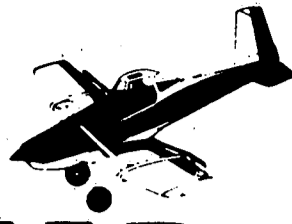


RELATIVE



WIND

THE OFFICIAL NEWSLETTER OF
THE NORTH DAKOTA AVIATION ASSOCIATION

VOL. 1, NO. 4

SEPTEMBER 1979

WAHPETON, ND

Letter Of Explanation

August 15, 1979

Mr. Larry Linrud
Tri-State Aviation
Wahpeton, ND 58075

Re: Schroeder Aviation, Inc.,
v. DeFehr

Dear Mr. Linrud:

Bob Odegaard has called me and asked that I summarize the decision of the North Dakota Supreme Court in the above-referenced case so that it may be published in your North Dakota Aviation Operators publication.

Attached is a summary of that case, and I will leave it to you to come up with an appropriate heading for the article.

Sincerely yours,
SOLBERG, STEWART &
BOULGER
Wayne O. Solberg

Gas Tax Rules Delayed

Regulations implementing the ag aviation fuel tax rebate have not been issued as of this newsletter.

On August 13, IRS advised that the regulations would not be issued until September. Originally, it was expected that IRS would issue temporary regulations in July or August. These temporary regulations would have been in effect upon issuance and a follow-up notice would have been the next step.

The plan now calls for simultaneous issuance of the notice and regulations along with a call for comment. (Public Hearing.)

Key Court Case Summarized

MEMORANDUM

To: North Dakota Aviation Operators Association

From: Wayne O. Solberg, Attorney

Dated: August 15, 1979

The North Dakota Supreme Court on August 2, 1979, reversed the decision of the District Court in the case of Schroeder Aviation, Inc., v. Dennis DeFehr. The primary issues in that case which are of interest to the Operators Association, are the constitutionality and application of SS 28-01-40 N.D.C.C. and 28-01-41 N.D.C.C. These statutes were enacted for the protection of aerial applicators and in essence, require that anyone who sustains damage by virtue of aerial application of chemicals must give notice to the operator within 60 days of the date of damage. The full text of these statutes are as follows:

28-01-40. Reports of loss through pesticide application required. No civil action shall be commenced arising out of the use or application of any herbicide, insecticide, fungicide or agricultural chemical by any applicator or operator, unless the claimant has filed a verified report of the loss with the state of North Dakota agriculture commissioner, together with proof of service of such verified report of loss upon the operator or applicator allegedly responsible and, if the claimant is not the person for whom such work was done, then also the person for whom such work was done within a period of sixty days from the occurrence of such loss or within sixty days from the date the claimant knew such loss had occurred, provided, however, if the damage is alleged to have been occasioned to growing crops, the report shall be filed prior to the time when fifty percent of the crop was harvested.

28-01-41. Contents of verified reports of damage. The verified report of the loss as set forth in section 28-01-40 shall include, so far as known to the claimant, the following: name and address of claimant, type, kind, and location of property allegedly injured or damaged, date the alleged injury or damage occurred, name of operator or applicator allegedly responsible for such loss or damage, and if the claimant is not the same person for whom such work was done, the name of the owner or occupant of the property for whom such operator or applicator was rendering labor or services.

Briefly, the facts in the case indicate that DeFehr called Schroeder Aviation on June 7, 1977, and requested assistance with a sunflower field which was infested with cutworms. After a brief discussion, tox-

Continued on Page 2

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Published Monthly for
its Members

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North Dakota Aviation Association
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Prairie West Publications

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aphene was selected as the best chemical for this purpose and the field was sprayed on June 8, 1977. The effectiveness of the chemical application did not meet Mr. DeFehr's expectations and he refused to pay Schroeder's bill for the chemical and the application. Schroeder Aviation eventually instituted legal proceedings against DeFehr for the collection of the account. DeFehr, in his answer to the complaint, denied that Schroeder was entitled to be paid and he also counterclaimed against Schroeder for his lost sunflower crop. The gist of the allegations in the answer and counterclaim of DeFehr were that the toxaphene had failed to kill the cutworm, therefore he should not be required to pay Schroeder's bill and should also be entitled to recover damages from Schroeder because of the reduced yield of his sunflower field. The trial was held in the District Court of Ransom County in the fall of 1978, and the Court dismissed the claim of Schroeder Aviation on the account and also dismissed the counterclaim of DeFehr. It should be noted that DeFehr had not given notice as required by the statute; however, the trial court held that the statute was unconstitutional and that the failure to give notice was of no consequence. The trial court reasoned that the sunflowers were killed by the cutworms, not by the chemical application; therefore, DeFehr's counterclaim was dismissed. The trial court also held that there was a breach of warranty since the toxaphene did not kill the cutworms and, therefore, the claim of Schroeder for the chemical and the application should also be dismissed. The dismissal of the claim of Schroeder was appealed to the North Dakota Supreme Court.

The Supreme Court, on appeal, reversed the decision of the trial court with respect to Schroeder's claim on the account and also upheld the constitutionality of the notice requirement of S28-01-40 N.D.C.C. It is significant that the Supreme Court could have avoided the constitutional issue and decided this case on the warranty theory as was done by the trial court. However, the Supreme Court was urged to face the Constitutional issue in view of the importance of this statute to the aviation industry. The court, in its opinion, stated that, "We do not believe the ends of justice would be furthered by postponing the determination of this issue." Thereafter, the Supreme Court went on to determine that the statutes were constitutional.

The significance of the constitutional issue in this case is obvious; however, the court also responded to Schroeder's request for clarification of the applicability of the statute under different circumstances. The statute clearly requires notice as a prerequisite to an action by one who sustains damage because of spraying operations. A typical example of this situation would be a farmer whose sunflower crop is damaged by the application of a herbicide on the farmer's adjoining wheat crop. Under these circumstances, the applicability of the statute is obvious and the farmer would be required to file the appropriate notice as a prerequisite to an action for damages against the applicator. The second situation is similar to the first; however, suppose that the farmer does not sue the applicator for damage but simply refuses to pay the applicator's bill for spraying his wheat field. Thereafter, when the applicator attempts to collect his account through legal action, the farmer counterclaims for damage to his crop. In that situation, the court has held that the statute requiring the notice would be applicable since the nature of the counterclaim would be exactly the same as if it were brought as an independent cause of action by the farmer and that therefore the counterclaim should be barred for failure to give the required notice. The third situation is illustrated by the Schroeder case where the farmer refuses to pay his bill because the application of chemical has not achieved the desired result which is raised by the farmer as a defense when he is sued by

Continued on Next Page

the applicator on the account. The court has held that in certain cases, the statutory notice is a prerequisite to a defense in a suit by the applicator on the account. It should be noted that failure to give notice does not bar a defense by the farmer in all circumstances, but does apply when the defense is in reality an offense. In short, a claimant cannot evade the requirements of the notice statute by simply refusing to pay and thereafter asserting his claim as a defense in a suit for the value of the services rendered by the applicator. The highlights of the Schroeder case are the determination of constitutionality of the statute and the application of the notice requirements to counterclaims and defenses as outlined above in the second and third illustrations.

As a matter of information, an aerial applicator is required to advise his customers of the reporting requirement. Subsection 3 of Section 4-35-21 N.D.C.C. provides as follows:

"A commercial applicator shall inform any person employing him to apply to land any pesticide of the reporting requirement of Section 28-01-40."

It seems that judicial decisions which are favorable to the aerial applicator are rare birds. The decision in this case solidifies the right of the applicator to be apprised of the scope and nature of any claims which may be made against him before all the evidence is destroyed. Last, but not least, it should be noted that favorable decisions result from reasonable and well-documented facts which in turn are only available when an operator maintains good records of all relevant information. The aerial application business is becoming more and more complex and it behooves each and every operator to utilize business practices which are commensurate with the risk involved.

Wayne O. Solberg

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Two Points Of View

(Re-printed From The August 22 Jamestown Sun.)

Audubon Plans Actions To Restrict Toxaphene

By Ron Harter
Sun City Editor

After finding a state monitoring system of Toxaphene is lacking, an environmental group has promised an "active" role in seeking stricter controls and monitoring of the toxic pesticide's use throughout the Northern Plains, according to a regional spokesman for the group.

Rich Madsen, regional director for the National Audubon Society, said his group was beginning to monitor the pesticide's use in North Dakota and found an adequate reporting system is lacking. "We were lead to believe the information (where the chemical has been used) would be readily available."

Since it is not, Madsen said, "I'm beginning to wonder if we're going to get data in time to request tests."

Madsen said two days ago the Audubon group intends to collect data on Toxaphene use in the state and determine whether or not beef and dairy herds, as well as forage crops and water courses, have been contaminated by recent applications to control army worm infestations in the state.

Should test results indicate possible Toxaphene contamination, Madsen said, the group is planning to request emergency field tests from the EPA and State Agriculture Department.

The Society was recently successful in obtaining a court injunction against an authorized 600,000 acre application in South Dakota to control grasshoppers. In South Dakota, the chemical would have been applied on rangeland, which is restricted by the U.S. Environmental Protection Agency.

Since the chemical is being applied on row crops in North Dakota, an authorized use, the group has no legal grounds to prevent it.

Concern over the substance was generated recently when a North Dakota State University entomologist said he was concerned the chemical may have been used on forage crops. If it were, Dennis Kopp said, it would contaminate the meat and milk of cattle feeding on the forage.

Audubon is taking an active role in fighting for tougher restrictions and a possible ban of the chemical because of several reports which indicate it is carcinogenic (cancer causing).

A recent fishkill in Tongue River, near Bathgate, N.D., has provided evidence of Toxaphene poisoning.

Glen Johnson, of the State Agriculture Department, noted traces of Toxaphene have been found in the water there.

He noted the traces were 10 times below the level necessary to cause a fish kill, however, State Game and Fish limnologist Jim Ragan, stationed at Spiritwood Lake, N.D., said when the pesticide entered the stream, it may have been in sufficient quantity to cause a fish kill and had dissipated to unharmed levels before tests were conducted.

Ragan said the fish kill was discovered August 4 and inspections were made August 7.

He noted 127 fish were reported killed and the EPA took two of the fish to its Denver laboratories for analysis. Results from tests are expected by the end of the month, however, Madsen said there is some concern the fish have decomposed beyond useful test value.

Ragan said two empty cans were reported floating down the stream; "We don't know what kinds of cans they were. If they were Toxaphene, there could have been enough residual material (to cause the fish kill)."

Ragan noted Toxaphene stays in the environment similar to DDT and said it is possible cattle are drinking out of the Tongue River. He also said a considerable amount of the pesticide is being sprayed in the Bathgate area.

The pesticide is currently being reviewed by the EPA, a process which should be completed by late October, according to Madsen.

He said the EPA may do one of four things: decrease restrictions; leave them as they are; increase them; or ban the use altogether.

However, Madsen said, "The people I've talked to (say) that Toxaphene should be banned, but that it won't be banned."

He noted there will be immense political pressures to keep the chemical on the market because of the economic factors involved.

"It may be the most we can hope for is stricter restrictions," Madsen said, but added his group will be working on state and national levels for either a ban or stricter restrictions. "Audubon is going to be involved in the pesticide issue at least to that degree."

Ragan pointed out the Toxaphene was taken off the list of approved pesticides several years ago. "Now," he said, "when you have an army worm infestation, it's haphazardly applied again."

The State Agriculture Department has enforcement, certification and permit authority for pesticides, given it by the EPA.

Buzz Words And Fictions

An Opinion Article
By John Chamberlain

There are buzz words. And there are sacred cow words. High in the latter category is the word "ecosystem."

An ecosystem is something that derives from the balance of nature, when different plants and animals, including humans, have learned how to co-exist with each other in a given area with the least possible friction. The environmentalists, quite rightly, say that we should be concerned with the possible effects of technological development, which is not a "natural" thing, on ecosystems of long-established duration. The environmentalists say that "nature knows best." And, up to a point, we may agree with them.

The trouble is that, among God's creatures, it is not only man that fails to respect the normal rhythms of nature. Take the grasshopper, for example. Every so often the grasshopper population goes berserk. It has been doing it in the United States West, and for the second year in succession. What is happening is extremely damaging to the ecosystem on which corn and beans and cows have come to depend.

The grasshopper, so my spies tell me, has crossed the Mississippi, going east. So now it is the ecosystem of southern Illinois that is menaced by a creature that does not read books about the balance of nature.

Last year the grasshopper armies swarmed over the trans-Mississippi West, devastating millions of acres. In Colorado alone they ruined 500,000 acres of cropland and 400,000 acres of rangeland. They moved on into Kansas, Nebraska, Oklahoma and parts of Missouri. Since eight grasshoppers per square yard can eat as much as a cow, the local livestock were particularly concerned with a balance of nature that had become spectacularly unhinged.

In their animosity against technology, which includes the making of chemicals, the worshippers of the word "ecosystem" do not admit the uses of simple human intelligence in trying to

reestablish the normal rhythms of nature. Western farmers tried last year to reduce the grasshopper population, which had grown to 200 per square yard in some cases, with such sprays as they were allowed to use. But the chemicals that were legally available were too weak to do the job, as Nebraska State Agricultural Director Roger Sandman morosely noted.

Sandman blames the Environmental Protection Agency for last year's failure to protect the Nebraska farm environment against the rampaging grasshoppers. The EPA, he says, "seems to have not only taken away the chemicals that we so vitally need, but they have encouraged the development of chemicals that would take care of the problems and be somewhat safer, supposedly."

This year the EPA did approve emergency spraying with the pesticide known as toxaphene. That was in June. But a federal judge, United States District Judge Donald Porter, acting at the behest of environmentalists, issued a temporary injunction against using the pesticide. The injunction lasted well into July, or long enough to let a lot of grasshoppers eat their fill. The judge said the EPA should have asked for public hearings before allowing the spraying to begin. And Nero fiddled while Rome burned.

No doubt pesticide poisonings can be a danger to ecosystems, and to the human beings who live within these systems. But where has our sense of arithmetic gone astray in interpreting the meaning of the phrase, "balance of nature"? Does the tent caterpillar, intent upon consuming every last leaf of my wild cherry trees, respect that balance? Does the Maine spruce budworm care what its appetite may do to an evergreen forest? Has the gypsy moth any thought about living within an ecosystem?

If mankind can find a spray that, on balance, will do more to preserve an ecosystem, than to harm it, the environmentalists ought to call off their dogs. They were all wrong when they produced the ban on DDT, which had done so much to rid tropical ecosystems of malaria. They could be all wrong about a lot of other things.

Meanwhile the grasshoppers go on eating.

Meanwhile

Meanwhile back on the research front a lengthy newspaper article by a Newhouse News Service writer Susan Fogg focuses on causes of cancer.

Her source was Dr. John Higginson, a pioneer in the field of environmental causes of cancer.

Says Dr. Higginson, "We are not living in a carcinogenic soup." Today he believes the emphasis on man made chemicals as cancer agents has been misplaced and has drawn attention of researchers away from those cancers that have NO known cause. That category includes 50 to 70 percent of ALL cancers.

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People VS The Birds

South Dakota Governor Bill Janlow has vowed to fight a court order banning the use of the pesticide Toxaphene.

The Governor charged that opponents of the chemical used to kill grasshoppers "act like they've got bird brains."

U.S. District Court Judge

Donald Porter prohibited ranchers from using the chemical pending settlement of a suit by the Audubon Society. The Society claims Toxaphene kills wildlife and may cause human cancer.

Janlow's comment on all of this... "Toxaphene is needed. People come first, then birds."

Interesting Reprint From Newsletter

Scanning newsletters of other state AAA members can be interesting. The following information was found in the August 14 Mississippi AAA newsletter.

EPA IS AFTER YOU!!! In an unprecedented move, EPA Atlanta Division has begun imposing ridiculously high fines on our Operators in Mississippi for alleged drift violations of over a year ago.

To our knowledge, the following firms (and perhaps others) have recently received Notices of such fines:

- (1) Kerry Rudder, Rudder Flying Service, Canton, MS (\$2,750.)
- (2) Dwight Follin, Follin Flying Service, Canton, MS (\$2,750.)
- (3) D. Gray, Gray's Flying Service, Edwards, MS (\$1,250.)
- (4) C. Cosby, Cosby Sprayers, Aberdeen, MS (\$2,500.)

Upon learning this, we immediately began investigating and learned that on every case, these were drift claims that had been settled, either by the

Operator or his insurance carrier. One of them was unbelievably trivial; a case of Dinitro damage to a few rows of a garden that was settled for \$300 to the satisfaction of the owner!

President Jack Flautt and I conferred with legal counsel Robert Crook and President Flautt authorized Robert to begin a preliminary investigation of this matter, starting in Atlanta with their legal branch. Officers and Directors contacted have been in favor of pursuing this matter diligently. We are now trying to determine just what course to follow. We feel certain that the National Association should be, and will be, drawn into the controversy since it may well become a nationwide problem.

You have the right to an Administrative Hearing, in the county in which the alleged violation occurred and all of our people have been instructed to ask for this hearing and to not pay these fines, at least at this time. In the event that you receive such a notice, contact us and file a written request for an Administrative Hearing immediately. Fines are apparently being based on your

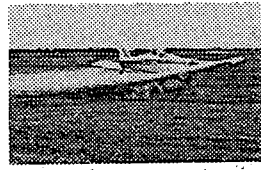
yearly gross income! Be very, very careful about drift. If this continues, EPA could very well put us all out of business.

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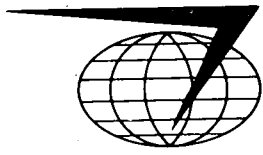
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Registration Request Withdrawn

Stating that "additional testing to attempt to fulfill the criteria established by the state appears to be fruitless," Ciba-Geigy

withdrew its request for a California registration of Galecron, a cotton insecticide.

In making the announcement, Company Spokesman Richard Feulner said this action is a result of California's desire to completely eliminate worker exposure to any pesticide.

A side issue to all this will be of interest to NDAA members. This is the question of reaction by California cotton growers to this announcement. Could a cotton grower sue the state for denying him a pesticide tool available to competing growers in other states?

The goal to completely eliminate worker exposure to any pesticide seems to suggest the elimination of pesticide use.

"much ado about nothing," according to a National Center for Disease Control (CDC) researcher.

A new CDC study shows the incidence of two of the most common birth defects declined measurably from 1970-71 to 1976-77.

One of them, open head, declined 5.4% while the other, open spine, dropped 6.7%.

Dr. Godfrey Oakley, chief of the CDC's birth defects branch, said he knew of only a few substances that caused monstrous growth. He included alcohol in abusive amounts.

"Alcohol is the single biggest one," said Oakley. "More babies get birth defects with alcohol than with anything else."

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Birth Defects Declining

Reports that the rate of some major birth defects is declining may indicate that fears of widespread deformities caused by chemicals and radiation are



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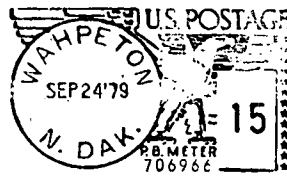
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