

SPI-76

(FOR CONFIDENTIAL USE ONLY -
LAWYERS' WORK PRODUCT)

(11)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE SOCIETY OF THE PLASTICS
INDUSTRY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION, UNITED STATES
DEPARTMENT OF LABOR; PETER J.
BRENNAN, SECRETARY, DEPARTMENT
OF LABOR; and JOHN H. STENDER,
ASSISTANT SECRETARY FOR OCCU-
PATIONAL SAFETY AND HEALTH,

Respondents.

) SPI
) ATP
) ACC
) Tenneco - Air Products

mentioned
Parties

No. 74-2284

MOTION FOR EXPEDITED BRIEFING SCHEDULE
AND EXPEDITED ORAL ARGUMENT

This case involves a petition for review of a permanent standard concerning occupational exposure to vinyl chloride, 29 C.F.R. § 1910.93q, which was promulgated by the Occupational Safety and Health Administration, United States Department of Labor, on October 1, 1974.

The standard involved has widespread economic consequences because vinyl chloride is the basic constituent in the manufacture of polyvinyl chloride, which is by volume the second largest plastic used in the American economy. The standard affects at least 700,000 American workers.

The provisions of the permanent standard relating to occupational exposure to vinyl chloride become effective

GENC 009947

On January 1, 1975. In the period until January 1, 1975, the provisions of an emergency temporary standard relating to occupational exposure to vinyl chloride which was promulgated by the Occupational Safety and Health Administration on April 5, 1974, remain in effect. This emergency temporary standard provides that the permissible level for employee exposure to vinyl chloride shall not exceed a 50 ppm ceiling.

Under the terms of the permanent standard, which become effective on January 1, 1975, no employee may be exposed to vinyl chloride concentrations greater than 1 ppm averaged over any eight-hour period, and no employee may be exposed to vinyl chloride at concentrations greater than 5 ppm averaged over any period not exceeding 15 minutes.

The evidence presented by SPI and other industry witnesses at the hearing conducted by OSHA showed that levels of exposure required by the permanent standard are not feasible for polyvinyl chloride manufacturers to achieve.^{1/} This

1/ The Occupational Safety and Health Act authorizes the setting of only those standards which can be feasibly met by the industry involved. The Occupational Safety and Health Act states that:

"The Secretary . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity . . ." 29 U.S.C. § 655(b)(5) (emphasis supplied).

(Cont'd)

feasibility issue will also be the primary issue which will be raised by Petitioner on this appeal.

Accordingly, it is essential that Petitioner obtain judicial relief from the Court in this case prior to January 1, 1975. In the event that such judicial relief is not obtained, Petitioner will be required by law to attempt to comply with an infeasible standard.

Petitioner recognizes that under this set of facts the normal remedy would be to seek a stay of the agency's order and a hearing on the merits as promptly as possible. However, in view of the fact that approximately two and one-half months remain until the effective date of the agency's order, it is hoped that Petitioner can obtain a full briefing and hearing on the merits within this time and avoid the necessity for seeking a stay and the effort and burden upon the parties and the Court of preparing the necessary stay pleadings. Once the case has been briefed and argued, the

(Cont'd)

This language was interpreted by the United States Court of Appeals for the District of Columbia Circuit in *Industrial Union Dept., AFL-CIO v. Hodgson*, ___ F.2d ___, 1 OSHC 1631, No. 72-1713 (D.C. Cir., April 15, 1974), to mean that OSHA cannot "protect employees by putting their employers out of business -- either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible." ___ F.2d at ___, 1 OSHC at 1639. Thus the feasibility requirement of the statute has two aspects -- one technological and the other economic.

*Eliminated
because we
now have
"irreparable
injury"
party will
be forced to
not operate
after 1-1-75
Party Unknown*

Court will be in a position to issue a stay pending decision without requiring the parties and the Court to expend time and effort in briefing a separate stay motion. In the event that the Court denies Petitioner's motion for an expedited briefing schedule and expedited hearing as suggested in this motion, Petitioner will promptly thereafter file a motion for stay.

Accordingly, it is respectfully requested that the Court establish a briefing schedule for the parties which will provide that the record will be filed on October 29, Petitioner's brief will be filed on November 15, Respondents' brief will be filed on December 13, and Petitioner's reply brief shall be filed on December 20. It is then respectfully requested that the Court schedule oral argument in this case during the week of December 23.^{1/}

Petitions for judicial review of this same standard by the Occupational Safety and Health Administration, United States Department of Labor, have also been filed by Hooker Chemicals & Plastics Corp. and Union Carbide Corporation in the United States Court of Appeals for the Second Circuit (No. 74-2286 and No. 74-2308) and by Tenneco Chemicals, Inc. and Air Products and Chemicals, Inc. in the United States

^{1/} These dates are subject to further negotiation with the government. An alternative schedule would be Petitioner's brief on November 13, Respondents' brief on December 9, Petitioner's reply brief on December 16, and hearing during the week of December 16.

Court of Appeals for the Third Circuit (No. 74-1983 and No. 74-1982) and by Firestone Plastics Company in the United States Court of Appeals for the Sixth Circuit (No. _____) Petitioners in the latter three cases have all filed motions to transfer their cases to the Second Circuit pursuant to Section 2112 of the Judicial Code, 28 U.S.C. § 2112 (1966) because judicial review proceedings were first filed in the Second Circuit. To the best of our knowledge, no petitions for review have been filed by any other party in any other Circuit.

[Counsel for SPI is authorized to state that counsel for the Respondent, Occupational Safety and Health Administration, United States Department of Labor, consents to this motion for expedited briefing schedule and expedited oral argument and to the briefing schedule set forth herein.]

Respectfully submitted,

GENC 009951