

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THE UNITED STATES OF AMERICA,)
)
 and)
)
 THE STATE OF NEBRASKA)
)
 Plaintiffs,)
)
 v.)
)
 UNION PACIFIC RAILROAD CO.,)
)
 UNION PACIFIC CORP.,)
)
 and)
)
 GOULD ELECTRONICS, INC.,)
)
 Defendants.)
 _____)

CIVIL ACTION NO. 8:11CV195

COMPLAINT

Plaintiffs, the United States of America, by the Attorney General of the United States and on behalf of the Administrator of the United States Environmental Protection Agency (EPA), and the Attorney General of Nebraska, on behalf of the Nebraska Department of Environmental Quality (NDEQ), allege as follows:

INTRODUCTION

1. For a combined period of over a hundred years, two lead smelters operated in downtown Omaha, Nebraska, releasing heavy metals into the air, and onto the private property of Omaha residents, contaminating their back yards and gardens with lead and other hazardous substances. The United States has incurred more than \$175 million investigating and responding to this

contamination. The State of Nebraska has contributed to a portion of the United States' costs. Plaintiffs bring this action to recover these environmental response costs from Defendants, former owners and/or operators of those smelters.

2. This is a civil action for the recovery of response costs from defendants Gould Electronics, Incorporated (Gould), Union Pacific Railroad Company, and Union Pacific Corporation (collectively UP) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. Plaintiffs seek to recover from all Defendants, pursuant to Sections 107(a) and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(g)(2), the costs incurred and to be incurred by the United States and Nebraska in responding to releases or substantial threats of releases of hazardous substances at or from the Omaha Lead Superfund Site, located in Douglas County, Nebraska.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to Sections 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(b), and 28 U.S.C. §§ 1331 and 1345.

4. Pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b), venue is proper in this district because the releases or threatened releases of hazardous substances that give rise to the claims occurred in this judicial district.

DEFENDANTS

5. Defendant Union Pacific Railroad Company is a corporation incorporated in the State of Delaware and is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

6. Defendant Union Pacific Corporation (referred to as UP, collectively with Union Pacific Railroad Company) is a corporation incorporated in the State of Utah and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

7. Defendant Gould Electronics, Inc. (Gould) is a corporation incorporated in the State of Arizona and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

RELEVANT FACTS

8. Two lead smelting facilities operated in downtown Omaha. The first and largest smelter to operate in Omaha was the Asarco Facility built at the end of the 19th Century on property leased from and owned by UP. The Gould Facility was built in the 1950s.

UP Property and Asarco Smelter

9. The Asarco Facility was located at 500 Douglas Street in downtown Omaha, Nebraska. UP bought the land in the 1860s. UP leased the property to Asarco which built and operated a smelter complex, beginning operations in 1871.

10. UP leased the land to Asarco under several leases; in 1912 the lease stated that the property was to be used “solely for the purpose of conducting and transacting thereon, its business of smelting and refining ore.” In 1946, UP sold the land to Asarco. UP ran spur rail lines directly into the leased property for the delivery of materials for smelting and refining and transporting out refined products.

11. The Asarco Facility processed lead bullion by adding metallic and non-metallic compounds to molten lead, separating the lead from the other metals, and removing impurities. The products of this process, used in the manufacturing of a variety of industries, included refined lead and specialty metal by-products such as antimony-rich lead, bismuth, dore (silver-

rich material), and antimony oxide. Under UP's ownership, the Asarco Facility released lead particulate emissions as a routine part of its operation.

Gould Smelter

12. In 1963, Gould purchased its Facility from Aaron Ferer & Sons and began upgrading the capacity of the Facility by adding new equipment. Gould used reverberatory and blast furnaces to smelt lead and lead products. During Gould's operation, at least eight kettles were used to refine the lead, seven 75-ton kettles and one 60-ton kettle. Under Gould's ownership and operation, the Gould Facility released lead particulate emissions as a routine part of its operation.

13. Throughout the years of operations at the Gould Facility, smoke stacks and other fugitive sources emitted lead and other metals into the atmosphere. The combined action of turbulent diffusion and gravitational settling transported the lead and other metals downwind to be deposited on residential areas of Omaha. Fallout from each of the facilities is a source of residential soil contamination in Omaha.

Site Cleanup and Enforcement Activities

14. In 1998, the Omaha City Council solicited assistance from the EPA to address problems with elevated blood-lead levels found in the children of Omaha. EPA performed initial sampling in March 1999 and identified Asarco as a potentially responsible party.

15. In August 1999, EPA ordered Asarco to perform the necessary removal action pursuant to a Unilateral Administrative Order (Docket Number - CERCLA-7-99-0029). Asarco responded stating it would not comply with the Order. Under its authority under CERCLA, the EPA began a fund-lead removal action in October 1999.

16. In 2002, the EPA proposed the Omaha Lead Site (OLS or Site) for the Superfund National Priorities List (NPL) and initiated a remedial investigation/feasible study (RI/FS) to

identify a long-term solution for the Site. The NPL is a national list of hazardous waste sites posing the greatest threat to health, welfare and the environment. The NPL has been established pursuant to Section 105(a) of CERCLA, 42 U.S.C. § 9605(a). The OLS, including residential properties, child care facilities, schools, and other residential-type properties located in eastern Omaha, was added to the NPL in February 2003.

17. On December 15, 2004, the EPA issued an Interim Record of Decision (ROD) for the Site. The Interim ROD stated EPA's decision on the first properties at the Site to be remediated: those with the highest soil lead concentrations and those with residents susceptible to lead, such as children and pregnant mothers. Remedial activities included excavation, backfilling, and revegetation of contaminated soils.

18. On May 13, 2009, EPA issued a Final ROD for the Omaha Lead Site. Remedial activities include excavation, backfilling, and revegetation of contaminated soils.

19. EPA has cleaned lead contamination at more than 4600 properties, and the work is still in progress.

20. The State of Nebraska contributes 10% of all remedial action costs performed under the Interim and Final RODs.

GENERAL FRAMEWORK OF CERCLA

21. Section 104 of CERCLA, 42 U.S.C. § 9604, provides that whenever any hazardous substance is released into the environment, or there is a substantial threat of such a release into the environment, the President is authorized to act, consistent with the National Contingency Plan, to remove or arrange for the removal of such hazardous substance, and to undertake such investigations, monitoring, surveys, testing or other information gathering as necessary to

identify the existence and extent of the releases and the extent of the danger to public health or welfare or to the environment.

22. The President's authority under Sections 104(a) and (b) of CERCLA, 42 U.S.C. §§ 9604(a) and (b), as amended, has been delegated to the Administrator of EPA pursuant to Section 2(e) of Executive Order No. 12316, 46 Fed. Reg. 42,237 (August 14, 1981), reprinted in 42 U.S.C.A. § 9615 at 544-48.

23. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in pertinent part:

"Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

* * *

shall be liable for --

(A) all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan"

* * *

(D) the costs of any health assessment or health effects study carried out under Section 9604 of this title.

24. Section 113(g)(2)(B) of CERCLA, 42 U.S.C. § 9613(g)(2)(B), provides:

"In any such action described in this subsection [an action for recovery of costs under Section 107 of CERCLA], the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages."

GENERAL ALLEGATIONS

25. The Asarco Facility, the Gould Facility, the property on which the smelters stood, and the places where hazardous substances released from the smelters came to be located each constitute a "Facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
26. Hazardous substances, within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), have been generated, treated, stored, or disposed of at each of the facilities.
27. There are and were, within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), releases and threatened releases of hazardous substances into the environment at and from the Facilities.
28. As a result of the releases or threatened releases at and from the Facilities, the United States incurred "response" costs as defined in Sections 101(25) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(25) and 9607(a), for actions taken in response to the releases or threatened releases from the facilities. The United States will continue to incur response costs in connection with the Facilities.
29. As a result of the releases or threatened releases at and from the Facilities, the State of Nebraska incurred "response" costs as defined in Sections 101(25) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(25) and 9607(a), for actions taken in response to the releases or threatened releases from the facilities. The State will continue to reimburse the United States for remedial action costs in connection with the Facilities.
30. As of February 28, 2010, the costs incurred by the United States pursuant to CERCLA Section 104, 42 U.S.C. § 9604, in responding to releases or substantial threats or release of hazardous substances at the Site total at least \$175 million. The funds required to pay the United States' costs have been drawn from the Hazardous Substances Superfund, see 26 U.S.C. § 9507.
31. The United States has not been reimbursed for all of these response costs.

32. The response costs incurred by the United States were incurred in a manner not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300.

CLAIM FOR RELIEF

(Liability for Response Costs Under CERCLA Sections 107(a) and 113(g)(2))

33. The foregoing paragraphs are realleged and incorporated herein by reference.

34. Defendants UP and Gould each operated and/or owned a lead smelter, which constituted a facility during the time of the disposal of hazardous substances at the facility, within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

35. Hazardous substances have been released at and from the facilities into the environment within the meaning of CERCLA, 42 U.S.C. §§ 9601, 9607.

36. The United States' actions in response to the release or threatened release of hazardous substances from the facilities constitute "removal" and "remedial" actions as defined by Sections 101(23) and 101(24) of CERCLA, 42 U.S.C. §§ 9601(23) and 9601(24), for which the United States has incurred costs.

37. Defendants UP and Gould are therefore liable under Sections 107(a)(2) and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9607(a)(2), 9613(g)(2), for all costs incurred by the United States in response to releases of hazardous substances at and from the facilities.

38. "Response costs," defined in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), include, without limitation, the costs incurred by the Agency for Toxic Substances and Disease Registry with respect to the Site pursuant to Section 104(i) of CERCLA, 42 U.S.C. § 9604(i).

PRAYER FOR RELIEF

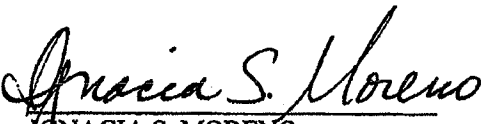
WHEREFORE, Plaintiffs respectfully request that the Court:

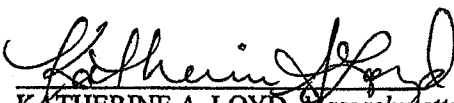
1. Enter a judgment against each of the Defendants under CERCLA Section 107(a), 42 U.S.C. § 9607(a), finding each Defendant jointly and severally liable for all unreimbursed costs that the United States and State of Nebraska have incurred in responding to releases and/or threatened releases of hazardous substances at and from the Site to the date of judgment;
2. Enter a declaratory judgment, pursuant to CERCLA Section 113(g)(2), 42 U.S.C. § 9613(g)(2), finding each Defendant liable for all response costs that will be incurred by the United States and State of Nebraska in responding to releases and/or threatened releases of hazardous substances at the Site; and
3. Grant such other relief as the Court deems appropriate.

DESIGNATION OF TRIAL LOCATION

Plaintiffs hereby request that trial of this action be held in Omaha, Nebraska, and that the case be calendared accordingly.

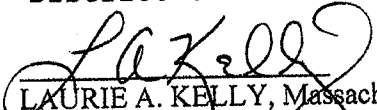
Respectfully submitted,

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