire, represented Respondent throughout the proceedings; Thomas E. Bischof, Esquire, represented Complainant at the hearing.

The Act provides, in pertinent part, as follows:

Sec. 3. Registration of Pesticides.

"(a) Requirement. Except as otherwise provided by this Act, no person in any State may distribute, sell, offer for sale, hold for sale..., to any person any pesticide which is not registered with the Administrator."

Sec. 12. Unlawful Acts.

"(a) in General. - -

"(1) . . . it shall be unlawful for any person in any State to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person - -"

"(A) any pesticide which is not registered under Section 3, . . ."

Sec. 2. For purposes of this Act -

"(q) Misbranded. - -

"(2) A pesticide is misbranded if -

"(D) the pesticide contains any substance or substances in quantities highly toxic to man, unless the label shall bear, in addition to any other matter required by this Act -

"(i) the skull and crossbones;

"(ii) the word 'poison' prominently in red on a background of distinctly contrasting color; and

"(iii) a statement of a practical treatment (first aid) or otherwise in case of poisoning by the pesticide.

On consideration of the record made at the hearing and the proposed Findings of Fact, Conclusions of Law, Briefs and Arguments filed by the parties, I make the following:

FINDINGS OF FACT

1. The parties stipulated (Complt Ex 2) that:

A. Sodium Cyanide, loaded in .38 caliber cartridges for use in "coyote getter" devices to control vertebrate pests, is a pesticide within the meaning of the Act.

B. Sodium Cyanide is not now and never has been registered with the agency by Respondent. (Compl Ex 2)

C. By order of March 9, 1972, the Agency cancelled - - all uses of Sodium Cyanide for predator control, with certain narrow exceptions - - Respondent has never at any time been authorized - - under any exceptions to use, sell, handle, possess or transfer sodium cyanide.

D. The following samples were properly tested and found to contain Sodium Cyanide.

1. Sample 180809 Sub 1 - a spent .38 shell
2. Sample 180809 Sub 2 - a .38 shell, apparently misfired
3. Sample 180809 Sub 3 - a .38 shell, apparently misfired.

E. Cyanide is one of the most toxic chemicals known - toxic not only to its target animal, but to other animals as well.

F. Baiting with a "coyote getter" poses two obvious and recognized threats to non-target animals that share the ranges of the coyote as a natural habitat. The unsupervised bait is itself a potential killer of non-target range species. The threat is compounded by the extremely high toxicity of cyanide, which can transform the predator carcass into a potential lethal killer of animal life.

G. The "coyote getter" poses a distinct hazard to humans.

H. The Administrator of the Environmental Protection Agency promulgated regulations which set criteria for categorizing pesticide products and set standards for labelling pesticide products based on the categorization. The product sodium cyanide has been assigned to Toxicity Category I on the basis of its inhalation toxicity.

2. The samples described in 1(D), supra, were found on the premises and in the possession of Respondent on January 15, 1980.

3. On December 24, 1979 Respondent sold to Randall Shearer 20 .38 caliber cyanide-loaded cartridges at 50¢ each; 4 "coyote getter" guns at the

approximate price of \$3.25 each; and one bottle of bait (to be used in the guns) for \$2.00 (Ex C-10; T.7-9).

4. Except for the marking .38 special (or .38 Spec) said cartridges contained no other marking and in particular did not warn of the presence of sodium cyanide by the use of the words "poison", "danger" or by any symbol such as skull and cross-bones, denoting the danger inherent from the presence of poison. (T.12)
5. At the time of the sale to Shearer by Respondent, Respondent requested Shearer not "to fink" (on him), but to represent, if questioned, that the cartridges, etc "came from Canada".
6. After said sale to Shearer, Respondent disposed of the remaining saleable cartridges, by throwing them away, except for two which he had used in an effort to obtain hides or pelts. (T.82)
7. Respondent's income consists of \$375 monthly pension (black lung compensation); he receives \$99 monthly from Social Security and his wife receives \$180 monthly. Respondent fur-trading has been unprofitable over the past 2 years (T69;81).
8. Respondent and wife have incurred substantial hospital and medical expenses over the past 8 to 10 years, a significant amount of which is owed to a hospital (T.65).
9. Respondent's physical condition is not good (T.70).

CONCLUSIONS OF LAW

1. When Respondent sold the cartridges to Randall Shearer on December 24, 1979 he violated Section 12 of the Act in the following particulars:
 - A. Said pesticide was not registered as required by Section 12(a)(1)(A);
 - B. Said pesticide was misbranded, as that term is defined in Section (2)(q)(2)(D), in violation of Section 12(a)(1)(E).
2. On this record, Respondent, prior to and the time of the said sale to Shearer, held for sale said cartridges, guns and bait. Said violation is not separate from but identical with the sale of said items to Shearer because the facts required to prove the sale are in substance, those

required to prove the holding for sale (Janelli v. US, 420 US 770, 795; 95 S.Ct. 1284 (1975) and cases there cited).

3. The evidence, showing possession of 3 "misfired" .38 caliber cartridges which contained amounts of sodium cyanide, falls short of proving that, on January 15, 1980, Respondent "held for sale" said items in violation of Section 12. The fact that said cartridges were spent or misfired corroborates Respondent's denial.

4. An appropriate penalty to be assessed against Respondent for the violation set out in these conclusions, paragraph 1, is \$2500.00, after consideration of all of the factors appropriate to the assessment of civil penalties.

CIVIL PENALTY

40 CFR 168.46 provides that, in determining the dollar amount of the civil penalty, I shall consider the elements set forth in 168.60(b) which states, in pertinent part:

"(b) Evaluation of civil penalty.

"(1) In evaluating . . . Regional Administrator must consider (i) the gravity of the violation, (ii) the size of respondent's business, and (iii) the effect of such penalty on respondent's ability to continue in business.

"(2) In evaluating the gravity of the violation, . . . shall also consider (i) respondent's history of compliance with Act, . . . and (ii) any evidence of good faith or lack thereof."

Gravity of the violation should be considered from the standpoint, first, of the misconduct involved, and, second, the gravity of the violation itself.

The sale of the cartridges was with knowledge by Respondent that said sale was unlawful. He implored the purchaser, Shearer, not "to fink" (T.13). Such misconduct was and is most grave. The violation itself was also very grave as it involved, as the parties stipulated, sodium cyanide, in quantities highly toxic to man (T.4); sale of this highly toxic poison was suspended in 1972. (T.36).

On this record, I do not find that Respondent has an established business; therefore, his ability to continue in business is not here relevant. As to his future acts, Respondent declared, under oath, that he understands that sales of unregistered and misbranded pesticides are clearly illegal and he intends to desist from any such sales at any time.

Because of the seriousness of the violation shown the penalty proposed by Complainant is not excessive; however, consideration of Respondent's ability to pay, as shown on this record, makes it apparent that a lesser amount is appropriate, and will be effective in achieving compliance by Respondent with the Act.

Weighing the various factors provided by applicable regulations, I find that an appropriate penalty to be assessed against Respondent is \$2500.00^{2/}. It can be seen from this record that the violation committed by Respondent is most serious, and each violation becomes more serious should such violations recur. In the premises, it should be apparent that the amount assessed as a civil penalty is not based on, nor should it be considered, a precedent.

It is here recommended that the Regional Administrator be receptive to an application, if made by Respondent, whereby it will be agreed what amount can be paid initially and thereafter monthly for the period of one year, or other period agreed upon, with the objective that Respondent will demonstrate good faith and that he respects the regulations concerning the use and sale of pesticides; and, if on expiration of the said period of time, it appears Respondent has faithfully performed and demonstrated that he will in the future faithfully abide by the law, consideration

^{2/} The "appropriateness" of a civil penalty should not suggest that no adverse effect will result or that the amount assessed is such that its cost can be defrayed with facility. (See Re: Bradley Ext. Co., I.F.&R. No. V-604-C, affirmed 11-26-80).

will be given to waiving the balance of said civil penalty then remaining unpaid.

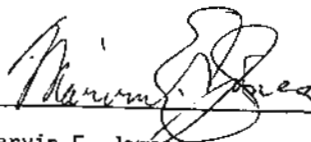
Based on the foregoing, I hereinafter submit the following:

PROPOSED FINAL ORDER^{3/}

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of \$2500.00 is hereby assessed against Respondent Arthur Nolan Rhoades for his violation consisting of the sale of sodium cyanide cartridges on December 24, 1979.

2. Payment of the full amount of the civil penalty assessed shall be made within 60 days of the service of the Final Order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's or certified check payable to the United States of America.^{4/}

December 10, 1980


Marvin E. Jones
Administrative Law Judge

^{3/} Unless appeal is taken by the filing of exceptions pursuant to Section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become final order of the Regional Administrator (see Section 168.46(c)).

^{4/} Any proposal by Respondent in keeping with the suggestion made herein above should be made before expiration of the time for appeal, for reasons obvious from a reading of ^{3/}.

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, (FIFRA) AS AMENDEDON OCTOBER 21, 1972, 86 STAT. 973, PUBLIC LAW 92-516NOVEMBER 28, 1975, 89 STAT. 751, PUBLIC LAW 94-140AND SEPTEMBER 30, 1978, 92 STAT. 819, PUBLIC LAW 95-396Parallel Citations

<u>Statutes at Large</u>	<u>7 U.S.C.</u>	<u>Statutes at Large</u>	<u>7 U.S.C.</u>
Section 2	Section 136	Section 15	Section 136m
3	136a	16	136n
4	136b	17	136o
5	136c	18	136p
6	136d	19	136q
7	136e	20	136r
8	136f	21	136s
9	136g	22	136t
10	136h	23	136u
11	136i	24	136v
12	136j	25	136w
13	136k	26	136w-1
14	136 l	27	136w-2
		28	136w-3
		29	136w-4
		30	136x
		31	136y