

11/28/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
BICKFORD, INC.,)	Docket No. TSCA-V-C-052-92
NEW LISBON, WISCONSIN,)	
)	
Respondent)	

PARTIAL ACCELERATED DECISION AND ORDER
ON THE ISSUE OF LIABILITY

An administrative complaint initiating this proceeding was filed on June 15, 1992, by the Environmental Protection Agency (sometimes EPA or complainant), charging Bickford, Inc. (respondent) with three violations of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 to 2692. Specifically, the complaint alleges violations of the Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce and Use Regulations (PCB Rule), promulgated pursuant to section 6(e) of TSCA, 15 U.S.C. § 2604(e), and found at 40 C.F.R. Part 761. The complaint alleges three counts. The first two for failure to maintain annual records for its handling of PCB wastes, as required by 40 C.F.R. § 761.180(a). The third count concerns respondent's neglect in notifying EPA of the former's wastehandling activities by submission of Form 7710-53 as required by 40 C.F.R. § 761.205(b).

Each of respondent's acts of omission is unlawful under section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C), and renders the

violator subject to civil penalties not to exceed \$25,000 for each day of violation under section 16(a) of TSCA, 15 U.S.C. § 2615(a). The complaint assesses a proposed penalty of \$50,000.

In its answer, respondent denied several allegations, admitted others and requested a hearing. The parties, thereafter, submitted their prehearing exchanges.

On February 22, 1994, complainant moved, pursuant to 40 C.F.R. § 22.20(a), for a partial accelerated decision on the issue of liability (motion) with regard to all three counts of the complaint, asserting that no genuine issue of material fact exists with respect to liability on any of the three counts and that it is entitled to judgment as a matter of law. On March 24, 1994, respondent sent a letter responding to the motion. The undersigned Administrative Law Judge (ALJ) subsequently found this response to be inadequate. EPA amended the motion to include additional evidence on April 12, 1994. Respondent did not file a timely response to either the motion or the amendment as required by 40 C.F.R. § 22.16(b); 57 Fed. Reg. 60129 (December 18, 1992).

In response to an order of June 8, 1994, respondent, in a letter of June 23, 1994, challenged liability. By leave of the ALJ, complainant replied, arguing that respondent failed to identify any evidence which would demonstrate an issue of material fact to defeat the motion. Respondent did not file a sur-response.

Initially, the ALJ observes that respondent has never disputed two of the essential elements necessary to prove a violation of section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C). First,

respondent did not deny that it is a person under the terms of TSCA. Second, respondent has not contested that the PCB Rule was lawfully promulgated pursuant to section 6 of TSCA, 15 U.S.C. § 2606. In that these two facts were alleged in the complaint, and respondent failed to admit, deny or explain these allegations, the ALJ deems them admitted. See 40 C.F.R. § 22.15(d). The issues of fact which remain are whether respondent violated a requirement of the PCB Rule as alleged in each of the three counts of the complaint.

Counts I and II of the complaint allege respondent failed to prepare and maintain annual records for the years 1987 and 1988, in violation of the PCB Rule at 40 C.F.R. § 761.180(a). This regulation requires that an owner or operator of a facility, using or storing a threshold level of PCB equipment, must develop and maintain annual records regarding the disposition of PCBs and PCB items. The threshold levels include using or storing at least one PCB transformer. The information comprising complete annual records under 40 C.F.R. § 761.180(a) is detailed therein with reasonable specificity. For instance, the annual documents required by the regulation must contain dates during the year in question when PCBs and PCB items were removed from service, the total weight of any PCBs in PCB containers handled during the given year, and the total number of PCB Transformers handled during a year.

To establish that the reporting requirements of 40 C.F.R. § 761.180(a) apply to respondent for the years 1987 and 1988, EPA

submitted documents (Motion, Exhibits 1 and 2) proffered by respondent, apparently as part of its prehearing exchange. These documents purport to be annual PCB summaries for 1987 and 1988. As understood, the data indicates respondent used or stored 12 PCB transformers in 1987 and 3 PCB transformers in 1988. Complainant EPA points out, and respondent has not disputed, these facts are sufficient to establish the applicability of the recordkeeping requirement. In that respondent has not offered any contradictory explanation or evidence refuting EPA's assertion, the ALJ concludes that the recordkeeping requirements of the PCB Rule apply to the former's New Lisbon facility.

As additional evidence of respondent's violation, complainant submitted the sworn affidavit of EPA Inspector Priscilla Fonseca, stating that on September 5, 1990, she conducted an inspection of respondent's New Lisbon facility and requested to see the annual documents for both 1987 and 1988. By the regulation, the documents should have been prepared by July 1, 1988 and July 1, 1989, respectively. Ms. Fonseca further states that respondent failed to produce specific portions of the records required under the pertinent regulation.

In its letter, dated June 23, 1994, respondent asserts simply that it did maintain annual documents available for inspection. However, it is significant that respondent submits no contradictory affidavits of any of its officers or employees, or other evidence, which would call into question the affidavit of Ms. Fonseca. Neither does respondent submit any documents or records as evidence

that the records were prepared in a timely manner consistent with the requirements of 40 C.F.R. § 761.180(a).

A simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. EPA correctly cites In re: Harmon Electronics, Inc., RCRA Docket No. VII-91-H-0037 (Order, August 17, 1993) where this ALJ granted EPA's motion for partial accelerated decision regarding four counts of a complaint, stating that a party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. Unsubstantiated denials will not suffice.

The Consolidated Rules of Practice (Rules) provide additional authority in determining how to address a party's failure or near failure to address an issue raised in a motion. The Rules provide that "[i]f no response to a motion is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion." 40 C.F.R. § 22.16(b). Respondent failed completely to respond to the motion within the 10-day period set forth in 40 C.F.R. § 22.16(b) and 57 Fed. Reg. 60129 (December 18, 1992). Additionally, it failed to file a meaningful response to the ALJ's order on June 8, 1994. The ALJ concludes further that respondent has waived objection to a finding of liability concerning Counts I and III.

With regard to liability on Count III, EPA observes that respondent, in its answer, admitted that it did not file Form 7710-53, thereby failing to notify EPA of its PCB wastehandling activities as a "transporter of PCB waste," as required by 40 C.F.R. § 761.205(b). Respondent transported regulated PCB waste. Documents in complainant's prehearing exchange establish this.

Respondent makes several assertions in its letter dated June 23, 1994, which appear to defend against the entry of accelerated decision. For instance, it disputes amounts and concentrations alleged in connection with PCB oil and transformer carcasses. However, beyond determining threshold amounts to prove the applicability of a given regulation, amounts and concentrations are irrelevant to determining liability. Similarly, respondent disputes the application of various "levels" to Counts I and II, classifications which are not appropriate to a discussion of liability, but rather to the amount of penalty.

Respondent also attempts to defend against liability in Count III for failure to file Form 7710-53 by stating that it has "correspondence between Bickford and EPA going back many years before 1990 indicating to EPA precisely the kind of waste handling activities in which Bickford's were and are involved." This is unpersuasive. Respondent fails to produce any of this correspondence. Also, unless this correspondence contained a completed Form 7710-53, it is irrelevant to a determination of

liability. The existence of any such "correspondence" might be relevant to the penalty, and can be assessed at a hearing on that issue.

Respondent also contends that the violations alleged were unintentional, did not involve actual environmental contamination and were "recordkeeping/paperwork violations, nothing else." The case law governing administrative proceedings, however, is clear that TSCA is a strict liability statute, and thus questions regarding intent and limited impact are irrelevant to a determination of liability. See In re: City of St. Joseph, Docket No. TSCA-VII-91-T-298, at 15 (Order on Cross Motions for Accelerated Decision, January 21, 1994) and In re: Asbestos Consulting Group, Inc., Docket No. TSCA-V-C-39-92, at 3 (Order Granting Motion for Accelerated Decision, June 7, 1994). Furthermore, none of these factors is relevant to the issue of liability, but may be, to the extent proven, relevant to the issue of penalty.

It is concluded that respondent violated section 15(1)(C) of TSCA. The amount of penalty may be met at a hearing addressing that question.

ORDER

IT IS ORDERED that:

1. Complainant's motion for an accelerated decision be GRANTED concerning liability on all three counts alleged in its complaint.

2. The parties engage in good faith settlement negotiations concerning the amount of penalty in this matter.

3. Complainant submit a status report 30 days from the service date of this decision and order.

Frank W. Vanderheyden

Frank W. Vanderheyden
Administrative Law Judge

Dated:

November 28, 1994

IN THE MATTER OF BICKFORD, INC., Respondent
Docket No. TSCA-V-C-052-92

Certificate of Service

I certify that the foregoing order, dated 11/28/94,
was sent this day in the following manner to the below addressees.

Original by Regular Mail to: Ms. Michele Anthony
Regional Hearing Clerk
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77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by Regular Mail to:

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Marion Walzel
Marion Walzel
Legal Staff Assistant

Dated: Nov. 28, 1994