UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. HALOCARBON PRODUCTS CORPORATION, Respondent, INTERNATIONAL BROTHERHOOD OF TEAMSTERS - LOCAL #560, Authorized Employee Representative.	Docket No. 89-2821

ORDER

This matter is before the Commission on a direction for review entered by Commissioner Edwin G. Foulke, Jr., on November 9, 1992. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the purposes of the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement

agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Dated April 13, 1994

Velma Montoya
Commissioner

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on April 13, 1994.

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., N.W. Room S4004
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575 Lexington Avenue, 19th Floor
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Irving Sommer
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
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Washington, D.C. 20036-3419

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH, SECRETARY OF LABOR, Complainant, v. HALOCARBON PRODUCTS CORP., Respondent.	OSHRC Docket No. 89-2821

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which are currently pending before the Commission.

II

1. Complainant hereby amends Item 1 of serious citation 1 by withdrawing the charge that the violation was "serious" and characterizing the citation as a violation of Section 17 of the Act. The proposed penalty for this citation is amended to $750. Respondent hereby withdraws its notice of contest to said violation as amended.

2. Complainant hereby withdraws Item 4 of serious citation 1, alleging a violation of 29 C.F.R. 1910.134(b)(8), and the notification of proposed penalty issued to respondent: the effect of which withdrawal is to make final the decision and order of Judge Sommer dismissing said Item 4.

3. Complainant hereby amends the proposed penalty for violation of serious citation 1, Item 7 to $750. Respondent

hereby withdraws its notice of contest to said violation as amended.

4. Respondent withdraws its notice of contest with respect to the following violations and penalties as found and amended by Judge Sommer in his Decision and Order of September 18, 1992:

(a) citation 1, item 8: $1,000; (b) citation 2, item 1: $1,000; (c) citation 2, item 4: $1,000; (d) citation 2, item 3 and citation 1, item 6: $1,000 for both items.

5. Except as provided above, each party withdraws its appeal of the Decision and Order of Judge Sommer below, and agrees that the citations and penalties as modified herein shall become a final order of the Commission. Each and every finding and ruling of Judge Sommer's Decision and Order shall remain in full force and effect, including, but not limited to, the determination that respondent did not willfully or intentionally commit any violation of the Act or regulations issued thereunder.

6. Nothing in this Stipulation and Settlement Agreement constitutes any admission by the respondent of any violation of the Occupational Safety and Health Act or regulations and standards promulgated thereunder. By entering into this Agreement, respondent does not admit that the conditions complained about were the cause, proximate or otherwise, of any accident or occurrence which may, or may not, have occurred. Further, nothing in this Settlement Agreement, nor any order of the Commission entered pursuant to this Stipulation and Settlement Agreement, nor any documents gathered or prepared in

connection with this matter constitute, or shall be construed by any person, or federal or state court or agency to constitute, any wrongdoing either civilly, criminally, at common law, or under any state or federal statute or regulations promulgated thereunder. Further, neither this Stipulation and Settlement Agreement, nor any order of the Commission entered pursuant to this Stipulation and Settlement Agreement, nor any documents gathered or prepared in connection with this matter shall be offered, disclosed or used adversely to respondent or admitted in evidence against it in any other proceeding or litigation, whether state or federal, or whether civil, criminal or administrative, except for subsequent proceedings, if any, pursuant to the Occupational Safety and Health Act involving respondent. By entering into this Agreement, the respondent does not admit to the truth of any alleged facts contained in the citations, to any of the characterizations of the respondent's alleged conduct by Complainant, or to any of the conclusions set forth in the citations in this matter.

Respondent states that it is entering into this Stipulation and Settlement Agreement solely for the purposes of compromising and settling this matter economically and amicably and avoiding the cost and expense which would otherwise be associated with the further litigation of the issues raised by the citations.

7. Respondent hereby agrees to pay a total penalty in the amount of $5,500 by submitting its check made payable to the

"U.S. Department of Labor - OSHA," to the OSHA Area Office within 45 days from the date of execution of this Agreement.

8. Each party agrees to bear own fees and other expenses incurred by such party in connection with any stage of this proceeding.

9. Respondent states that there are no authorized representatives of affected employees at its current workplace.

10. The parties agree that this Stipulation and Settlement Agreement is effective upon execution.

11. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted on this 25TH day of March, 1994, pursuant to Commission Rules 7 and 100, and will remain posted for a period of 10 days.

Dated this 25TH day of March, 1994.

Respectfully submitted,

THOMAS S. WILLIAMSON, JR.
Solicitor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
Deputy Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional
Trial Litigation

PHILIP MANDEL, ESQ.
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Halocarbon Products Corp.

ORLANDO J. PANNOCCHIA
Attorney for the
Secretary of Labor

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SECRETARY OF LABOR
Complainant,
v.

HALOCARBON PRODUCTS CORPORATION,
Respondent,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS - LOCAL #560
Authorized Employee Representative.

OSHRC DOCKET NO. 89-2821

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 9, 1992. The decision of the Judge will become a final order of the Commission on November 9, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before October 29, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: October 9, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 89-2821

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

HALOCARBON PRODUCTS CORPORATION,

Respondent,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS - LOCAL #560

Authorized Employee Representative.

Docket No. 89-2821

Appearances:

Diane Wade, Esquire
U.S. Department of Labor
Office of the Solicitor
New York, New York 10014
For Complainant

Philip Mandel, Esquire
Marc Owen Mandel, Esquire
Golden and Mandel
New York, New York 10166
For Respondent

Before: Administrative Law Judge Sommer

PROCEDURAL BACKGROUND

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 *et seq.*, (the Act), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Following an investigation at a workplace located at 82 Burlews Court in Hackensack, New Jersey, the Secretary issued a complaint on October 3, 1989. Currently at issue is a

serious citation containing seven items,[1] and a willful citation containing three items.[2] Serious citation 1 alleges that Halocarbon Products Corporation (Halocarbon) violated section 5(a)(1) of the Act, 29 C.F.R. 1910.134(b)(8), 29 C.F.R. 1910.1200(d)(1), 29 C.F.R. 1910.1200(f)(5)(ii), 29 C.F.R. 1910.1200(g)(2)(iv), 29 C.F.R. 1910.1200(h)(2)(i), and 29 C.F.R. 1910.1200(h)(2)(iv). Willful citation 2 alleges violations of 29 C.F.R. 1910.134(e)(3), 29 C.F.R. 1910.1200(g)(1), and 29 C.F.R. 1910.1200(h)(2)(ii). The total proposed penalty is $7000 for the serious violations and $30,000 for the willful violations.

A hearing was held in New York, New York. All parties were represented by counsel who filed post-hearing briefs. No jurisdictional issues are in dispute, the parties having pleaded sufficient facts to establish that the respondent is subject to the Act and the Commission has jurisdiction of the parties and of the subject matter. Halocarbon filed a timely notice of contest placing in issue all items in serious citation 1 and willful citation 2.

Background

Respondent Halocarbon is a chemical manufacturing company engaged in the production of chloroflouro oils, grease, waxes, and lubricants, as well as fluorinated inhalation anaesthetic and alternate refrigerants. (Tr. 1151-52). At the relevant time, Halocarbon had two plants operating, one in New Jersey and one in South Carolina. The citations issued involve the New Jersey plant (the plant). Halocarbon employed approximately one hundred people in both operations, and approximately twenty-five in New Jersey. (Tr. 18-20).

On February 7, 1989, the Occupational Safety and Health Administration (OSHA) began an investigation of the Halocarbon facility in New Jersey following the report of an alleged chemical exposure which resulted in the hospitalization of two employees. (Tr. 14-15). One of the employees, Granville Drinkwater, eventually died. (Exh. C-12). The

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1 Items 2, 3, and 5 were withdrawn

2 Item 2 was withdrawn

investigation primarily focused on hoods 8 and 9 of the oils section where two chemical operations, the cracker trap process and the DFO process, took place. (Exh. C-2, C-3, and C-4). Both processes involve toxic and highly toxic chemicals.

The cracker trap process' purpose was to collect and treat cracker trap material, a chemical by-product of the production of the final product chloro-oil. (Tr. 41-42). Cracker trap material is composed of chloro pentaflouro propene (propene), a highly toxic halogenated organic compound, chlorotriflouroethene (monomer), a toxic compound, and other elements with unknown toxicity. (Tr. 22-24). The cracker trap process was performed four or five times a year. (Tr. 1737). It begins with the heating of material in reactor vessel G-360 which generated chloro-oil and cracker trap material. After the materials are separated, the gaseous cracker trap is collected and chilled in the cracker trap reactor vessel which causes it to condense to liquid. (Tr. 41-42, Exh. C-5). Once the vessel fills, the cracker trap material is moved to storage tanks 551 and 552 which are located outside of the plant. (Tr. 43, Exh. C-5). When economical, this material is transferred to vessel C-320 where it is heated which causes the chemical monomer to evaporate. The gaseous monomer then proceeds through a methylene chloride condenser cooling to a liquid, and is stored in monomer receiver C-530. Halocarbon will eventually re-use the monomer. (Tr. 45).

As the level of monomer in C-320 decreases, the temperature in the column above it increases which serves to alert the chemical operator to begin the intermediate cut step of the process. The chemical operator turns a valve above the C-530 monomer receiver which re-directs the monomer-propene mixture to the nine gallon bomb pressure vessel, avoiding the contamination of the pure monomer. This intermediate cut mixture is chilled to avoid vaporizing. It eventually is forced, by the introduction of nitrogen pressure, through 3/8 inch flexible pipes connected by compression fittings (Tr. 724) back to storage tanks 551 and 552 where it will undergo the same process again in order to maximize monomer reclamation. (Tr. 45-48).

The second chemical operation at issue, the DFO process, is performed within the confines of hood 9. (Tr. 1410). Halocarbon used the term DFO to describe a gyroflotation fluid, the process that produces it, and the materials used in the process. For the purposes of the citation, the Secretary stipulated that DFO materials referred to the bromonated materials used in the DFO process described below. (Tr. 1406-07).

The DFO process is initiated by placing the chemical bromomonomer in the G-362 cracker reactor. This reactor is heated which breaks the larger molecules into smaller ones. (Tr. 1409-11). This step produces DFO material composed of bromine, bromomonomer, the numbered chemicals 470, 480, and 490, and other unknown components. (Tr. 1411-14). After heating, most of the bromonomer goes into a glass trap and the remaining material goes into a receiver. The material in the receiver is then transferred to a fifty liter glass flask. (Tr. 1419, 1424). Once transferred, the glass flask is transported to another hood where its contents are chlorinated. (Tr. 1430). Toxicity studies on some DFO material components showed them to be toxic. (Exh. C-18).

Alleged Violation of Section 5(a)(1) of the Act- Serious Citation 1, Item 1

Serious Citation 1, Item 1 alleges:

> The employer did not furnish employment and place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the cracker trap material.

To prove a violation of section 5(a)(1) of the Act, the Secretary must show: (1) that a condition or activity in the employer's workplace presented a hazard to employees, (2) that the cited employer or the employer's industry recognized the hazard, (3) that the hazard was likely to cause death or serious harm, and (4) that feasible means existed to eliminate or materially reduce the hazard. *United States Steel Corp.*, 12 BNA OSHC 1692, 1697-98 (No. 79-1998, 1986); *Coleco Industries*, 14 BNA OSHC 1961, 1963 (No. 84-546, 1991).

The Secretary contends that Halocarbon's intermediate cut was a recognized hazard to employees, and consequently, was a violation of the general duty clause. The Secretary's expert, Motley, maintained that the use of 3/8 inch flexible tubing, compression fittings, and

the process' location outside of hood 8 was a hazard per se. (Tr. 49, 54-56). He stated that the compression fittings used were inappropriate for the transfer of highly toxic chemicals and would be subject to leaks from substantial movement. (Tr. 54). However, after a review of the relevant credible testimony and evidence, I am led to the inevitable conclusion that the Secretary has failed to meet her burden of proof.

The Secretary did not fulfill the first element by demonstrating that the intermediate cut process constituted a condition or activity hazardous to employees. While her expert Motley, an industrial hygienist, attacked the process as faulty, he was shown to have a specious knowledge of chemical manufacturing at best. He had no experience in chemical manufacturing. (Tr. 713). He was unaware of any limitations of the compression fittings that he called inappropriate. He did not contact manufacturers to discover if the fittings were susceptible to leaks when moved. (Tr. 715-17). He did not know the pressure rating of the flexible tubing. (Tr. 718). His experience with these fittings and tubing was restricted to the laboratory. (Tr. 55). In contrast, Halocarbon's experts, Bender and Cruice, were shown to have extensive knowledge of the chemical manufacturing industry. (Tr. 1184, 1305).

Bender and Cruice both maintained that Motley's conclusions about the intermediate cut were erroneous. Bender called the tubing and fittings appropriate for the transfer of cracker trap material. (Tr. 1200). Cruice stated that the strength and durability of the fittings were unquestioned, and that they could withstand greater movement than occurred in the intermediate cut. (Tr. 1338-39, 1365). Cruice also testified that the location of the nine gallon bomb did not present a hazardous condition. (Tr. 1338). In resolving the conflicting testimony, I am compelled to find that Halocarbon's experts' greater experience casts grave doubts upon the accuracy of Motley's testimony, and therefore, cannot find that the Secretary proved the first element of a 5(a)(1) violation.

The Secretary also failed to prove the second element. No credible evidence was presented to show that either Halocarbon or the chemical manufacturing industry recognized a hazard. Motley was unaware of competitors that used a similar process, used cracker trap materials, or made similar products. (Tr. 475-76, 587). He had no knowledge of competitors' precautions. (Tr. 475). Bender and Cruice both testified that the industry would not classify the intermediate cut a hazard. (Tr. 1298, 1338).

The preponderance of the evidence introduced fails to establish the existence of a recognized hazard. The record evidence and testimony does not demonstrate that Halocarbon had the requisite knowledge needed to prove a 5(a)(1) violation. Accordingly serious citation 1, item 1 is vacated.

Alleged Violation of 29 C.F.R. 1910.134(b)(8)- Serious Citation 1, Item 4

The standard at 29 C.F.R. 1910.134(b)(8) provides:

Section 1910.134 Respiratory protection . . .

(b) Requirements for a minimal acceptable program . . .

(8) Appropriate surveillance of work area conditions and degree of employee exposure or stress shall be maintained.

The standard at issue requires that "appropriate" surveillance of a work area must take place to meet the requirements for an acceptable program. The plain meaning of "appropriate" is "specially suitable," "fit," "proper."[3] To prove a violation of this standard the Secretary must show that Halocarbon's surveillance was inappropriate or not suitable for an operation utilizing its specific chemicals and processes. To attempt to add additional meaning or responsibilities to the standard would deprive Halocarbon of its due process rights to know what hazard it must protect against so as not to violate the standard. The Secretary alleges that the combination of the Davis monitor and employee monitoring was not an appropriate or proper method of surveillance of the oils section of the plant. Motley testified that due to the varying levels of toxicity of the chemicals at the Halocarbon facility, the Davis monitor was not suitable as a "gauge of employee exposure." (Tr. 154-55). He testified that the nine minute cycle where each of six ports will be monitored for approximately one minute and fifteen seconds was inappropriate for an area where chemicals used had a high level of toxicity and potential to vaporize as a result of a liquid spill. (Tr. 159-60). He felt that the Davis monitor's inability to differentiate between the low and high toxicity chemicals made it an improper monitor. (Tr. 182). Motley testified that a monitor that could differentiate and quantify the different chemicals would be appropriate for a work place such as Halocarbon's. (Tr. 654). The Secretary also alleged that the alarm

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[3] Webster's Third New Int'l Dictionary, 1986 Edition, p. 106.

level of 25-30 parts per million was "relatively high," because of its correlation to the LC-50 of propene, a component of the cracker trap material. (Secretary's Post Hearing Brief 81). The Secretary's complaint about employee monitoring was simply that relying on employee senses and observation would be insufficient to fulfill the standard's requirements. (*Id.*).

There can be no doubt that had Halocarbon relied solely on employee monitoring the standard of appropriate surveillance would not have been met. However, the combination of trained chemical operators' surveillance and the Davis monitor's surveillance presents an entirely different situation. The respondent's witnesses testified that the chemical operators, who were trained to recognize hazards in the work place (Tr. 1612), were its first line of defense. (Tr. 1436, 1573, 1640). They also stated that the Davis monitor was the best surveillance monitor for the Halocarbon facility. (Tr. 1439-40, 1164-65, 1170).

It was the Secretary's position that the surveillance of potential toxic hazards was not appropriate and that other instruments could survey the work area and warn of impending hazards more promptly and efficiently. This position was not proven. Actually, a new instrument being tested was found wanting. (Tr. 1849). No credible proof was offered that an employee could be exposed to either propene or another chemical at Halocarbon at a level to cause harm considering the totality of the protective methods used by Halocarbon including the use of the Davis monitor plus management and employee surveillance methods. Surely the record of Halocarbon's more than twenty years of use of these protective systems without any serious incidents (the mishap and death in 1989 is unexplained and the investigation was unable to determine the reason d'etaire) attests to the suitability of the surveillance method used.

The evidence as presented by the Secretary was insufficient to support a finding that there was a violation of 29 C.F.R. 1910.134(b)(8). Insufficient evidence in the eye of the law is no evidence. Accordingly, the citation alleging a violation of 29 C.F.R. 1910.134(b)(8) is vacated.

Alleged Violation of 29 C.F.R. 1910.1200(f)(5)(ii)- Serious Citation 1, Item 7

The standard at 29 C.F.R. 1910.1200(f)(5)(ii) provides:

(f) Labels and other forms of warning . . .

(5) Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information . . .

(ii) Appropriate hazard warnings.

Secretary alleges that Halocarbon violated 29 C.F.R. 1910.1200(f)(5)(ii) by failing to have appropriate hazard warnings on certain process equipment. Halocarbon contends that it was permitted to use an alternative method of hazard warning as provided in 29 C.F.R. 1910.1200(f)(6) which allows the use of "other written materials in lieu of affixing labels . . . as long as [they] identifies containers to which it is applicable and conveys the information required by paragraph (f)(5) . . ." 29 C.F.R. 1910.1200(f)(6).

In the Halocarbon system, each vessel was identified by a letter and number. This letter and number could be found in an index in front of the material safety data sheet (MSDS) books which lists the corresponding vessel's contents. Another list could then be consulted to find either the page or volume number where the MSDS for a specific chemical could be found. The MSDS was expected to convey the appropriate hazard warnings. (Tr. 1647, 1782-88).

For Halocarbon to have an adequate alternative method, it must show that it communicated appropriate hazard warnings to its employees. To do so Halocarbon had to prove that it had an appropriate MSDS for the contents of each cited vessel. While the MSDS for chlorotriflouroethene was provided (Exh. C-9) and had appropriate warnings, the same cannot be said for methylene chloride. The record evidence does not demonstrate that such an MSDS did exist at the Halocarbon facility. As a result, it cannot be said that Halocarbon's alternative system effectively communicated appropriate hazard warnings as

required by the standard. Accordingly, I find that Halocarbon in violation of 29 C.F.R. 1910.1200(f)(5)(ii). A penalty of $1000 is appropriate under the criteria of section 17(j) of the Act.

Alleged Violation of 29 C.F.R.1910.1200(g)(2)(iv) - Serious Citation 1, Item 8

The standard at 29 C.F.R.1910.1200(g)(2)(iv) provides:

(g) Material safety data sheets ....

(2) Each material safety data sheet shall be in English and shall contain at least the following information....

(iv) The health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical...

The Secretary alleges that Halocarbon violated the standard because its MSDS on cracker products materials did not identify the acute health hazards associated with such materials, such as pulmonary and kidney dysfunction and accompanying health risks. The Hazard Communication Standard (HCS) requires every manufacturer of chemicals to investigate the potential hazard of the chemicals it uses or produces, and provide an MSDS which communicates "all the potential hazards associated with a chemical" so that employees know "the specific nature and degree of hazard they are likely to encounter in their particular exposure situations." (Preamble to HCS) Appendix A is to be consulted for the scope of the health hazards covered. The appendix requires detailed information about bodily health risks and includes a target organ description of health damage which may occur from chemicals. The MSDS must list fully the target organ dangers to apprise employees

of the specific hazards present. *Durez, Division of Occidental Chemical Corp. v. OSHA*, 906 F2d 1, 2 (14 BNA OSHC 1633)(D.C. Cir. 1990).

The MSDS for the cracker trap products did not warn of the hazards associated therewith, specifically to the lungs or kidneys. Yet the evidence shows that Halocarbon was aware both from the illnesses and death which occurred in 1965 due to chemical exposure to such materials, and the results of the inhalation exposure tests in 1966 that cracker trap products constituted a significant health hazard.

It is clear that Halocarbon was required to list such specific target organ hazards, including signs and symptoms of exposure. It failed to do so, and therefore violated the standard at 29 C.F.R. 1910.1200 (g)(2)(iv). A penalty of $1000 is appropriate under the criteria of Section 17(j) of the Act.

Alleged Violation of 29 C.F.R. 1910.1200(h)(2)(i) Serious Citation 1, Item 9

The standard at 29 C.F.R. 1910.1200(h)(2)(i) provides:

(h) Employee information and training . . .

(2) Training. Employee training shall include at least:

(i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.)

The Secretary alleges that Halocarbon did not train (a) that the Davis monitor analyzed all points serially, and (b) that odors or signs associated with leaks in the cracker trap process could signal exposure to a potentially lethal chemical.

Motley's hearing testimony served to discredit his issuing of this citation regarding improper training on the Davis monitor's functioning. He stated that the allegation was based solely on employee Carmichael's statements that he misunderstood the Davis monitor's serial analysis. (Tr. 776, 779). However, cross examination elucidated the reality that Motley's conclusion and characterization of Carmichael's understanding of the Davis monitor was simply unfounded, having no basis in fact. The Secretary later had no choice but to admit that she had no evidence to claim that Carmichael misunderstood the Davis monitor's serial analysis. (Tr. 1858). This repeal of Motley's allegation, the entire basis for this complaint, leads to the inevitable conclusion that this charge is without merit. Accordingly, this charge is vacated.

The second allegation of a lack of training regarding odors and signs associated with leaks is similarly unfounded. The record testimony and evidence does not establish a violation. When asked if employees were not trained to realize that odors or signs of leaks could signify hazardous exposure, Motley hedged and avoided giving a straightforward, definitive answer. He eventually admitted that employees recognized that odors could lead to exposure to the cracker trap material which could be deadly. (Tr. 783-85).

Former safety trainers Cohen and Chablani testified that they trained employees to recognize that odor could indicate potential exposure to a chemical leak. (Tr. 1652, 1733). Cohen testified that all Halocarbon employees received training on the signs of leaks in their initial hazard communication training. (Tr. 1649-50). While Silence testified in his deposition that employees were not trained to detect leaks, his statement cannot be regarded as persuasive. He was confused during questioning by what he termed an "ambiguous"

question. (Exh. R-28 149-50). He also was not presented as a witness at the hearing, and therefore, was not subject to searching and probing cross examination which could serve to highlight or uncover any inconsistencies or misunderstandings present in his testimony. The credibility of his testimony is therefore suspect.

The Secretary did not allege that Halocarbon did not have a training program, but that it did not train employees in this isolated instance. In light of the evidence presented she was obligated to establish that the training that employees received was inadequate. I cannot find by the preponderance of the evidence that she has met her burden of proof. Accordingly, serious citation 1, item 9 alleging a violation of 29 C.F.R. 1910,1200(h)(2)(i) is vacated.

Alleged Violation of 29 C.F.R. 1910.1200(h)(2)(iv)- Serious Citation 1, Item 10

The standard at 29 C.F.R. 1910.1200(h)(2)(iv) provides:

(h) Employee information and training . . .

(2) Training. Employee training shall include at least:

. . .

(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

Halocarbon was cited for a violation of 29 C.F.R. 1910.1200(h)(2)(iv) for failing to explain how to use appropriate hazard information on the cracker trap MSDS. This claim

was based specifically on foreman Mallon's lack of knowledge of the term LC-50 as indicating an acute hazard, and "partially" on the claim that Carmichael never saw the cracker trap MSDS before the Drinkwater fatality. (Tr. 818-19). Halocarbon contests this citation and claims that it gave the required training on MSDS reading and interpretation.

Cohen and Ferstandig testified that MSDS training was given, and numerous employees stated that they received training. (Tr. 1465-66, 1652, 278, Exh. R-3, Exh. R-28 155). Halocarbon submitted signed documents that confirmed employee MSDS training. (Exh. R-25). While Mallon could not define LC-50, Motley failed to ask him if he had received training on its meaning. (Tr. 841). Cohen testified that he discussed the term LC-50 in his training sessions. (Tr. 1652). Carmichael had not seen the cracker trap MSDS, but Motley did state that Carmichael said that MSDS training was part of Cohen's training program. (Tr. 821).

After a review of the record evidence and testimony, I cannot find that the Secretary has met her burden of proof in establishing a violation of the cited standard. The foundation of this citation is little more than vague assertions and conclusions that are far from convincing when weighed against the opposing evidence and testimony. These facts and circumstances constrain me to the conclusion that Halocarbon was in compliance with the cited standard. This citation alleging a violation of 29 C.F.R. 1910.1200(h)(2)(iv) is vacated.

Alleged Violation of 29 C.F.R. 1910.134(e)(3) and/or (b)(3) Willful Citation 2, Item 1

The standard at 29 C.F.R. 1910.134(e)(3) provides:

(e) Use of respirators . . .

(3) Written procedures shall be prepared covering safe use of respirators in dangerous atmospheres that might be encountered in normal operations or emergencies. Personnel shall be familiar with these procedures and the available respirators.

The standard at 29 C.F.R. 1910.134(b)(3) provides:

(b) Requirements for a minimal acceptable program.

. . .

(3) The user shall be instructed and trained in the proper use of respirators and their limitations.

This citation involves two separate allegations that must be addressed accordingly.

The Secretary alleges that Halocarbon did not comply with 29 C.F.R. 1910.134(b)(3) by failing to instruct and train employees in the proper use and limitations of the respirators in its plant. Halocarbon has offered extensive proof that compels me to conclude that their training was in compliance with the cited standard. Respirator fit test records signed by employees were introduced to evidence which established that employees were shown how to operate the respirators. (Exh. R-24). Cohen testified that he gave a forty-five minute training session on the proper use of respirators. (Tr.1605). Motley admitted that employees were taught how to put on and check the mechanics of the respirators. (Tr. 323). He further stated that monthly meetings (that employees were paid overtime to attend) were held

regarding the respirator program. (Tr. 882). The Secretary introduced no evidence to discredit this testimony and evidence. Accordingly, the citation alleging a violation of 1910.134(b)(3) is vacated.

The violation of 29 C.F.R. 1910.134(e)(3) was alleged for Halocarbon's failure to have written procedures covering the safe use of respirators in foreseeable emergencies. Halocarbon contends that the combination of its contingency plan and emergency procedures (Exh. R-13), and the Scott Air Pack Operational Instructions and Halocarbon's supplement (Exh. J-2) satisfy the standard. However, this does not appear to be the case.

While these instructions do explain the procedure for putting on and operating the respirators, they do not explain when the respirators should be used. Halocarbon has argued that employees knew that they were to evacuate the premises in the event of a significant leak and then were to inform a foreman who would decide if respirator use was warranted. (Tr. 864, Exh. R-28 77). This procedure, however, does not fulfill the standard, because it fails to establish a written procedure for determining when the respirators should be used. Mere subjective decisions of a foreman about the need for respirator use are not enough. There must be "[w]ritten procedures . . . prepared covering safe use . . ." 29 C.F.R. 1910.134(e)(3). Halocarbon did not have these required written procedures which must result in the finding of a violation.

I cannot find that the Secretary showed the required indicia necessary to hold that Halocarbon's violation of the standard was willful. To establish a willful violation of the Act it must be established that the violative conduct "was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee

safety." *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1595 (No. 82-12, 1985). Halocarbon has shown a commitment to employee safety, and therefore, such a finding would be unwarranted. Halocarbon had a good faith opinion that its program did not violate the hazard communication standard. (Tr. 1598). Thus, the violation cannot be classified as willful. *See Mel Jarvis Construction Co.*, 10 BNA OSHC 1052, 1053 (No. 77-2100, 1981). Accordingly, the violation is amended to serious as there is "substantial probability that death or serious physical harm could result" from the condition. Section 17(k). A penalty of $1000 is assessed.

Alleged Violation of 29 C.F.R. 1910.1200(h)(2)(ii)- Willful Citation 2, Item 4

The standard at 29 C.F.R. 1910.1200(h)(2)(ii) provides:

(h) Employee information and training.

. . .

(2) Training. Employee training shall include at least:

. . .

(ii) The physical and health hazards of chemicals in the work area . . .

Halocarbon was cited for violation of 29 C.F.R. 1910.1200(h)(2)(ii) for failing to train on health hazards of the toxic materials bromo-oil, cracker trap material, and chloromonomer. Halocarbon does not dispute that it did not give *specific* training on each of the materials in its plant, but instead, contends that its *generic* training was sufficient to comply with the requirements of the cited standard. (*See* Respondent's Post-Hearing Memorandum 138). This generic training was intended to explain the general dangers of

hazardous chemicals, important terms, and the use of MSDS's so that employees could learn about specific dangers. (Tr. 1618, 1628-29). The generic training was divided into two categories: physical hazards and health hazards. During training, safety director Cohen would use specific examples to elucidate general chemical dangers. (Tr. 1628-29). He did specifically train on chloromonomer, but did not use either bromo-oil or cracker trap material as examples. (Tr. 1630).

The Secretary does not contend that Halocarbon must train on each individual chemical in the plant, but that Halocarbon's training was not enough to alert employees to the physical and health hazards in the work area. The purpose of the standard is to protect employees from serious risks of health damage posed by hazardous chemicals which insidiously cause bodily damage. Employee training is a vital part of this protection.

Training about physical and health hazards is more than an explanation of the MSDS system and important terms which are covered under 1910.1200(h)(1)(iii) and (h)(2)(iv). For generic training to be sufficient, it cannot place an inordinate amount of responsibility on employees to complete the process. Mere words of caution and general statements about health hazards are not enough. Training must include an explanation of "both the change in body function and the signs and symptoms that may occur to signal that change." 29 C.F.R. 1910.1200 Appendix A. An employer may train generically if the training classifies similar chemicals with similar dangers together in a single category. Thus, a group of similar toxic chemicals that similarly affect the lungs, for example, could be grouped together in a training program. If a chemical does not fall within a known category, separate, supplementary training is required in order to comply with the standard.

Halocarbon did not provide training on either bromo-oil or cracker trap material that fulfills the requirements of the standard. There is no evidence of record that suggests that Halocarbon employees knew of the particular dangers of these materials. While they knew that a man had died from cracker trap materials many years before, they were not trained in the health hazards associated with cracker trap exposure as defined in Appendix A. There furthermore is no credible evidence that suggests any training in the hazards of bromo-oil. This lack of training is a violation of 29 C.F.R. 1910.1200(h)(2)(ii).

The violation cannot be classified as willful. The Secretary did not introduce any testimony or evidence that proved that Halocarbon had the requisite state of mind to constitute willfulness. Motley specifically stated that parts (a) and (c) of the citation would not have been classified as willful if they had not been cited in conjunction with part (b). (Tr. 1039). He stated that there was not any evidence of intentional disregard. (Tr. 1031-32). All credible evidence constrains me to conclude that Halocarbon believed that it was in compliance with the cited standard. Accordingly, the citation alleging a violation of 29 C.F.R. 1910.1200(h)(2)(ii) is amended to serious in accordance with section 17(k) of the Act and a penalty of $1000 is assessed.

Alleged Violation of 29 C.F.R. 1910.1200(g)(1) - Willful Citation 2, Item 3

The standard at 29 C.F.R. 1910.1200(g)(1) provides:

(g) Material Safety Data Sheets. (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

This citation alleges that Halocarbon did not develop a material safety data sheet for DFO chemicals produced during the DFO process located in hood 9. Halocarbon does not contend that it developed an MSDS for DFO chemicals, but that it was not required to do so, because DFO material is not a single chemical, but is a bundle of chemicals that are continually changing throughout the DFO process. (Tr. 1411-14, 1425). Halocarbon maintains that it complied with the cited standard by having MSDS's for the known elements in the DFO material. It did not believe that OSHA regulations required an MSDS for all in process chemicals produced. (Tr. 1421, 1432-33).

The standard requires chemical manufacturers to "obtain or develop a [MSDS] for each hazardous chemical they produce . . . ." 29 C.F.R. 1910.1200(g)(1). 'Produce' means to manufacture, process, formulate, or repackage." 29 C.F.R. 1910.1200(c). The standard does not limit itself to final products, nor does it exclude intermediate products. The purpose of the hazard communication standard is to ensure that employees working with hazardous chemicals are apprised of their dangerous properties. 29 C.F.R. 1910.1200(a). Failure to abide by any section of the standard strikes a potentially fatal blow to its multi-tiered system of protection.

Halocarbon's failure to develop an MSDS for DFO materials is a clear violation of the standard. The standard requires an MSDS for *each* hazardous chemical produced. Failure to have an MSDS available for the DFO material undermines effective communication of potential hazards to employees. While the DFO material may contain bromine, a known toxic with good warning properties, this fact does not alleviate the requirements of the Act. To apprise employees of potential changes in body function and signs and

symptoms that may signal that change (as required in Appendix A), an employer must make an appropriate MSDS as required by the standard. Halocarbon's failure left employees without a way to determine all difficulties that could arise in a foreseeable emergency. The complexity and transitory nature of the DFO materials does not remove it from the scope of the standard. Accordingly, a violation of the standard has been established. While agreeing with the Secretary that Halocarbon violated the standard at 1910.1200(g)(1), I do not agree that on this record said violation was wilful in nature. "A wilful violation is differentiated by a heightened awareness-of the illegality of the conduct or conditions-and by a state of mind-conscious disregard or plain indifference" and a showing of "such reckless disregard for employee safety ... that one can infer that if the employer had known of the (legal provision), the employer would not have cared that the conduct or conditions violated it." *Williams Enterprises, Inc.*, 13 BNA OSHC AT 1256-57, 1986-87 CCH OSHD at p. 36,589. The evidence does not establish that Halocarbon was indifferent to employee safety or showed intentional disregard of the standard. The totality of the evidence shows an employer with a positive attitude toward the Act and concerned with employee safety, and with an ongoing safety program with positive training efforts. Halocarbon's violation of § 1910.1200(g)(1) will be affirmed as "serious".

It is further concluded that serious citation 1, item 6 which alleges that Halocarbon did not evaluate DFO materials in violation of 29 C.F.R. 1910.1200(d)(1) is duplicative of citation 2, item 3. In order for Halocarbon to prepare a proper MSDS, it would have to evaluate the DFO materials as required in § 1910.1200(d)(1). Thusly, the two citations involve substantially the same violative conduct. Under such situations, only a single

violation is found and a single penalty assessed. *Cleveland Consolidated, Inc.*, 13 BNA OSCH 1114, 1118 (No. 84-696, 1987). Accordingly, citation 2, item 3 and citation 1, item 6 are affirmed as serious and a penalty of $1000 is considered appropriate under the criteria of section 17(j) of the Act.

PENALTY

The penalties assessed herein were based on the nature and gravity of the violations and with consideration of the other relevant elements set out in 29 U.S.C. ¶ 666(J).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Any proposed findings or conclusions not contained in this opinion are nether found nor concluded. Any motions pending are denied.

ORDER

In view of the foregoing, good cause appearing therefore, it is ORDERED that :

(1) The allegation of a serious violation set forth at section 5(a)(1) of the Act found in serious citation 1, item 1 is vacated.

(2) The allegation of a serious violation of 29 C.F.R. 1910.134(b)(8) found in serious citation 1, item 4 is vacated.

(3) The allegation of a serious violation set forth at 29 C.F.R. 1910.1200(f)(5)(ii) found in serious citation 1, item 7 is affirmed, and a penalty of $1000 is assessed.

(4) The allegation of a serious violation set forth at 29 C.F.R. 1910.1200(g)(2)(iv) found in serious citation 1, item 8 is affirmed, and a penalty of $1000 is assessed.

(4) The allegation of a serious violation set forth at 29 C.F.R. 1910.1200(g)(2)(iv) found in serious citation 1, item 8 is affirmed, and a penalty of $1000 is assessed.

(5) The allegation of a serious violation set forth at 29 C.F.R. 1910.1200(h)(2)(i) found in serious citation 1, item 9 is vacated.

(6) The allegation of a serious violation set forth at 29 C.F.R. 1910.1200(h)(2)(iv) found in serious citation 1, item 10 is vacated.

(7) The allegation of a willful violation set forth at 29 C.F.R. 1910.134(e)(3) and/or (b)(3) found in willful citation 2, item 1 is amended to a serious violation. A violation of 29 C.F.R. 1910.134(e)(3) is found. The allegation of a violation of 29 C.F.R. 1910.134(b)(3) is vacated. A penalty of $1000 for the serious violation of 29 C.F.R. 1910.1200(e)(3) is assessed.

(8) The allegation of a willful violation set forth at 29 C.F.R. 1910.1200(h)(2)(ii) found in willful citation 2, item 4 is amended to a serious violation and as amended is affirmed. A penalty of $1000 is assessed.

(9) The allegation of a willful violation of 29 C.F.R. 1910.1200(g)(1) found in willful citation 2, item 3 is amended to a serious violation and as amended is affirmed. Citation 1, item 6 alleging a serious violation of 29 C.F.R. 1910.1200(d)(1) is affirmed. A penalty of $1000 is assessed to reflect both items.

IRVING SOMMER
Judge, OSHRC

DATED: OCT - 9 1992
Washington, D.C.