

IN RE COMMERCIAL CARTAGE COMPANY, INC.

CAA Appeal No. 93-2

REMAND ORDER

Decided February 22, 1994

Syllabus

The U.S. EPA, Office of Air and Radiation, Field Operations and Support Division ("FOSD") appeals the dismissal with prejudice of its complaint against Commercial Cartage Company, Inc., which the presiding officer concluded failed to state a claim upon which relief can be granted. The FOSD contends that the complaint should not have been dismissed because it set forth a claim that Commercial Cartage violated section 211 of the Clean Air Act, 42 U.S.C. § 7545, and its implementing regulations, 40 C.F.R. Part 80, by transporting gasoline with a Reid Vapor Pressure (RVP) in excess of the regulatory level established for the St. Louis, Missouri non-attainment area. In particular, FOSD argues that Commercial Cartage is liable for violations detected at a retail outlet under 40 C.F.R. § 80.28(e) because it transported the non-complying gasoline to the outlet. The FOSD also argues that the complaint should not have been dismissed because it could have been fairly read to state a claim under 40 C.F.R. § 80.28(b), which governs violations detected at carrier facilities, even though that regulation was not cited in the complaint. The FOSD seeks a reversal of the dismissal, or alternatively, a reversal of the decision to dismiss the complaint with prejudice in light of *In re Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3 (EAB, Oct. 6, 1993), and leave to file an amended complaint.

Held: The presiding officer erred in not following the general rule, set forth in *Asbestos Specialists*, that dismissals with prejudice, that is, without leave to file an amended complaint, are disfavored in the first instance of a pleading deficiency in the complaint. Leave to amend the complaint is appropriate here, where there is no basis for assuming that the FOSD cannot correct the deficiencies through an amendment, and where Commercial Cartage will not be prejudiced by such an amendment.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

U.S. EPA, Office of Air and Radiation, Field Operations and Support Division ("FOSD") appeals the dismissal with prejudice of an administrative complaint filed against Commercial Cartage Company, Inc., assessing a penalty of \$81,000 for alleged violations of section 211 of the Clean Air Act, 42 U.S.C. § 7545, and the regulations promulgated thereunder in 40 C.F.R. Part 80. For the reasons set forth below,

we reverse the presiding officer's decision to dismiss the complaint with prejudice, and we remand this case so that the FOSD may file an amended complaint.

I. BACKGROUND

On June 2, 1993, the FOSD filed the Agency's first administrative complaint under Title II of the Clean Air Act Amendments of 1990. Title II of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990), amended section 211 of the Clean Air Act to authorize the Administrator to promulgate regulations making it unlawful to sell, offer for sale, dispense, supply, transport or introduce into commerce gasoline with a Reid Vapor Pressure ("RVP") over a specified level in ozone non-attainment areas. Pub. L. No. 101-549, § 216 (codified at 42 U.S.C. § 7545(h)). For the St. Louis, Missouri non-attainment area, the RVP standard has been set at 7.8 pounds per square inch ("psi") for gasoline sold from June through September. *See* 40 C.F.R. § 80.27(a) and § 81.226.

The complaint alleged that on September 4, 1992, an EPA inspection at the Commercial Cartage Company and at a branded Unocal retail outlet, which is located in the St. Louis, Missouri non-attainment area, revealed that the Unocal outlet was selling gasoline with a RVP greater than 7.8 psi, in violation of § 211, 42 U.S.C. § 7545. The complaint further alleged that Commercial Cartage had been responsible for transporting the non-complying gasoline to the Unocal outlet and that Commercial Cartage had previously transported several additional loads of non-complying gasoline to the Unocal facility. Commercial Cartage was charged with a total of 11 violations of section 211 of the Clean Air Act and 40 C.F.R. § 80.27 which, according to the complaint, prohibit a carrier¹ or distributor from selling, supplying or transporting gasoline whose RVP exceeds 7.8 psi from June 1 through September 15. Specifically, the complaint alleged that Commercial Cartage vio-

¹ The regulation, 40 C.F.R. § 80.2(t), defines carrier to mean:

(t) Carrier means any distributor who transports or stores or causes the transportation or storage of gasoline or diesel fuel without taking title to or otherwise having any ownership of the gasoline or diesel fuel, and without altering either the quality or quantity of the gasoline or diesel fuel.

lated 40 C.F.R. § 80.28(e), which governs violations “detected” at branded retail outlets.²

Commercial Cartage answered the complaint and simultaneously filed a motion to dismiss under 40 C.F.R. § 22.20,³ claiming that the complaint failed to state a claim upon which relief can be granted. The motion was based on the assertion that under 40 C.F.R. § 80.28(e), a carrier is liable for violations “detected” at branded retail outlets only if the carrier “caused” the gasoline to violate the applicable standard. Commercial Cartage argued, based on the preamble to the applicable regulations and EPA guidance,⁴ that a carrier is liable under § 80.28(e) only if the carrier altered the quality of the gasoline, or intentionally or

² The cited regulation, 40 C.F.R. § 80.28(e), provides:

(e) Violations at branded retail outlets or wholesale purchaser-consumer facilities. Where a violation of the applicable standard set forth in § 80.27 is detected at a retail outlet or at a wholesale purchaser-consumer facility displaying the corporate, trade, or brand name of a refiner or any of its marketing subsidiaries, the following parties shall be deemed in violation:

- (1) The retailer or wholesale purchaser-consumer, except as provided in paragraph (g)(5) or (g)(8) of this section;
- (2) The distributor (if any), except as provided in paragraph (g)(3) or (g)(8) of this section;
- (3) The carrier (if any), if the carrier caused the gasoline to violate the applicable standard; and
- (4) The ethanol blender (if any) at whose ethanol blending plant the gasoline was produced, except as provided in paragraph (g)(6) or (g)(8) of this section.

³ Section 22.20 provides, in pertinent part, that “the Presiding Officer, upon motion of the respondent, may at any time dismiss the action * * * on the basis of failure to establish a prima facie case or other grounds which show no right to relief upon the part of the complainant.”

⁴ The preamble provides in pertinent part, at 54 Fed. Reg. 11868 at 11874-11875 (March 22, 1989) (emphasis added):

5. Carriers

The Agency received several comments regarding presumptive liability for carriers. The proposal provided that carriers would be presumed liable for violations detected at their facilities. To rebut this presumption, carriers would have to provide documents from the refiner or importer at whose refinery or import facility the gasoline was produced or imported which represented to the carrier that the gasoline was in compliance with the applicable RVP standard when

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negligently delivered non-complying gasoline to an area covered by the applicable standard. Commercial Cartage contended that because the complaint failed to allege causation or any facts suggesting causation, the complaint must be dismissed.

The FOSD objected to the motion to dismiss. In a one-page pleading the FOSD argued that the complaint should not be dismissed because the FOSD had clearly alleged that Commercial Cartage had “transported” non-complying gasoline based on evidence obtained during inspections of the Commercial Cartage Company and the Unocal retail outlet.

Administrative Law Judge Spencer T. Nissen, the presiding officer, granted Commercial Cartage’s motion to dismiss on September 23, 1993. The presiding officer concluded that where, as here, the com-

delivered to the carrier. In addition, the carrier would have to demonstrate that it had an oversight program, such as periodic sampling and testing of product that it carries, which shows that the carrier is attempting to ensure that the product which it carries meets the applicable RVP standards. Finally, the proposal provided that the carrier would have to show that it or its employees or agents did not cause the violation. *For violations detected at facilities downstream from the carrier, the proposal would have held a carrier liable only when the carrier actually caused the violation. *** For example, batches of gasoline with different RVP levels can be inadvertently or negligently commingled in storage tanks at a pipeline facility. Also, product that was intended to be delivered to one RVP area *** may be intentionally, or negligently re-routed by the carrier to another RVP area ***. This re-routing of gasoline could result in gasoline not complying with the applicable standard for that area.*

Commercial Cartage also cited p. 21 of a 1992 Volatility Question and Answer Document, which, in pertinent part, provides:

11. Question: When a violation is found at a retail outlet, when is the carrier who delivered the gasoline to the retail outlet liable, and how may the carrier establish a defense?

Answer: When a violation is found downstream from a carrier (*i.e.*, not at the carrier’s facility), the carrier is liable only if EPA is able to show that the carrier caused the gasoline to violate the standard. The only defense available to the carrier in such a case is to show that it did not cause the violation or that no violation occurred. The carrier defense at 40 C.F.R. § 80.28(g)(1) applies only to violations found at carrier facilities.

plaint alleges that the violation was detected at the branded retail outlet, Commercial Cartage's liability is to be determined under 40 C.F.R. § 80.28(e), and that under section 80.28(e) the FOSD must allege that a carrier did more than simply transport non-complying gasoline to state a cause of action. Order Granting Motion to Dismiss at 11. More specifically, the presiding officer stated: "[i]f a carrier is deemed in violation only if it caused the violation, it follows that a complaint which merely alleges that a carrier transported gasoline found in violation at a branded * * * retail outlet and does not allege that the violation was found at the carrier's facility or that the carrier caused the violation, does not state a claim upon which relief may be granted." *Id.* at 11.⁵ The presiding officer dismissed the complaint, *with prejudice*.

The FOSD appeals the dismissal of its complaint with prejudice on three grounds. First, the FOSD contends that the complaint alleged that Commercial Cartage caused the alleged violation by "transporting" non-complying gasoline and therefore it stated a claim upon which relief can be granted. On appeal, FOSD contends that the bills of lading which it would have introduced at a hearing, expressly state that the gasoline Commercial Cartage transported was not suitable for areas subject to the 7.8 RVP standard. Second, FOSD contends that the complaint also fairly states a cause of action under 40 C.F.R. § 80.28(b), which governs liability for violations detected at a carrier's facility.⁶ FOSD contends that its failure to cite § 80.28(b) in the complaint does not support a motion to dismiss for failure to state a claim upon which relief can be granted. Third, FOSD argues that even if the complaint did not state a claim upon which relief can be granted the complaint should not have been dismissed with prejudice, but without prejudice and with leave to amend the complaint.⁷ The FOSD requests that the dismissal be reversed on the merits, or alternatively, that the decision

⁵ The Presiding Officer noted that the FOSD did not allege that it had "detected" the violation at Commercial Cartage's facility. Order granting Motion to Dismiss at 9. The Presiding Officer recognized that if the violation had been "detected" at Commercial Cartage's facility, Commercial Cartage would be liable under 40 C.F.R. § 80.28(b) and it could escape liability only by showing, *inter alia*, that it had invoices, delivery tickets or other documents from the refiner representing that the gasoline conformed to the applicable standard; that Commercial Cartage had an oversight program, such as periodic sampling and testing; and that the violation was not caused by Commercial Cartage, its agents, or employees (40 C.F.R. § 80.28(g)(1)). *See supra* note 4.

⁶ *See supra* note 5.

⁷ The FOSD did not seek leave to amend the complaint before the presiding officer. However, this omission does not preclude obtaining such relief on appeal. *In re Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, at 11 (EAB, Oct. 6, 1993) ("Leave to amend a complaint is generally available even where the plaintiff did not ask for it at an earlier stage in the proceeding.").

to dismiss the complaint “with prejudice” be reversed so that it may file an amended complaint.⁸

In response to the FOSD’s appeal, Commercial Cartage again asserts that the complaint fails to allege facts supporting a claim that it caused the violation, as required by 40 C.F.R. § 80.28(e). In addition, Commercial Cartage contends that the complaint fails to allege any facts to support a claim that the violation was detected at a carrier’s facility, as required under 40 C.F.R. § 80.28(b). In Commercial Cartage’s view, no redrafting of the complaint could correct these deficiencies, and therefore dismissal of the complaint with prejudice is appropriate.

II. DISCUSSION

Under the rules governing this proceeding, 40 C.F.R. Part 22, a complaint must set forth factual allegations that if proven establish a prima facie case against the respondent. *In re Standard Scrap Metal Company*, TSCA Appeal No. 87-4, at 11 (CJO, Aug. 2, 1990) (“The allegations set forth in the complaint are the elements of complainant’s prima facie case.”). Pursuant to 40 C.F.R. § 22.20, a complaint can be dismissed if it fails to allege a prima facie case, or upon other grounds showing no right to relief on the part of the complainant. In determining whether dismissal is warranted, all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant.⁹ In addition, in the event dismissal appears to be appropriate, dismissal of a complaint should ordinarily be without prejudice. As this Board has recently stated:

[A]s a general rule, dismissal with prejudice under the Agency’s rules should rarely be invoked for the first instance of a pleading deficiency in the complaint; instead, it should be reserved for repeat occasions or where it is clear that a more carefully drafted complaint would still be unable to show a right to relief on the part of the complainant.

⁸ We hereby grant the FOSD’s request to consider its reply brief, to which Commercial Cartage objected. We reject Commercial Cartage’s argument that it will be prejudiced by our consideration of the FOSD’s reply.

⁹ This is the standard used under the Federal Rules of Civil Procedure. See *Bank v. Pitt*, 928 F.2d 1108, 1109 (11th Cir. 1991) (“In the context of a motion to dismiss, we accept as true facts alleged in the complaint, and construe them in a light favorable to the plaintiffs.”). Although those rules are not applicable here, we have found them to be instructive in analyzing motions to dismiss. *Asbestos Specialists*, at 10 n.20.

Asbestos Specialists, at 13. We conclude that under the test established in *Asbestos Specialists*, dismissal of the complaint with prejudice in this case was in error and must be reversed.

We do not fault the presiding officer for concluding that the existing complaint is deficient. The complaint does not expressly allege "causation" as required to state a claim under § 80.28(e). We agree with the presiding officer that transportation alone is not sufficient to state a claim, but that the complaint must allege that the carrier either intentionally or negligently brought gasoline above the RVP standard to an area subject to the standard. Nor does the complaint expressly allege that any of the violations were "detected" at Commercial Cartage's facility as required to state a claim under § 80.28(b). Here, the complaint does not allege which, if any, violations were found during the inspection at the Commercial Cartage Company. The fact that the complaint alleges that the Commercial Cartage Company was inspected is not enough to state a claim that violations were "detected" at the carrier's facility, which is an essential element under § 22.28(b). For these reasons, we believe that the presiding officer did not clearly err in dismissing the complaint.

However, for the reasons set forth below we conclude that the dismissal with prejudice was in error and that the FOSD must be given an opportunity to amend the complaint. First, there is no basis to assume that amending the complaint would be futile. It appears from FOSD's pleadings before this Board that FOSD has evidence, records reviewed during the inspection at the Commercial Cartage Company and bills of lading that on their face stated that the gasoline was not suitable for areas subject to a 7.8 RVP standard, which may support a claim under § 80.28(b)¹⁰ and § 80.28(e). Second, there is no reason to assume that amending the complaint will result in any prejudice to Commercial Cartage. Commercial Cartage does not allege that it would

¹⁰ Commercial Cartage contends that because the FOSD did not raise its argument about the possible applicability of 40 C.F.R. §80.28(b) before the presiding officer, it is precluded from raising that argument on appeal, citing *In re Pollution Control Industries of Indiana, Inc.*, RCRA Appeal No. 92-3 (EAB, Aug. 5, 1992). That case, however, involved a permit, and thus involved a set of procedural rules inapplicable here. Moreover, even if the FOSD is procedurally barred from raising new issues on appeal, we do not interpret the FOSD's reference to §80.28(b) as a new issue, but merely as an example of how the complaint may be amended to correct the deficiencies cited by the presiding officer.

be prejudiced by an amendment and there is nothing in the record to suggest any prejudice. Where, as here, no hearing has been held, Commercial Cartage will have ample opportunity to present its views. *Asbestos Specialists*, at 14 (“[G]ranted the Region an opportunity to amend * * * will not unduly prejudice Respondent since no hearing has taken place.”).

III. CONCLUSION

For these reasons, we reverse the presiding officer’s decision to dismiss the complaint with prejudice, and we remand the case with instructions to grant the FOSD leave to file an amended complaint.¹¹

So ordered.

¹¹ We are not granting the FOSD’s request for leave to amend the complaint. Rather, we are instructing the presiding officer to do so. *See Bank v. Pitt*, 928 F.2d at 1113. In *Asbestos Specialists*, at 14. n.27, the Board, itself, granted leave to amend because the case needed to be reassigned to a new presiding officer and no meaningful purpose would have been served by relegating that task to the new presiding officer.