

4/4/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



IN THE MATTER OF

NORHLAND HELICOPTERS, INC.

Respondent

DOCKET NUMBER:
IF&R-VII-1105C-91P

Federal Insecticide, Fungicide and Rodenticide Act, § 12(a)(2)(g), 7 U.S.C. § 136j(a)(2)(G): Respondent did not fail to observe the requirements of the labels of pesticides used to spray field, as alleged in the complaint.

Appearances

Rupert Thomas, Esquire, Assistant Regional Counsel, and Gayle Hoopes, Esquire, Assistant Regional Counsel, U. S. Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, for complainant.

Jerry Folkers, Esquire, Dunkelberg, McKinley & Folkers, Attorneys at Law, 515 State Street, Osage, Iowa 50461, for respondent.

BEFORE:

Judge J. F. Greene
Decided March 23, 1994

DECISION AND ORDER

This matter arises under sections 12 and 14 of the Federal Insecticide, Fungicide and Rodenticide Act ["FIFRA" or "the Act"], 7 U.S.C. §§ 136j and 1 of the Act.

The complaint herein alleges that on June 30, 1990, respondent Northland Helicopters, Inc. used two restricted pesticides in a manner inconsistent with their labeling¹, in that a vehicle owned by a pesticide investigator for the Iowa Department of Agriculture and Land Stewardship was sprayed as respondent's helicopter passed over a field to which it was applying a solution of Atrazine and Buctril in water.²

Respondent takes the position that the vehicle could not have been sprayed as alleged or could not have been sprayed by respondent as alleged, that there is no evidence to support the car-spraying allegation other than the pesticide investigator's testimony, and much evidence to support respondent's position that the pesticides were sprayed properly, in a manner consistent with product labelling. Alternatively, respondent urges that it did everything possible to comply with label directions and is therefore not liable for the violation alleged.

The record discloses that to support the complaint in this matter there is, at bottom, only the testimony of a State of Iowa

¹ See **Complainant's exhibits (CX) 8** (Atrazine label) and **8-A** (Buctril label).

² Section 12 (a) (2) (G), 7 U.S.C. § 136j, provides that "in general -- it shall be unlawful for any person -- to use any registered pesticide in a manner inconsistent with its labeling."

pesticide investigator and certain evidence which stems from his testimony. In support of respondent's denial there is significant credible evidence, including weather reports of wind speeds on the day in question, and the testimony of the owner of the field being sprayed. Respondent's impressive and credible evidence leads to the conclusion that the incident could not have occurred as alleged in the complaint and that respondent did not violate the regulations as alleged. Accordingly, the complaint herein will be dismissed.

Complainant's primary witness, the pesticide investigator whose automobile was allegedly sprayed with pesticides, testified that as he was driving north on State Highway 63 on the morning of June 30, 1990, he observed a helicopter making a turn over woods near the road, and assumed it to be spraying a field adjacent to the road.³ As the helicopter started to pull up at the north end of the field after making a pass over the field, the car "got splatters on" the windshield, like rain, -- not just mist -- to the extent that the investigator had to use both the washers and wipers to clear the windshield in order to see.⁴ He testified that he stopped at a nearby farmhouse to ask who owned the field, and then

³ TR 25.

⁴ TR at 25, 31, 42, 54. At TR 54, the testimony was as follows:

Q. Was it necessary for you to wash the windshield for you to see?

A. Yes.

drove seven or eight miles⁵ to the Fredericksburg Cooperative in an effort to learn who owned the field and what material was being sprayed. The employees on duty that day (a Saturday) knew who owned the field, and who was doing the spraying, but, according to complainant's witness, did not say what pesticide was being sprayed except that it "wouldn't hurt" him.⁶ Thereafter complainant's witness continued driving to Decorah, Iowa. The following day (Sunday, July 1, 1990) he returned to his home in Waverly, Iowa, and took a sample from the windshield of the car.⁷ The trip from Waverly to Decorah and return is about 140 miles.⁸ On Tuesday, July 3, 1990, he took the samples to Des Moines for analysis. On July 5, 1990, he obtained from the Fredericksburg Cooperative copies of the applicator records and the labels of the pesticides used in the spraying.⁹ He then telephoned Des Moines and told an official there what chemicals had been used by respondent (Buctril and Atrazine) after which the sample was analyzed for the presence of those chemicals.¹⁰

Another pesticide investigator for the Iowa Department of Agriculture and Land Stewardship conducted an investigation

⁵ TR at 48.

⁶ TR at 26.

⁷ Id.

⁸ TR at 49.

⁹ TR at 27.

¹⁰ TR at 53.

following a call from complainant's primary witness. In an affidavit, the second investigator stated that "after the pesticide investigator Steven Van Helten [complainant's primary witness] contacted me, I called the Northland Helicopters . . . and made an appointment . . . with owner Ed Hatten."¹¹ He visited respondent's place of business on Monday, July 2, 1990 -- before the windshield sample was taken to Des Moines -- and talked with respondent's president.¹² Respondent's president was cooperative, was open with his records, produced all of the information requested, and said that the pesticide application to the field had been Buc-tril and Atrazine. At some point respondent's president asked that samples be taken from an "off-target" area where the pesticide drift was alleged to have fallen.¹³ It is normal procedure in the case of a "drift complaint"¹⁴ to take samples from an "off target" area. However, the investigating official testified that in this case he "requested guidance" of a supervisor as to whether or not the off-target samples ought to be taken, and was told that it was up to him. He was also cautioned by the supervisor that it would put him (the investigating official) "in the position of possibly being in opposition to other investi-

¹¹ CX 2-A.

¹² TR 59-60.

¹³ TR at 63-65.

¹⁴ TR 64.

gators."¹⁵ Significantly, the off-target samples requested by

¹⁵ TR 64-66. The exchange, in pertinent part, was as follows:

Q. After . . . a drift complaint is made, is it customary to . . . take samples for analysis from the off-target area where the drift was alleged to have occurred?

A. If I am the primary investigator, that is the normal procedure.

Q. Do you know what the normal procedure is in the agency?

A. In regard to taking samples? . . . We are instructed to take samples dealing with the spray complaint when we are the original individual investigator involved. . . .

Q. Did anyone from the agency, to your knowledge, go out and take any off-site samples?

A. Not that I'm aware of.

Q. Did you make any request of anyone in your agency to do that?

A. I requested some guidance, yes.

Q. Who did you request the guidance from?

A. Mark Lohaver . . . Staff supervisor.

Q. What did you ask him?

A. For some guidance whether I should do this or not.

Q. . . . Did he allow you to do that?

A. He said that it was up to me to decide.

Q. Did he caution you in any respect?

A. Yes.

Q. How did he caution you?

A. That it would put me in the position of possibly being in opposition to other investigators.

respondent's president were not taken. Subsequently the investigating official prepared a report in which he indicated that respondent had applied the pesticides in accordance with the rate specified on the label, by checking the "yes" box on the report.¹⁶ The investigating official testified that the records that he had reviewed pertaining to respondent's compliance history with the State of Iowa "were good," and that he had not received complaints "in regard to their application."¹⁷ The parties have stipulated that the analysis performed by the State of Iowa on the samples taken was accurate.¹⁸ There is no issue as to the chain of custody of the sample.¹⁹

Respondent's evidence included the testimony of the owner of the field being sprayed on the date in question. The owner testified with great credibility that there had been "hardly any weed kill . . . at all" on the two or three rows closest to the road after the field had been sprayed by respondent's helicopter²⁰,

¹⁶ TR at 68-69; complainant's exhibit [CX] 2.

¹⁷ TR at 63.

¹⁸ TR at 78; Court's Exhibit 1.

¹⁹ TR at 78-81.

²⁰ TR at 175. The owner of the field, Mr. Jerry Schmudlach, testified at TR 174-175 that "We had -- reasonably good coverage on the whole field, except along Highway 63 there on the first two or three rows in, didn't get hardly any kill there at all We didn't get any kill there. . . weeds didn't die there. Didn't get [any] spray there . . . it was a good two or three rows in there. . . ."

and that this had been a source of some annoyance.²¹ Respondent's president testified, also credibly, that after he learned that a drift complaint had been filed, and after the Iowa Department of Agriculture declined to "come and reinvestigate,"²² he went to the area and saw that there had been no weed kill in the ditch (thirty-two feet wide²³) between the road and the fence around the field that was sprayed.²⁴ The pilot of the helicopter who sprayed the field testified credibly that he sprayed the crop with one quart of Atrazine and one pint of Buctril in water (a five gallon solution²⁵) from a height of four to six feet²⁶, that the wind had been only about six to seven miles per hour on the day in question²⁷, and that he had watched and had seen that there was no

²¹ Mr. Schmudlach testified in connection with the failure to have the weeds killed in the rows along side Route 63 that "I guess that's why I'm a little disgusted about the spray, because everybody else drives along and sees it, see, they say, well, he's a piss-poor farmer that he can't keep his rows clean." **TR** at 177.

²² **TR** at 107. This is apparently a reference to respondent's president's request to take samples in the "off target" area, which the Department of Agriculture did not do, although an investigator testified that it would be normal procedure to do so where there is a drift complaint. See supra note 15.

²³ **TR** 102.

²⁴ **Respondent's exhibits (RX) K, L, I, and G; TR** at 107-112, 118.

²⁵ **TR** 185.

²⁶ **TR** 186.

²⁷ **TR** 190.

noticeable drift.²⁸ Further, the wind had been prodominantly from the north and at times from the northwest.²⁹ He testified that he remembered the details because respondent's president had called him in to discuss the spraying of the field shortly after the report of the complaint, and that he had gone back to the field.³⁰ The pilot testified that, based upon his experience of 5100 hours of actual spraying time (about one million acres³¹), and his observations on the day in question, there was no possiblity at all that the spray could have carried as far as the highway,³² and that, at most, the drift would have been two to five feet.³³

Another of respondent's pilots testified credibly that, based upon spraying tests conducted by the State of Iowa Department of Agriculture in which he participated using a helicopter identical to the one used on June 30, 1990, and various other test

²⁸ **Id.** The pilot testified [TR 190] that when he is flying he can see the booms from which the spray comes, and is able to "see what happens to the spray after [it is] dropped from the helicopter" because "there is a mirror on the one skid on the toe over here that is pointing -- it's more of an oval type mirror . . . it's like a wide angle type mirror . . . that you can look out the cockpit into the mirror and see the spray underneath." He would have been able to see whether the spray was drifting.

²⁹ **TR** at 131; **RX AA** and **Z**.

³⁰ **TR** 187.

³¹ **TR** 185.

³² **TR** 195.

³³ **TR** at 192.

patterns showing the distance and rate of drift³⁴, that a seven mile per hour wind would move an object ten feet per second, and, consequently, would take ten seconds to go 100 feet. As for a car travelling at 55 miles per hour³⁵ along the highway, spray from respondent's helicopter could not possibly have landed on the car if the helicopter had been thirty to one hundred yards to the right of the car, as complainant's witness testified.³⁶ In fact, the car would have been ten seconds down the road, or 800 feet to the north by the time any spray from the helicopter could have reached the place in the road where the car had been when the spray allegedly hit.³⁷ This pilot also testified that, with regard to the drift characteristics of large drops, as compared to the drift characteristics of mist out of the boom that "the larger the drop, the heavier it's going to be, and the more just straight down it's going, the wind is not going to affect it near as much."³⁸

The daughter of the owner of the field testified that complainant's witness had stopped to talk with her and had asked questions about who was spraying the field, but had not mentioned

³⁴ TR at 211-228.

³⁵ TR 41.

³⁶ Id. 41.

³⁷ TR at 219.

³⁸ TR at 227-229. It is noted that complainant's witness testified that the car got "splatters" on it like rain -- not like mist. See supra note 4.

that his car had been sprayed.³⁹

Finally, it is noted that the results of the test conducted on the sample submitted by complainant's witness show concentrations of Buctril and Atrazine very different from the two-to-one mixture of Atrazine to Buctril which was used by respondent's helicopter to spray the field on the day in question.⁴⁰

It is concluded that respondent's helicopter could not have sprayed the car of complainant's witness, and that there is no credible and reliable evidence that respondent used Atrazine and Buctril in a manner inconsistent with their labels.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent's evidence is credible and reliable, and supports findings on the record that respondent did not fail to spray Buctril and Atrazine 4L in a manner inconsistent with

³⁹ TR at 167. At this point, complainant's witness apparently did not know that he was questioning the daughter of the owner of the field. In any case, it would have seemed reasonable for a trained investigator to ask a bystander in the area to witness that his car was wet, but there is no indication that he did this. In fact, in his testimony complainant's witness did not mention that he had talked with a young woman -- only that he had inquired at a house north of the field but that they did not know who owned the field. [TR at 25].

⁴⁰ See TR at 185, CX 7, CX 1, CX 2, CX 3, and CX 4-A. The test results on samples X231 and X232, however, found about 500 times as much Atrazine as Buctril. (See CX 7, at 2). It is noted that Atrazine seems clearly to be well known as being used on corn. See the testimony of respondent's president on another point, in which he stated [TR 107-108] in response to the question "What was the crop in 1990 [in the field on the day of the alleged incident]?" that "(I)f they were doing Atrazine, it would have been corn."

labelling and did not violate the Act as charged. A preponderance of the evidence shows that respondent did not violate the Act as charged.


2. Respondent did not fail to spray in a manner consistent with the labelling of the pesticides being used.

3. Respondent did not violate section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).

4. Complainant's evidence lacks the requisite degree of credibility to support findings of violation and imposition of civil penalties.

ORDER

It having been determined that respondent did not violate the Act as charged, this matter must be, and it is hereby, dismissed with prejudice.



J. F. Greene
Administrative Law Judge

Washington, D. C.
April 4, 1994