

Jmt 11/26/85

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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO JUN 4 2 28 PM '85

GENERAL DIVISION

MONTGOMERY COUNTY
FILED-COURT OF
COMMON PLEAS

STATE OF OHIO, ex rel. : CASE NO. 83-3417
 ANTHONY J. CELEBREZZE, JR., :
 :
 Plaintiff, :
 :
 -vs- : AMENDED JUDGMENT ENTRY
 :
 ██████████ CORP., :
 et al., :
 Defendants. :

Brown, J.: June 4, 1985

: : : : : : : : : : : :

The referee's report having been filed in the within matter on May 3, 1985, and no timely objections having been filed thereto, the report of the referee is ordered approved, and judgment is hereby entered as follows:

- 1) the defendants are hereby enjoined from disposing of any hazardous waste at any facilities, or in any manner other than is allowed by Chapter 3734 of the Ohio Revised Code;
- 2) defendant American Carco Corporation is hereby fined the amount of \$500;
- 3) defendant Wayne Maggard is hereby fined the amount of \$50; and,
- 4) the costs of this action are hereby assessed to defendant American Carco Corporation.

SO ORDERED:

ROBERT M. BROWN, JUDGE

Copies of the above were sent to all parties listed below

by ordinary mail this date of filing.

TERRENCE M. FAY/MONICA FRIES, Co-Counsel for Plaintiff,
Assistant Attorneys General, Environment Law Section,
30 East Broad Street, 17th Floor, Columbus, Ohio 43215
JOSEPH P. BUCHANAN, Attorney for Defendants, 2580 Kettering
Tower, Dayton, Ohio 45423
DANNY HAMILTON, Bailiff

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Defendants

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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO, ex rel. : CASE NO. 83-3417
ANTHONY J. CELEBREZZE, JR.

Plaintiff : (Judge Brown)
(Referee Turner)

vs.

AMERICAN CARCO CORPORATION, : REFEREE'S REPORT
et al.,

Defendants

To: Hon. Robert M. Brown

From: Dennis J. Turner, Referee Pro Tempore

This matter was referred to the referee for trial and report on all the issues of law and fact on February 17, 1984. After reviewing the testimony and the exhibits submitted by the parties the referee reports as follows.

FINDINGS OF FACT

1. On July 26, 1983, the defendant Wayne Maggard, while acting in his capacity as plant superintendent at the American Carco plant located at 2800 Ontario Avenue, Dayton, Ohio, ordered that eight carboys labeled "goggle cleaner" be dumped on the ground behind the plant.
2. Neither Wayne Maggard or any of American Carco's employees made a serious effort to determine the nature of the substance in

the carboys before the liquid was dumped.

3. It was later determined that the dumped material was strongly acidic.

4. On July 27, 1983, Jeffrey Hines and Bruce Midolo, inspectors for the Ohio Environmental Protection Agency, acting upon a complaint, examined the site where the liquid was dumped. Their field inspection indicated that the material which had been dumped was highly acidic. They took samples of the soil and liquid and sent them to the Ohio Department of Health Lab in Columbus for testing.

5. Jeffrey Hines told Wayne Maggard not to do anything to the site until notified by the EPA on how to neutralize the acid.

6. Several days later Mr. Hines told Mr. Maggard that lime should be worked into the soil and then the top several inches should be dug up and put in barrels.

7. Mr. Maggard ordered the neutralization process as suggested by the EPA to be carried out immediately.

8. The Ohio Department of Health subsequently confirmed that the substance which was dumped by the defendants had a pH of less than two, which confirmed that it was highly acidic.

9. Although the substance was very acidic, there was no evidence introduced by the State that the dumping caused any measurable harm to the environment. Nevertheless, the dumped material was potentially hazardous at the time it was dumped, and

the fact that a nearby well was not affected or that acidic gases were not created was more a matter of luck than design.

10. No permits had been issued to American Carco authorizing the disposal of acid at its Ontario Avenue plant.

11. The complaint filed in this action was the first time that the Ohio EPA had found any problem with the defendant's operation. Prior inspections by both the Ohio EPA and the United States EPA did not discover any violations of Environmental Protection Regulations.

FINDINGS OF LAW

The applicable law can be summed up by quoting the statutes which govern the dumping of hazardous waste.

§3734.01(J) ORC

Hazardous waste means any waste or combination of wastes in solid, liquid, semisolid, or contained gaseous form that in the determination of the director, because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

- (1) Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
- (2) Pose a substantial present or potential hazard to human health or safety to the environment when improperly stored, treated, transported, disposed of, or otherwise managed.

Hazardous waste includes any substance identified by regulation as hazardous waste under the "Resource Conservation and Recovery Act of 1976."

§3734.02(F)

No person shall store, treat or dispose of hazardous waste identified or listed under this chapter and rules adopted under it, regardless whether generated on or off the premises where the waste is stored, treated, or disposed of, or cause to be transported any hazardous waste identified or listed under this chapter and rules adopted under it to any other premises,...

§3734.13(C)

If the director determines that any person is violating or has violated this chapter, a rule adopted thereunder, or term or condition of a permit issued thereunder, the director may, without prior issuance of an order, request in writing that the attorney general bring a civil action for appropriate relief, including a temporary restraining order, preliminary or permanent injunction, and civil penalties in any court of competent jurisdiction. Such action shall have precedence over all other cases. The court may impose upon the person a civil penalty of not more than ten thousand dollars for each day of each violation of this chapter, a rule adopted thereunder, or a term or condition of a permit issued thereunder, which moneys shall be paid into the hazardous waste clean-up special account created in §3734.28 of the Revised Code.

CONCLUSIONS

In light of the above findings of fact it is clear that the defendants violated §3734.02(F) of the Ohio Revised Code when the substance in question was dumped on American Carco's back lot.

The substance was highly acidic and therefore constituted a hazardous waste. The fact that the defendants may not have known of its acidic qualities or that it was hazardous does not constitute a defense to their action. State ex rel. Brown v. Dayton Malleable, Inc., 13 ERC 2189 (Montgomery Co. C. P. 1979). The lack of intent may, however, be taken into consideration when determining the size of the fine to be imposed.

The first issue that must be addressed is the plaintiff's request for an injunction which would prohibit the defendants from disposing of any hazardous waste at any facility, or in any manner other than as permitted by Chapter 3734 of the Ohio Revised Code. Such an injunction should be issued if the evidence shows that the statutory requirements have been met. Ackerman v. Tri-City Geriatric and Health Care, Inc., 55 Ohio St.2d 51 (1978). In this case those prerequisites are that the defendants disposed of a hazardous waste at a location other than a licensed and approved hazardous waste disposal facility. The defendants did dispose of the acid in an unauthorized location. Therefore, an injunction is a proper remedy in order to insure that the defendants refrain from dumping hazardous waste in the future.

The second issue is to determine the amount of the fine that should be imposed for the violation which occurred. The statute provides for a ten thousand dollar per day maximum fine but establishes no minimum fine. All parties essentially agree that the violation

only existed for the period of one day. The evidence also shows that the defendants were not so much wanton and reckless as negligent. The contents of the carboys were not adequately checked before they were dumped, and the dumping itself was rather haphazard. On the other hand, after the EPA inspectors had informed them that the dumping may have violated the hazardous waste statute, the defendants were most cooperative in attempting to clean up the site. The evidence showed that there was no actual harm to the environment as a result of the dumping. Furthermore, the defendants had no previous violation of EPA regulations or environmental statutes. In short, the defendants can in no way be labeled as hard-core polluters. Nevertheless, the fine must be of sufficient size to insure that the defendants will not be tempted to violate the hazardous waste law in the future. Therefore, the fine will be set at \$500 for the defendant, American Carco Corporation and \$50 for the defendant, Wayne Maggard.

RECOMMENDATION

In conclusion therefore it is the recommendation of this referee that:

1. that the defendants be enjoined from disposing of any hazardous waste at any facility, or in any manner other than is allowed by Chapter 3734 of the Ohio Revised Code;
2. that the defendant American Carco Corporation be fined in the amount of \$500;

3. that the defendant Wayne Maggard be fined in the amount of \$50; and,

4. that the cost of this action be paid by the defendant American Carco Corporation.

Counsel are referred to Civ. R. 53 and Rule 2.51 of the Rules of the Montgomery County Common Pleas Court regarding the filing of objections to the referee's report.

Dennis J. Turner, Referee Pro Tempore

This referee's report was served upon counsel, named below, by regular mail on this date of filing.

Terrence M. Fay/Monica Fries, co-counsel for plaintiff
Assistant Attorneys General
Environmental Law Section
30 E. Broad St., 17th Floor, Columbus, Ohio 43215

Joseph P. Buchanan, attorney for defendants
2580 Kettering Tower, Dayton, Ohio 45423

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