


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 complainant and counsel for the respondent on April 18, 1996.



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NAME OF RESPONDENT: Tri-State Motor Transit
DOCKET NUMBER: TSCA-VII-92-T-382

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



IN THE MATTER OF

TRI-STATE MOTOR TRANSIT

DKT. NO. TSCA-VII-92-T-382

Judge Greene

Respondent

Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, and 40 C.F.R. Part 761: Held, that (1) pursuant to 40 C.F.R. § 761.20 (c) (2) PCBs transported in commerce for disposal are required to be totally enclosed; and (2) PCBs being transported to a disposal facility are "in commerce," pursuant to definitions of "commerce" and "distribution in commerce" found in TSCA and at 40 C.F.R. § 761.3.

Appearances:

Henry F. Rompage, Esq., U. S. Environmental Protection Agency,
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for Complainant;

William A. Frerking, Esq., 2600 Grand Avenue, Kansas City,
Missouri, for Respondent.

DECISION and ORDER UPON SUBMISSIONS

This matter arises under Section 16(a) of the Toxic Substances Control Act ("TSCA," or "the Act"), 15 U.S.C. § 2615 (a), which provides for the assessment of civil monetary penalties for violations of the Act and implementing regulations issued pursuant to Section 6 of the Act, 15 U. S. C. § 2605. The complaint charges that Respondent transported leaking transformers and other materials which contained polychlorinated biphenyls (PCBs) in interstate commerce, in violation of the Act and regulations codified at 40 C.F.R. Part 761, specifically §§ 761.20, and (c) (2).¹ Respondent denied generally that any violation had occurred, and interposed affirmatively that, among other things, (1) any violations which did occur were "a direct and proximate result of a third party other than Tri-State" and that Respondent "had no ability or power to control that third party or to prevent the alleged violations from occurring;"² and (2) that no transportation "in commerce" had taken place.³

The parties seek determination upon stipulations of facts, submissions of proposed findings and conclusions, and briefs. The parties' stipulations of facts are attached hereto and made a part hereof as Appendix 1.

¹ Complaint, at ¶ 14.

² Answer to the Complaint, at 3, ¶ 23.

³ Id. at 4, ¶ 25.

The record shows that this matter came to the attention of the Missouri Department of Natural Resources on December 12 or 13, 1991, when an individual who was driving on Interstate 44 in the St. Louis, Missouri, vicinity asserted to the Department that a vehicle bearing Respondent's placards sprayed his pick-up truck as it passed him. Upon investigation by the Department, the vehicle in question, a flat-bed tractor-trailer, was found to contain a load composed of 33 PCB transformers, two drums of PCB liquid, and other PCB wastes in boxes and drums, which had been picked up from generators (electric utilities) in Maryland and Pennsylvania.⁴ Fourteen of the transformers had liquid or moisture on or about their exteriors. Samples of the "oily spots" on the exteriors of two transformers disclosed the presence of PCBs.⁵ The load was being transported for disposal by defendant to a site in Beatty, Nevada. Complainant argues that the foregoing facts constitute transportation of PCBs in commerce in a manner which was not "totally enclosed," as 40 C.F.R. §§ 761.20 and 761.20 (c) require. Respondent asserts in lengthy and vigorous briefs that

⁴ Stipulations of fact, Appendix 1, at 4, ¶¶ 10-12.

⁵ Id. at 7, ¶ 24. Laboratory analysis of the two samples showed the presence of PCB-1260 in the amounts of 28 ug/100 cm² and 15 ug/100 cm². (It appears that samples relating to the other twelve transformers were not taken).

In addition, a sample taken from the front compartment of the trailer, which held free-standing liquid, was analyzed and found to contain 240 ug/l PCB Arachlor 1260. Id. at 6 (¶¶ 20-21).

After the transformers were "overpacked or wrapped," Id. at 7, ¶ 24, the trailer was allowed to continue in transport. The stipulation does not say whether all fourteen transformers were overpacked or wrapped.

transportation only for the purpose of disposal does not constitute "commerce," since the load of materials itself was not being "sold to or by any entity;"⁶ that the definition of "commerce" in the regulation is circular and vague, causing a lack of notice and failure of due process; and that 40 C.F.R. § 761.20 (c) (2) does not require tht PCBs be transported *for disposal* in a totally enclosed manner.

"Commerce."

Taking first the matter of the definition of "commerce," both 40 C.F.R. § 761.3 and Section 2 of TSCA provide that "commerce means trade, traffic, transportation . . . [B]etween a place in a State and any place outside of such State. . . ." The definition is hardly vague in the usual sense of the word. Perhaps it may be said colloquially to be vague because it is broad, far-reaching, and all-inclusive -- but not because it does not clearly encompass almost any sort of commercial activity, including activities conducted within the boundaries of a single state. The definition of "commerce" has long been very broad, and its import in the law cannot, to any lawyer, be misapprehended: "commerce" includes just about anything and everything. Any notion that a particular activity may not be "in commerce" must be examined very carefully and with great skepticism. Decisions particularly from the 1930s and 1940s leave no doubt that virtually any business activity is

⁶ Id. at 4 (¶ 12) and 7 (¶ 24).

included in the term,⁷ and that it takes very little to constitute an "effect" upon interstate commerce. The definitions in the Act and regulations are similarly very broad. Subsection (2) of the definition of "commerce" at 40 C.F.R. § 761.3 and Section 3(B) of TSCA refer to the "effect" doctrine in specifically including trade, traffic, and transportation which "affects trade, traffic, transportation" between a "place in a State and any place outside of such State. . . ."⁸ In short, the applicable regulatory

⁷ Respondent's load was "in interstate commerce" within the meaning of the Act under either a "flow of interstate commerce," or an "affecting interstate commerce" rationale. Under the "flow of interstate commerce" approach, an "apparently local activity will be considered 'in interstate commerce' when it is an essential component of an inseparable activity." City of Cleveland v. Cleveland Electric Illuminating Co., 538 F. Supp. 1295, 1301 (N.D. Ohio 1980) (citing Bain v. Henderson, 621 F.2d 959, 960 (9th Cir. 1980)). See also United States v. Yellow Cab, 332 U.S. 218, 228 (1947) ("[w]hen . . . goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character."); Gulf Oil Corp. v. Cobb Paving Co., 419 U.S. 186, 195 (1974) (interpreting the "flow of interstate commerce" as "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer."); Rio Vista Oil, Ltd. v. Southland Corp., 667 F. Supp. 757 (D. Utah 1987) (applying this approach to the retail sale of goods previously shipped in interstate commerce).

⁸Emphasis added. See also, for accord, definitions of "distribute in commerce" and "distribution in commerce," § 761.3.

Respondent's load of PCB wastes can be said to be in interstate commerce under the "affecting commerce" rationale, as set forth by the Supreme Court in United States v. Darby, 312 U.S. 100 (1940): "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it so as to make regulation of them appropriate means to the attainment of a [Footnote continued on page 6]

and statutory definitions of "commerce," which are in complete accord with case law, do not require that the items themselves (here, the PCB wastes going for disposal) be the subject of a sale in order to be "in commerce."⁹ Far from it.

Respondent points to the preamble to the 1978 publication of the proposed PCB regulation¹⁰ as requiring a "sale" before

Footnote 8 continued from page 5] legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." Id. at 118 (emphasis added). Stated differently, Congress "may choose the means reasonably adapted to the attainment of the permitted end, even though they involve the control of interstate activities." Id. at 121. Moreover, this power extends to acts that, taken individually, have no effect on interstate commerce. See Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (effect on wheat market of farmer's decision to consume wheat grown himself might be trivial. But this decision, "taken together with that of many others similarly situated, is far from trivial").

South Terminal Corp. v. EPA, 504 F. 2d 646, 677 (1st Cir. 1974) noted that "the problem of pollution itself involves the nation as a whole; pollutants are not respecters of state borders." Id. Thus, pollution from multiple uses PCBs in many states could have a substantial interstate effect. See Wickard, 317 U.S. at 127-28. Federal regulation of this effect would be a "means reasonably adapted to the attainment of the permitted end," in this case, the control of PCBs under TSCA.

⁹ As Complainant correctly notes, there can be little doubt that a sale of services was involved in the transportation of the load to Nevada by Respondent, and that another sale of services was involved in the receipt of the wastes at the Nevada site. Respondent does not claim to be an eleemosynary organization, and neither, presumably, would the owner of the Nevada site. (Appendix 1, at 4, ¶ 12).

The Court does not understand Complainant to be arguing that the sale of PCBs is equivalent to baby-sitting, as defendant's Second Reply Brief suggests, at 19.

¹⁰ Manufacturing, Processing, Distribution in Commerce, and Use Bans, 43 Fed. Reg. 24802, 24807 (June 7, 1978); see also 44 Fed. Reg. 31549 (May 31, 1979).

"commerce" attaches. After examination of the preambles to both the 1978 (proposed) and 1979 (final) rules in their entireties, it is concluded that the 1978 discussion -- fully read and considered -- does not require a "sale" to effect "commerce" and so does not prevent a finding here that the waste load was in commerce.

Accordingly, since the transportation of PCB wastes for disposal falls within the regulatory and statutory definitions of "commerce," it is found that the load in question was "in commerce."¹¹

Responsibility for Failure to Transport in a Totally Enclosed Manner.

In its answer to the complaint, Respondent asserted that any leakage of PCBs in the load in question could not be attributed to its own activity, since it (1) had not even placed the items on

¹¹ Complainant correctly points out that the court in Environmental Transportation Systems, Inc. v. ENSCO, Inc., 763 F. Supp. 384, C. D. Ill. 1991) states at 391 that:

. . . . the term 'distribution in commerce' is defined in terms of 'commerce,' which is in turn defined . . . as 'trade, traffic, transportation, or other commerce. Thus, the term 'distribution in commerce' includes transportation.

While it is true that this statement was made in aid of the court's analysis of the central issue of whether U. S. Environmental Protection Agency regulations under TSCA supersede U. S. Department of Transportation regulations promulgated under the Transportation Safety Act of 1974, 49 U.S.C. § 1804, in connection with the transportation of PCBs, it is noteworthy that the District Court had no difficulty in determining that transportation of waste is in "commerce" based upon TSCA definitions of "commerce" and "distribution in commerce."

board the tractor-trailer¹², and (2) took numerous precautionary measures to avoid problems of this sort.¹³ However, it is seen from the clear language of § 761.20 (c) that neither lack of knowledge nor absence of fault constitutes a defense to violations of 40 C.F.R. § 761.20 (c) (2).

No person may distribute in commerce any PCB. . . regardless of concentration, for use within the United States or for export . . . without an exemption [Emphasis supplied]

The words "no persons" are all-exclusive. No exceptions are made for waste transporters who can demonstrate that they did not cause a PCB leak, and none may be created judicially.

40 C.F.R. § 761.20 (c) (2).

Respondent argues that the portion of the regulations under which the parties stipulated that the complaint was principally brought¹⁴ does not require transportation of PCBs *for disposal* to be accomplished in a completely enclosed manner.

40 C.F.R. § 761.20 (c), together with subsection (2), provides as follows:

No person may process or distribute in commerce any PCB . . . regardless of concentration, for use within the United States . . . without an exemption, except that an exemption is not required to process or distribute in commerce PCBs. . . resulting from an excluded manufacturing process In addition, the activities described in paragraphs (c) (1)

¹² Appendix 1, at 5, ¶ 15.

¹³ *Id.* at 2-6, ¶¶ 7-9, 13-17.

¹⁴ *Id.* at 7, ¶ 27.

through (5) of this section may also be conducted without an exemption. . .

(2) PCBs at concentrations of 50 ppm or greater . . . may be processed and distributed in commerce in compliance with the requirements of this Part for purposes of disposal in accordance with the requirements of § 761.60.

It is obvious that subparagraph (2) sets out one of five activities involving PCBs which may be engaged in without a specific exemption from the broad prohibitions set forth at § 761.20 (c). Subparagraph (2) permits distribution of PCBs in commerce for disposal without an exemption if "the requirements of this Part" are complied with; it then specifies that the disposal itself, e. g. incineration, must be carried out in accordance with 40 C.F.R. § 761.60, *Disposal Requirements*, where the requirements pertaining to the physical disposal of PCBs are set out at great length. In other words, persons may distribute PCBs in commerce for disposal without an exemption, but (1) the distribution in commerce must comply with "this Part" and (2) the actual disposal must be accomplished as required by § 761.60. It is the alleged failure to distribute in commerce for disposal "in compliance with the requirements of this Part" -- which include § 761.20 and 761.20(a) -- that is charged in the complaint.

40 C.F.R. § 761.20, *Prohibitions*, provides that:

Except as authorized in § 761.30, the activities listed in paragraphs (a) and (d) of this section are prohibited . . .
In addition, the Administrator hereby finds, . . . that any exposure of human beings or the environment to PCBs, as measured or detected

by any scientifically acceptable analytical method, may be significant, depending on such factors as the quantity of PCBs involved in the exposure, the likelihood of exposure to humans and the environment, and the effect of exposure. For purposes of determining which PCB Items are totally enclosed . . . since exposure to such Items may be significant, the Administrator further finds that a totally enclosed manner is a manner which results in no exposure to humans or the environment to PCBs. The following activities are considered totally enclosed: distribution in commerce of intact, nonleaking electrical equipment such as transformers. [Emphasis added]

40 C.F.R. § 761.20 (a) states that:

(a) No persons may use any PCB, or any PCB Item regardless of concentration, in any manner other than in a totally enclosed manner within the United States unless authorized under § 761.30. [Emphasis added]

Finally, the Act itself provides at Section 6:

(e) *Polychlorinated biphenyls*

(2) (A) Except as provided under subparagraph (B), effective one year after January 1, 1977, no person may manufacture, process, or distribute in commerce any polychlorinated biphenyl in any manner other than in a totally enclosed manner.¹⁵
[Emphasis added]

(B) The Administrator may by rule authorize the . . . distribution in commerce . . . of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such . . . distribution in commerce . . . will not present an unreasonable risk of injury to health or the environment.

Thus, the Act provides unequivocally that PCBs in commerce, unless they are totally enclosed, are prohibited after January 1,

¹⁵ See also Section 6 (e) (3) (A) and (B).

1978. Moreover, the preamble to 40 C.F.R. § 761.20 states that the activities of subparagraph (c) of § 761.20 are prohibited pursuant to section (6) (e) (3) (A) of TSCA, which provides that "no person may process or distribute in commerce any polychlorinated biphenyl after two and one-half years after" January 1, 1977.¹⁶ Accordingly, even if a transporter were in doubt upon examining § 761.20 (c) (2), a reference to the specific enabling portion of the Act would have made quite clear the prohibition against transportation of PCBs in a non-totally enclosed manner.

Given TSCA's specific prohibitions upon use, manufacture, processing, and distribution in commerce of PCBs in any manner other than a totally enclosed manner, it is difficult to understand how a member of the regulated community could reasonably have assumed that PCBs were permitted in commerce for any purpose, including disposal, in the absence of total enclosure. Virtually nothing else can be done with PCBs unless they are totally enclosed -- at least not without an exemption or authorization.¹⁷ Members of the regulated community are responsible for knowing and understanding the purpose of TSCA and the implementing

¹⁶ Section 6 (e) (3) (A) of TSCA, 15 U.S.C. § 2605 (e) (3) (A). Provisions are made at Section 6 (e) (3) (B) for exemptions upon the granting of an exemption by the Administrator of EPA. There is no exemption to the total enclosure rule for transportation of PCBs to a disposal site.

¹⁷ The exceptions ("authorizations") are listed at 40 C.F.R. § 761.30.

regulations.¹⁸ It has been noted that PCBs, alone among chemicals, have been the subject of specific statutory requirements¹⁹ because of their pervasive danger, thus making knowledge of the Act and rules even more urgent. The overall *schema* is abundantly clear. The detail and breadth of Respondent's precautions in connection with the load in question, and generally in the matter of transporting PCB wastes, suggest that Respondent is aware of the necessity for caution and total enclosure.²⁰

Respondent points out that subsection (c) (2) of § 761.20 does not contain the words "transportation of PCBs for disposal must be accomplished in a totally enclosed manner." Statutes and regula-

¹⁸ There are, of course, instances of insufficient notice which can result in unfairness. See MRM Trucking Co., II MWTA -89-0102, Order Upon Motion for "Accelerated" Decision as to Liability, September 5, 1991, at 6-12 ss; K. O. Manufacturing, Inc., EPCRA VII-89-T-611, Decision and Order Granting Respondent's Motion for "Accelerated Decision and Denying Complainant's Motion, February 28, 1993; [reversed on appeal as EPCRA Appeal No. 93-1, April, 1995]; and see In re Wheland Foundry, RCRA-IV-89-25-R, October 22, 1993, Decision and Order; [Order Setting Aside and Vacating Initial Decision on other grounds, December 22, 1993].

This is not such an instance.

¹⁹ Environmental Transp. Systems, Inc. v. ENSCO, Inc., at 391. quotes with approval from Environmental Defense Fund v. EPA, 598 F. 2d 62, 67 (D. C. Cir. 1978):

Considering that there are few statutes aimed so particularly at control of an individual chemical, we construe this provision [Section 6 of TSCA, which gives authority for rulemaking] as a significant comment on the failure of existing regulatory mechanisms.

²⁰ See Appendix 1.

tions commonly do not repeat, in each subsection, everything that has gone before, particularly if a shorthand phrase (e. g. 'in compliance with the requirements of this Part') will serve to refer back. Sections 761.20 and 761.20 (a) being portions of Part 761, they, among other portions, are referred to in subsection (c) (2). Accordingly, compliance with them is required. Apart from this, Sections 6 (e) (2) (A) and 6 (e) (3) (A) of the Act specifically prohibit the distribution of PCBs in commerce after certain dates that have long passed.

It is noted that the court in ENSCO, supra, had no difficulty concluding (at 392), in connection with its determination that the defendant there had complied with the Part 761 regulations, as follows:

The EPA regulations provide at 40 C.F.R. 761.20(c)(2) that PCBs may be distributed in commerce (therefore transported) provided that it is done in a 'totally enclosed' manner. The same regulation sets forth in its introductory section that PCBs which are contained in "intact, non-leaking electrical equipment such as transformers" are "totally enclosed." Thus, under the TSCA and the EPA regulations promulgated thereunder, PCBs may be transported if done in a totally enclosed manner such as in an intact, non-leaking transformer. [Emphasis added]

The court concluded by observing that

It is somewhat ironic that an application of the EPA regulations which were intended to improve existing safeguards on PCB production and distribution may result in less stringent restrictions on PCB transportation. Whether this concern is a reality depends of course upon the relative safeguards afforded by the EPA requirement of "totally enclosed" versus the general DOT.

[U. S. Department of Transportation] restrictions upon transportation. [At 392]

Respondent's argument that PCBs being transported for disposal need not be totally enclosed is rejected as being manifestly inconsistent with the dictates of TSCA and the regulations.

Other "affirmative defenses" were merely stated, but not developed or briefed. On their face, none have merit in the circumstances here.

Accordingly, it will be ordered that decision shall be rendered in favor of Complainant. An Order relating to the penalty to be imposed herein will be issued separately unless, no later than March 15, 1996, the parties advise that they wish to engage in settlement discussions respecting the penalty.

Findings of Fact

The stipulations of facts of the parties are hereby adopted as findings of facts.

Additional Findings of Fact

Conclusions of Law

Respondent is a "person," as the term is defined in the Act and applicable regulations; at all times material to this action respondent was a transporter of PCB waste as defined at 40 C.F.R. § 761.3.

PCBs and PCB Items being transported for disposal are in "commerce" as that term is defined in the Act and at 40 C.F.R. §

761.3.

Section 6 (e) of TSCA and 40 C.F.R. Part 761 require that PCBs must be transported for disposal in a totally enclosed manner. Specifically, § 761.20(c) (2), which states an exemption from the prohibitions set forth at § 761.20 (c), permits PCBs to be distributed in commerce for disposal provided that such distribution is in compliance with the requirements of Part 761. Part 761 includes 40 C.F.R. §§ 761.20, 761.20 (a), and 761.20 (c).

Respondent's employee was driving a transport vehicle owned by Respondent on December 13, 1991; the load on the trailer included two transformers which had PCBs on their exteriors. Accordingly, the PCBs on the transformers were not being distributed in commerce in a totally enclosed fashion. In addition, since PCBs were found in the front compartment of the trailer of the vehicle, these PCBs also were not totally enclosed.

Respondent failed to comply with the requirements of 40 CFR § 761.20 (c) (2) and the Act, and thus violated section 15 (1) of TSCA, 15 U.S.C. § 2614 (1). Accordingly, Respondent is liable for a civil monetary penalty pursuant to section 16 (a) of the Act, 15 U.S.C. § 2615 (a).

ORDER

Accordingly, it is ordered that the decision herein shall be, and it is hereby, rendered in favor of Complainant. A separate order will issue with respect to the penalty to be imposed, unless, before March 15, 1996, the parties advise this office that they

wish to pursue settlement.



J. F. Greene
Administrative Law Judge

February 29, 1996
Washington, D. C.