

**IN RE COMMERCIAL CARTAGE COMPANY**

CAA Appeal No. 97-9

***FINAL DECISION***

Decided July 30, 1998

**Syllabus**

The United States Environmental Protection Agency Air Enforcement Division ("Air Enforcement") appeals an Initial Decision dismissing all counts of an amended complaint alleging violations of EPA's gasoline volatility regulation by Commercial Cartage Company ("Commercial Cartage").

Commercial Cartage was in the business of transporting gasoline and other fuels in the St. Louis, Missouri, metropolitan area. Air Enforcement alleged that Commercial Cartage delivered gasoline to the Union W 70 station in Foristell, Missouri, during the summer of 1992, and that the gasoline had a Reid Vapor Pressure ("RVP") that exceeded EPA's RVP standard for the area in which Foristell is located.

The amended complaint alleged multiple violations of the gasoline volatility regulation, 40 C.F.R. § 80.27(a)(2), under two theories of liability. The first count of the complaint alleged that Commercial Cartage was liable pursuant to 40 C.F.R. § 80.28(b) for violations of the RVP standard "detected at a carrier's facility." The second and third counts of the amended complaint alleged liability pursuant to 40 C.F.R. § 80.28(e) for violations of the RVP standard "detected at a branded retail outlet." A carrier is liable for violations of the RVP standard detected at a retail outlet only if it caused the violation, intentionally or negligently. In the Initial Decision, the Presiding Officer held that Air Enforcement failed to prove certain elements of each of the counts and therefore dismissed the entire amended complaint.

Air Enforcement appeals from this decision, requesting that the Board review the Presiding Officer's holdings regarding the type of proof necessary to establish violations of the gasoline volatility regulation under both theories of liability alleged in the amended complaint. Air Enforcement also appeals the Presiding Officer's determinations that the evidence offered in this case was insufficient to prove the alleged violations.

**HELD:**

- In order to establish that a violation of the gasoline volatility regulation was detected at a carrier's facility under 40 C.F.R. § 80.28(b), evidence of gasoline RVP must be obtained by sampling gasoline from the carrier's facility and conducting an RVP analysis that satisfies the regulatory testing requirements. (Section II.C.1.)
- Air Enforcement's evidence in this case did not include RVP data obtained by sampling and testing gasoline from Commercial Cartage's facility and is therefore insufficient to establish that a violation was detected at a carrier's facility under 40 C.F.R. § 80.28(b)(1). (Section II.C.2.)

- In order to establish that a violation of the gasoline volatility regulation was detected at a retail outlet under 40 C.F.R. § 80.28(e), evidence of gasoline RVP must be obtained by sampling and testing gasoline from the retail station. (Section II.D.1.)
- Air Enforcement's evidence in this case established that the RVP of two gasoline samples from the Union W 70 station exceeded the applicable standard. (Section II.D.2.)
- Commercial Cartage negligently contributed to the delivery of gasoline to the Union W 70 station in excess of the applicable RVP standard. Commercial Cartage failed to conduct minimal diligence activities upon receipt of information that should have alerted it to a potential RVP compliance problem. Commercial Cartage is therefore liable for two violations of the gasoline volatility regulation pursuant to 40 C.F.R. § 80.28(e)(3). (Section II.D.3.)
- A penalty of \$2,625 is assessed against Commercial Cartage for the two violations of the gasoline volatility regulation detected at the Union W 70 station. (Section II.E.)

***Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.<sup>1</sup>***

***Opinion of the Board by Judge Reich:***

The United States Environmental Protection Agency, Air Enforcement Division ("Air Enforcement"), appeals an Initial Decision dismissing all counts of an amended complaint against Commercial Cartage Company ("Commercial Cartage"). Air Enforcement alleged that Commercial Cartage violated EPA's gasoline volatility regulations by transporting gasoline that exceeded EPA's gasoline volatility standard during the summer of 1992. Administrative Law Judge Nissen ("Presiding Officer") dismissed Air Enforcement's amended complaint, holding that Air Enforcement had failed to establish that Commercial Cartage was liable for the violations charged.<sup>2</sup> This appeal calls upon us to interpret and apply the regulations governing carrier liability for violations of EPA's gasoline volatility regulation, 40 C.F.R. § 80.27. We uphold in part and reverse in part the Presiding Officer's liability determination. We find Commercial Cartage liable for two violations of section 80.27, and we assess a penalty of \$2,625 for these violations.

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<sup>1</sup> Environmental Appeals Judge Kathie A. Stein did not participate in this decision.

<sup>2</sup> The Presiding Officer's decision follows the Board's remand order in *In re Commercial Cartage Co.*, 5 E.A.D. 112 (EAB 1994) ("*CCC I*"). In that order, the Board held that the Presiding Officer had properly found that Air Enforcement's original complaint failed to state a claim but that Air Enforcement should be given leave to amend the complaint. The present appeal brings this case before the Board for the second time.

## I. BACKGROUND

### A. Regulatory Background

This case involves alleged violations of the prohibitions in EPA's gasoline volatility regulation, 40 C.F.R. § 80.27. The volatility regulation establishes a maximum Reid Vapor Pressure ("RVP")<sup>3</sup> for gasoline sold during "high ozone season," *i.e.*, June 1 to September 15 of any calendar year. 40 C.F.R. § 80.27(a)(2)(ii). The regulation limiting RVP of gasoline during summer months is mandated by section 211(h) of the Clean Air Act, 42 U.S.C. § 7545(h), and is one of the tools EPA uses to combat ground-level ozone pollution. Ground-level ozone is a regulated pollutant under Title I of the Clean Air Act and concentrations of ozone in excess of the National Ambient Air Quality Standard ("NAAQS") are considered a public health concern. 52 Fed. Reg. 31,274, 31,275 (Aug. 19, 1987). Evaporative emissions from gasoline products contribute to the formation of ground-level ozone through chemical reactions that are enhanced in the presence of summer heat and sun. *Id.*

One method of controlling ground-level ozone formation is to limit the volatility of petroleum products such as gasoline. Lower volatility gasoline evaporates less readily and therefore gives off fewer emissions that can react to form ground-level ozone. EPA's gasoline volatility rule requires use of low volatility gasoline during summer months in ozone nonattainment areas<sup>4</sup> in southern states. Beginning in 1992, the gasoline volatility standard in these areas has been an RVP no higher than 7.8 pounds per square inch ("psi"). *See* 40 C.F.R. § 80.27(a)(2)(ii).

EPA's gasoline volatility regulation prohibits the sale, offer for sale, dispensing, supply, offer for supply, transportation or introduction into commerce of gasoline whose RVP exceeds the applicable standard. 40 C.F.R. § 80.27(a)(2). Liability for violations of the prohibition is specifically delineated by regulation. *See* 40 C.F.R. § 80.28. All parties in the gasoline distribution network are potentially liable, including refiners and importers, distributors, resellers, carriers, and wholesaler/retailers. The number of parties liable for any particular violation depends upon where the violation is detected.

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<sup>3</sup> Gasoline volatility is commonly expressed in terms of RVP. 52 Fed. Reg. 31,274, 31,278 (Aug. 19, 1987).

<sup>4</sup> Nonattainment areas and their exact boundaries are described in 40 C.F.R. part 81.

This case involves violations allegedly detected (1) at a carrier's facility, *see* 40 C.F.R. § 80.28(b), and (2) at a branded retail outlet, *see* 40 C.F.R. § 80.28(e). Carriers are potentially liable for violations at both locations. *See* 40 C.F.R. § 80.28(b)(1), (e)(3).

### B. *Factual Background*

Commercial Cartage operated as a common carrier<sup>5</sup> in the St. Louis metropolitan area during the summer of 1992. Commercial Cartage's business consisted of transportation of bulk materials, primarily liquids, in tank trucks. Hearing Transcript Part II ("Tr. Part II") at 71. This service was provided pursuant to a certificate of authority issued by the Interstate Commerce Commission ("ICC"). *Id.* At the time of the events at issue in this case, Commercial Cartage maintained a facility in downtown St. Louis, which consisted of office space, a shop, and a parking area for a few trucks. *Id.* at 69. There were no fixed fuel storage tanks at Commercial Cartage's facility.

Commercial Cartage's gasoline delivery business functioned by way of established arrangements for transportation of fuel from specific distribution facilities to specific retail facilities. *Id.* at 88-89. Instructions for a delivery on a particular day were communicated to a driver through Commercial Cartage's dispatcher. The driver assigned to a particular delivery would fill out a delivery ticket form with the dispatcher's instructions regarding the distribution facility from which to pick up the gasoline, the destination for the gasoline, and the type of gasoline to be delivered. *Id.* at 96-98. Gasoline deliveries in excess of 200 miles were unusual. *Id.* at 88. Trucks would typically complete a delivery without stopping at Commercial Cartage's facility in St. Louis, and most trucks were not stored at the facility due to limited parking space.

One of Commercial Cartage's customers was Unocal Oil Company ("Unocal"), for whom Commercial Cartage transported gasoline to a branded retail outlet known as Union W 70, located in Foristell, Missouri. Foristell, Missouri, and thus the Union W 70 station, are located in St. Charles County, which is designated a nonattainment area for ozone due to its proximity to St. Louis. 40 C.F.R. § 81.326. During the summer of 1992, all gasoline sold in ozone nonattainment areas in Missouri was subject to EPA's RVP standard of 7.8 psi. 40

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<sup>5</sup> The parties stipulated that Commercial Cartage was a "tank truck common carrier of gasoline, petroleum products and other bulk liquids[.]" and that Commercial Cartage met the definition of "carrier" under EPA's fuel regulations. Joint Exhibit A; *see infra* note 8.

C.F.R. § 80.27(a)(2)(ii). Air Enforcement has alleged that Commercial Cartage transported gasoline whose RVP exceeded the 7.8 standard to Union W 70 on several occasions during June, July, and August of 1992.

At issue in this case are gasoline deliveries made by Commercial Cartage to Union W 70 on the following seven dates in 1992: June 5, June 12, June 17, June 23, July 20, July 24, and August 31. On each of these dates, Commercial Cartage picked up regular and premium unleaded gasoline at the Hartford Wood River Terminal ("HWRT"), a distribution facility located in Hartford, Illinois, and delivered the fuel to Union W 70 in Foristell. The distance from HWRT to Union W 70 is approximately 50 miles.

On each of those trips, Commercial Cartage carried regular and premium unleaded gasoline in separate compartments of its tank truck. HWRT generated a bill of lading for each load of gasoline indicating the number of gallons of each product (*i.e.*, regular and premium gasoline), the carrier's name, and the destination of the gasoline. Complainant's Exhibit ("C Ex.") 2. There are seven bills of lading in evidence in this case, corresponding to the seven delivery dates. Each bill of lading includes the following two statements regarding RVP:

GASOLINE NOT MARKETABLE IN 7.8 RVP CONTROL  
AREAS

GASOLINE MEETS FEDERAL R.V.P. REGULATIONS

*Id.* Commercial Cartage also generated a delivery ticket for each delivery. Tr. Part II at 96. The delivery tickets indicate the destination of the gasoline, the amount and type of gasoline loaded in each compartment of the tank truck, the corresponding bill of lading number, and a variety of transportation related data, including mileage and timing of loading and unloading. C Ex. 3. The delivery tickets do not contain any information about the RVP of the gasoline being delivered. The bills of lading and the delivery tickets were signed by both Commercial Cartage's driver and an employee of the Union W 70 station upon delivery.

In September 1992, EPA contractors conducted an inspection of HWRT to determine compliance with the gasoline volatility regulations. Hearing Transcript Part I ("Tr. Part I") at 16-17. During the course of the inspection, the inspectors obtained a copy of HWRT's log book, in which HWRT recorded the results of RVP tests periodically conducted on gasoline at the terminal. The inspectors also made copies of bills of lading documenting deliveries made within the St.

Louis area. *Id.* at 18-19. In the documents obtained from HWRT, the inspectors discovered a number of bills of lading designating Commercial Cartage as the carrier and indicating a delivery destination within the RVP 7.8 area. *Id.* at 22. The inspectors subsequently conducted an inspection of Commercial Cartage's business office in St. Louis, where they copied delivery tickets and invoices corresponding to the deliveries documented on the bills of lading obtained from HWRT. *Id.* at 23. The inspectors did not obtain gasoline samples from either HWRT or Commercial Cartage.

The inspectors next proceeded to the Union W 70 station in Foristell, Missouri, on September 4, 1992, and took samples of regular and premium unleaded gasoline. *Id.* at 45-46. The samples were shipped to EPA's laboratory in Ann Arbor, Michigan, for RVP analysis. *Id.* at 47. A laboratory technician determined that the regular gasoline sample from Union W 70 had an RVP of 8.82 psi and the premium gasoline sample had an RVP of 8.65 psi.<sup>6</sup> C Ex. 5.

### C. Procedural History

Air Enforcement initiated an enforcement action against Commercial Cartage in June 1993<sup>7</sup> by filing an administrative complaint alleging that Commercial Cartage transported gasoline with an RVP in excess of 7.8 to a branded retail outlet in an area subject to the 7.8 standard. The complaint sought a penalty of \$81,000. The complaint alleged that Commercial Cartage violated EPA's gasoline volatility regulation, 40 C.F.R. § 80.27, and was liable pursuant to 40 C.F.R. § 80.28(e). The relevant portion of section 80.28(e) provides that when a violation of the RVP standard is detected at a retail outlet, the carrier is liable "if the carrier caused the gasoline to violate the applicable standard[.]" 40 C.F.R. § 80.28(e)(3).

The original complaint was dismissed with prejudice by Administrative Law Judge Nissen ("Presiding Officer") for failure to state a claim upon which relief may be granted. The Presiding Officer found that Air Enforcement did not allege that Commercial Cartage caused the violation, which is an element of liability under section

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<sup>6</sup> The technician conducted two RVP tests on each sample and reported the average RVP. The individual test results for the regular gasoline sample were 8.81 psi and 8.83 psi. The premium gasoline yielded test results of 8.61 psi and 8.69 psi. C Ex. 5.

<sup>7</sup> At the time this enforcement action was initiated, the prosecuting office was the Field Operations and Support Division of EPA's Office of Air and Radiation. For consistency, however, we refer to the complainant as "Air Enforcement" throughout this decision.

80.28(e)(3). Order Granting Motion to Dismiss at 11 (ALJ, Sept. 23, 1993). Air Enforcement appealed the Presiding Officer's dismissal to the Environmental Appeals Board. The Board held that the Presiding Officer properly found that the complaint failed to state a claim. In particular, the Board stated that under section 80.28(e)(3), "transportation alone is not sufficient to state a claim, but \* \* \* the complaint must allege that the carrier either intentionally or negligently brought gasoline above the RVP standard to an area subject to the standard." *In re Commercial Cartage Co.*, 5 E.A.D. 112, 118 (EAB 1994). However, the Board reversed the Presiding Officer's decision to dismiss the case with prejudice. In keeping with the general rule on dismissals for first time pleading deficiencies, the Board ordered that Air Enforcement be given leave to file an amended complaint. *Id.* at 119.

Air Enforcement filed an amended complaint in March 1994. The amended complaint alleged that Commercial Cartage violated the prohibitions in the gasoline volatility regulation at 40 C.F.R. § 80.27(a)(2), based on 40 C.F.R. § 80.28(b), which imposes liability on a carrier if a violation of the applicable RVP standard is detected at the carrier's facility. The amended complaint also alleged that Commercial Cartage was liable under section 80.28(e) for having caused RVP violations detected at a branded retail outlet. Commercial Cartage filed a motion to dismiss and Air Enforcement filed a motion for accelerated decision as to liability. The Presiding Officer denied both motions. An evidentiary hearing was held in November 1996, at which time Air Enforcement decreased the requested penalty amount to \$40,500 due to a recalculation of the size of Commercial Cartage's business. In an Initial Decision issued in August 1997, the Presiding Officer held that Air Enforcement failed to prove certain elements of each claim for relief and therefore dismissed all counts of the amended complaint. This appeal followed.

## II. DISCUSSION

Air Enforcement requests that the Board review the Presiding Officer's holdings regarding the type of proof necessary to establish violations of the gasoline volatility regulation detected (1) at a carrier's facility under 40 C.F.R. § 80.28(b), and (2) at a branded retail outlet under 40 C.F.R. § 80.28(e) as it applies to carriers. Air Enforcement also appeals the Presiding Officer's determinations that the evidence offered in this case was insufficient to prove the alleged violations. Air Enforcement seeks a reversal of the Presiding Officer's liability decision and a remand for a penalty determination. Conversely, Commercial Cartage urges us to uphold the Initial Decision with regard to the type of evidence necessary to establish violations and the

Presiding Officer's findings that the evidence presented in this case was insufficient.

Our analysis of this case begins with a brief overview of the regulatory prohibition and enforcement provisions relating to gasoline volatility. Second, to better understand the particular liability issues pertaining to sections 80.28(b) and 80.28(e) in the context of this case, we examine how Air Enforcement structured its allegations of liability in the amended complaint. We then examine the two liability regulations at issue here and the evidence presented by Air Enforcement in seeking to establish liability.

#### *A. Regulatory Prohibition and Enforcement Provisions*

EPA's gasoline volatility regulation prohibits, among other things, carriers<sup>8</sup> from transporting in commerce gasoline whose RVP exceeds the applicable standard for a designated area. 40 C.F.R. § 80.27(a)(2). The applicable standard for the area in question in this case is an RVP of 7.8 psi. Section 80.27 also provides that compliance with the RVP standard shall be determined by way of specified gasoline sampling and testing methodologies that are set forth in appendices to the fuel regulations. 40 C.F.R. §§ 80.27(b), 80 apps. D, E. Finally, the regulation provides that "[l]iability for violations of paragraph (a) of this section [the general prohibition] shall be determined according to the provisions of § 80.28." 40 C.F.R. § 80.27(c). Although much of our analysis focuses on two particular subsections of section 80.28, section 80.27 provides the basic framework for enforcement.

#### *B. The Amended Complaint*

Air Enforcement's amended complaint against Commercial Cartage alleges twenty violations of the gasoline volatility regulation, 40 C.F.R. § 80.27(a)(2). The first count alleges nine violations based on the carrier liability standard at 40 C.F.R. § 80.28(b). The second count claims two violations based on 40 C.F.R. § 80.28(e), the regulation which governs liability in situations where an exceedance of the applicable RVP

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<sup>8</sup> Carriers are defined in the fuels regulations as follows:

*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.

40 C.F.R. § 80.2(t).



standard is detected at a branded retail outlet. The third count claims an additional nine violations based on 40 C.F.R. § 80.28(e). The second and third counts rely on the same regulatory authority, but differ in terms of the evidence offered to prove the violations.

Although twenty violations are alleged in the amended complaint, the requested penalty of \$81,000 (later reduced to \$40,500) is based on only eleven violations. Materials in the record regarding Air Enforcement's calculation of a proposed penalty indicate that the third count (alleging nine violations) is an alternative to the first count (also alleging nine violations). C Ex. 7. Thus, the nine violations alleged in the first or third counts, plus two violations alleged in the second count yields a total of eleven alleged violations.

In the first count, Air Enforcement asserts that through its inspections of HWRT and Commercial Cartage and examination of records obtained during those inspections, it detected nine violations of the gasoline volatility regulation based on 40 C.F.R. § 80.28(b). Amended Complaint ¶¶ 25, 28.<sup>9</sup> Thus, the first count alleges that EPA detected violations "at a carrier's facility." *See* 40 C.F.R. § 80.28(b). If violations have been detected at a carrier's facility, the carrier is presumed liable, unless the carrier demonstrates that all elements of the regulatory affirmative defense for carriers are satisfied. *See* 40 C.F.R. § 80.28(b)(1), (g)(1) (describing elements of the defense). Commercial Cartage did not assert the affirmative defense in its answer and has not since contended that the defense is applicable.

The issues presented with respect to the first count are: (1) what type of evidence is required to establish that a violation of the RVP standard was "detected at a carrier's facility," and (2) does Air Enforcement's documentary evidence, consisting of bills of lading, delivery tickets, and HWRT's test log, establish that a violation of the standard was detected and therefore that liability for violating the gasoline volatility regulation attaches under section 80.28(b)(1)?

The second count alleges that Commercial Cartage "caused the regular unleaded and premium gasoline at the Union W 70 retail outlet to be in violation of the RVP standard on September 4, 1992" and charges Commercial Cartage with two violations of the gasoline

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<sup>9</sup> Air Enforcement alleges that the regular unleaded gasoline transported by Commercial Cartage on four of the seven delivery days had an RVP in excess of the applicable limit. Air Enforcement also alleges that the premium unleaded gasoline exceeded the applicable RVP for five of the deliveries. Air Enforcement concluded that Commercial Cartage delivered nine loads of noncompliant gasoline and therefore charged nine violations.

volatility regulation based on 40 C.F.R. § 80.28(e). Amended Complaint ¶ 33. Through reference to the two samples collected by the inspectors on September 4, 1992, this count charges Commercial Cartage with one violation for each of the samples.

Count three alleges nine additional violations of the gasoline volatility regulation based on 40 C.F.R. § 80.28(e). *Id.* at ¶ 36. The third count charges violations for each of the deliveries evidenced in the documentation referenced in the first count (*i.e.*, bills of lading, delivery tickets, HWRT test log). The third count also asserts that Commercial Cartage acted either intentionally or negligently in delivering noncompliant gasoline to the Union W 70 station. *Id.* at ¶ 35.

The issues on appeal relating to the second and third counts are: (1) what type of evidence is required to establish that a violation of the RVP standard was “detected at a retail outlet,” (2) does Air Enforcement’s evidence in this case, consisting of EPA’s sampling results, bills of lading, delivery tickets, and HWRT’s test log, establish that violations were detected at the Union W 70 station, and (3) if violations were detected, does Air Enforcement’s evidence establish that Commercial Cartage caused the gasoline at the Union W 70 station to violate the RVP standard and therefore that liability for violating the gasoline volatility regulation attaches under section 80.28(e)(3)?

### *C. Carrier Liability Under 40 C.F.R. § 80.28(b)(1)*

Much of the regulatory liability scheme for violations of the gasoline volatility regulation is based on the concept of presumptive liability. 54 Fed. Reg. 11,868, 11,872 (Mar. 22, 1989). If a violation of the applicable RVP standard is detected at a party’s own facility, that party is presumed liable (*i.e.*, presumed to have violated the gasoline volatility regulation by engaging in one of the prohibited acts). For violations of the RVP standard detected at facilities downstream in the distribution network, the downstream facility is presumed liable, as well as certain upstream parties. Where presumptive liability applies, EPA need not establish actual fault in order to prevail in an enforcement action. Liability may be avoided if a party satisfies all required elements of an applicable affirmative defense. *See* 40 C.F.R. § 80.28(g).

Carriers are presumed to have engaged in a prohibited act and thus are presumed liable when “a violation of the applicable [RVP] standard \* \* \* is detected at a carrier’s facility, whether in a transport vehicle, in a storage facility, or elsewhere at the facility \* \* \* [.]” 40 C.F.R. § 80.28(b). In proposing this rule, EPA explained its rationale for applying presumptive liability to violations found at carrier facilities:

When a violation [of the applicable standard] is detected at a carrier facility, either in the actual carrier (pipeline, truck, etc.) or in the carrier's storage facilities, EPA proposes to hold the carrier presumptively liable because either: (1) The carrier physically "caused" the violation through its affirmative act or omission, or (2) the carrier "transported" product which was in violation.

\* \* \* \* \*

The Agency considered proposing to hold a carrier liable only where it actually "caused" the violation by act or omission; however, EPA believes the proposed expanded liability will most effectively encourage carriers to more closely monitor the product they carry, thus helping to eliminate product in violation from reaching the retail level.

52 Fed. Reg. 31,274, 31,306-31,307 (Aug. 19, 1987). In responding to comments on the presumptive liability proposal for carriers, the Agency further noted:

The Agency is promulgating the liability provisions for carriers as proposed because it believes that presumptive liability, with the defenses as proposed, will provide some degree of RVP quality control without imposing unreasonable costs and burdens on carriers.

\* \* \* \* \*

[T]he carrier's handling of the product can \* \* \* result in violations. 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 the gasoline could result in the gasoline not complying with the applicable standard for that area.

54 Fed. Reg. at 11,875.

If a violation of the applicable RVP standard is detected at a carrier's facility, the carrier is deemed liable, unless it can establish that

the regulatory affirmative defense applies. 40 C.F.R. § 80.28(b)(1). As noted previously, Commercial Cartage has not claimed that the carrier affirmative defense is applicable in this case.

The carrier liability regulations in section 80.28 were largely upheld in *National Tank Truck Carriers, Inc. v. EPA*, 907 F.2d 177 (D.C. Cir. 1990). The court struck one element of the original affirmative defense for carriers. *Id.* at 184-185. However, the other aspects of the liability scheme, including presumptive liability for violations found at the carrier's facility, were upheld.

#### 1. "Detected at a Carrier's Facility"

The parties in this case disagree about the meaning of the phrase "detected at a carrier's facility" in the carrier presumptive liability regulation. *See* 40 C.F.R. § 80.28(b). The Presiding Officer held that detection requires sampling and testing of gasoline and that the carrier's facility consists of tanks which hold gasoline, which in this case applies only to Commercial Cartage's tank truck. Initial Decision at 42.

Our interpretation of "detected at a carrier's facility" recognizes that the so-called "presumptive" liability of section 80.28(b)(1) is tantamount to strict liability but for the availability of a special affirmative defense. EPA chose this liability framework so that it would not have to investigate and litigate potentially complex factual issues of causation. If EPA finds a violation of the RVP standard at a particular facility, the owner of that facility is presumed liable. EPA need only establish that the violation was detected. *See National Tank Truck Carriers*, 907 F.2d at 179 ("[a] carrier is presumptively liable when EPA finds noncomplying gasoline in the carrier's tank."). The presumptive liability regulation for carriers thus provides EPA with a relaxed burden of proof, but nonetheless sets forth certain standards for the evidence required to establish a violation.

As a preliminary matter we note that the word "violation," in the context of the liability provisions at 40 C.F.R. § 80.28, refers to gasoline whose RVP exceeds the applicable standard. There are at least three factual issues that may bear upon whether there is a violation. First, the RVP level of the gasoline must be known. Second, the intended destination for the gasoline is important, because the RVP standard is different in different geographic areas. Finally, the time of year in which the gasoline is intended to be dispensed to motor vehicles may also influence whether there is a violation, because the RVP standard changes during the summer months in certain areas. *See* 40 C.F.R. § 80.27(a)(2)(ii). The parties' arguments regarding detection of

violations in this case focus on how to establish the first of these three issues, *i.e.*, the RVP level of the gasoline.

The parties present divergent views of the type of evidence required to establish that a violation has been detected at a carrier's facility pursuant to section 80.28(b). Air Enforcement argues that violations may be detected through reference to a wide variety of evidence, including commercial documents. Air Enforcement also argues that evidence of detection may be obtained from locations other than the carrier's facility.<sup>10</sup> Commercial Cartage counters that the regulation requires that proof of the RVP level of gasoline must be obtained by sampling and testing gasoline from the carrier's facility, which in this case consists of Commercial Cartage's tank truck.

Commercial Cartage turns to the regulatory history to support its argument that "detected" refers solely to sampling and testing gasoline. Respondent's Brief ("CCC's Brief") at 7. The regulatory preambles certainly indicate a preference for sampling and testing as the foundation of an enforcement system for the volatility regulation:

EPA believes that a[n] [enforcement] program based on testing fuel that is being sold and distributed would be the most effective means to detect violations and to assure that the emission reduction benefits from RVP controls are actually achieved.

52 Fed. Reg. at 31,296. Further, EPA's view of the limitations of documentation in the absence of test results is illustrated in a preamble discussion of the affirmative defense for distributors:

The reliability of documents alone, without test results to support them, is questionable. \* \* \* Without such test results it will be more difficult for the Agency to determine where the violation occurred.

54 Fed. Reg. at 11,873. Moreover, the plain language of the volatility regulation itself explicitly states that compliance shall be determined by use of sampling and testing:

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<sup>10</sup> Air Enforcement also raised an argument on appeal urging a definition of "carrier's facility" that includes a carrier's office as well as gasoline storage facilities and tank trucks. Air Enforcement's Notice of Appeal of Presiding Officer's Initial Decision at 18. This argument is largely mooted by our holding that the RVP level of gasoline must be determined by sampling and analysis.

Compliance with the [volatility] standards \* \* \* shall be determined by use of one of the sampling methodologies as specified in appendix D of this part and the testing methodology specified in appendix E of this part.

40 C.F.R. § 80.27(b).

Air Enforcement nonetheless argues that violations may be detected by means other than gasoline sampling and testing, such as examining documents and taking testimony. Brief for Complainant-Appellant (“Air Enforcement’s Brief”) at 21. Air Enforcement states that the preamble to the final gasoline volatility regulations and an EPA guidance document addressing enforcement of the volatility regulations support its view. *See* 54 Fed. Reg. at 11,868; U.S. EPA, 1992 Volatility Question and Answer Document (May 1, 1992) (“Q&A Guidance”).

We disagree with Air Enforcement’s analysis for purposes of establishing the RVP level of gasoline (although documentary evidence may be admissible to prove other issues). Not only is Air Enforcement’s position contradicted by the plain language of the volatility regulation, but the regulatory preambles, as shown above, explain that EPA decided to rely on sampling gasoline and testing RVP levels throughout the distribution network in order to enhance accuracy of detection. In addition, if “[t]he reliability of documents alone, without test results to support them, is questionable” for purposes of establishing an affirmative defense, documents alone ought also be viewed as questionable for purposes of establishing liability. *See* 54 Fed. Reg. at 11,873.

Contrary to the reading of the Q&A Guidance urged by Air Enforcement, the guidance actually supports reliance on RVP test results as the means of determining RVP levels. For example, in describing inspection procedures, the guidance indicates that RVP levels will be determined by a laboratory test and that documents may be reviewed for other evidence, such as the intended destination of the gasoline:

If the field screening [RVP] test indicates a potential violation, a laboratory sample will be collected and analyzed in accordance with the regulatory procedure. \* \* \* [T]he inspectors will ask to see documents indicating where the gasoline is being shipped and other evidence indicating that the party has taken steps to ensure that the gasoline will be shipped to the proper area.

Q&A Guidance at 44. The guidance contains numerous other references to the use of documentary evidence, but always for purposes of establishing something other than RVP level. *See, e.g., id.* at 22 (records may be used to establish a defense); *id.* at 1 (EPA will look to documentation to determine the intended use of a product).

In sum, the plain language of the volatility regulations, their regulatory history, and EPA's RVP enforcement guidance emphasize that RVP levels are to be determined through sampling and testing.

Air Enforcement further argues that even if RVP test results are required, the RVP tests conducted by HWRT and reflected in the HWRT test log are sufficient to establish a violation.<sup>11</sup> Air Enforcement's Brief at 22. Air Enforcement asserts that "the primary concern is whether or not the party has committed a prohibited act, not where the physical evidence of the violation is located." *Id.* at 20.

Air Enforcement's position does not accord significance to the entire phrase, "violation \* \* \* *detected at a carrier's facility.*" 40 C.F.R. § 80.28(b) (emphasis added). The primary distinction among the various liability provisions of 40 C.F.R. § 80.28 is the location where the violation is detected. Because gasoline volatility is subject to change as the fuel passes through the distribution network, especially if one batch or load of gasoline is mixed with another, an RVP test result from an upstream facility will not necessarily reflect the RVP of the gasoline at a downstream location. The reverse is also true. Therefore, in order to establish the RVP level of gasoline for purposes of detecting a violation at a carrier's facility, there must be evidence of an RVP test result for an actual gasoline sample obtained from the carrier's facility, *i.e.*, an area or vehicle within the carrier's control.

In order to establish a *prima facie* case against a carrier under section 80.28(b), we hold that evidence of gasoline RVP must be obtained by sampling gasoline from the carrier's facility and conducting an RVP analysis that satisfies the regulatory testing requirements. EPA need not do the sampling and testing itself, but must introduce evidence of such sampling and testing.<sup>12</sup> Documentary evidence or

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<sup>11</sup> Commercial Cartage challenged the methodology used by HWRT in collecting and analyzing the samples recorded in the test log. CCC's Brief at 12-16. However, we need not address Commercial Cartage's contentions in this case in light of our interpretation of "detected at a carrier's facility."

<sup>12</sup> Air Enforcement expressed a concern that it is unrealistic and unreasonable to require EPA to sample and test gasoline in carriers' tank trucks, primarily due to the difficulties in tracking

Continued

testimony may be properly used to prove ancillary issues necessary to establish a violation, such as the intended destination for particular gasoline, or the date on which the gasoline is intended to be dispensed to motor vehicles. The regulation, however, requires that evidence of RVP level must be established through results of sampling and testing gasoline from the carrier's facility.

*2. Does the Evidence in this Case Establish that a Violation was Detected at a Carrier's Facility and Therefore that Commercial Cartage is Liable Under 80.28(b)(1)?*

In seeking to establish that a violation of the RVP regulation was detected at Commercial Cartage's facility for purposes of liability under section 80.28(b)(1), Air Enforcement relies upon the bills of lading obtained during the inspection of HWRT, the delivery tickets obtained from Commercial Cartage, and the HWRT test log. Notably, there are no sampling results from Commercial Cartage's tank truck. None of the proffered evidence includes RVP data obtained by sampling and testing gasoline from Commercial Cartage's facility. Although the delivery tickets and bills of lading provide evidence of the intended destination of the gasoline and dates of delivery, evidence of RVP level is lacking. Air Enforcement's evidence is therefore insufficient to establish that a violation of the RVP regulation was detected at a carrier's facility pursuant to 40 C.F.R. § 80.28(b).

We uphold the Presiding Officer's dismissal of the first count of the amended complaint. Air Enforcement has not established that a violation was detected at Commercial Cartage's facility. Consequently, Commercial Cartage cannot be held liable under section 80.28(b)(1).

*D. Carrier Liability Under 40 C.F.R. § 80.28(e)(3)*

The second and third counts of the amended complaint allege that Commercial Cartage is liable for having caused violations of the RVP regulation that were detected at a branded retail outlet, namely

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down carriers who only possess a load of gasoline for a short period of time. Air Enforcement's Brief at 7 & 22. Air Enforcement argues that such a requirement renders the carrier presumptive liability provision meaningless. *Id.* at 22- 23. Although we recognize that the regulation as written (and our interpretation thereof) potentially complicates the logistics of enforcement against motor carriers such as Commercial Cartage under section 80.28(b), carriers are not free from the spectre of liability. The carrier may have its own RVP test results that could serve as the basis for detection of a violation. In addition, as discussed below, carriers may be held liable for having caused violations detected at downstream facilities even if violations are not detected at a carrier's facility.



the Union W 70 station in Foristell, Missouri. These counts are based upon 40 C.F.R. § 80.28(e), which provides in pertinent part:

Where a violation of the applicable standard set forth in § 80.27 is detected at a retail outlet \* \* \* displaying the corporate, trade, or brand name of a gasoline refiner or any of its marketing subsidiaries, the following parties shall be deemed in violation:

\* \* \* \* \*

(3) The carrier (if any), if the carrier caused the gasoline to violate the applicable standard[.]

This provision differs from the regulation imposing presumptive liability on carriers. Under this provision, carriers may be held liable for violations detected downstream, *e.g.*, at a retail outlet, but only if the carrier “actually caused the violation.” 54 Fed. Reg. at 11,872. In the preamble to the proposed and final regulations, EPA repeatedly used variations of the phrase “only where it actually caused the violation” to describe a carrier’s potential liability for violations downstream of a carrier facility. *See* 52 Fed. Reg. at 31,307-08; 54 Fed. Reg. at 11,872 & 11,875. EPA further described this concept in the context of violations detected at a retail outlet by stating, “the carrier would be held liable, without defense, only where it \* \* \* actually caused the product not to be in compliance with the applicable [RVP] standard.” 52 Fed. Reg. at 31,307. Thus, liability for carriers under section 80.28(e)(3) must be based upon a finding of causation.

However, similar to section 80.28(b)(1), we must first determine what constitutes detection of a violation at a retail outlet. We analyze the issues of detection and causation in the following sections.

1. *“Detected at a Retail Outlet”*

Consistent with our interpretation of “detected at a carrier’s facility,” we find that “detected at a retail outlet” requires that evidence of an RVP level in excess of the applicable standard be obtained by sampling and testing gasoline from a retail outlet.

2. *Does the Evidence in this Case Establish that Violations Were Detected at a Retail Outlet?*

There is no dispute that the RVP level of the two gasoline samples collected from the Union W 70 station exceeded the applicable

standard. The gasoline samples collected during the inspection of the station yielded RVP test results of 8.82 psi (for regular unleaded gasoline) and 8.65 psi (for premium unleaded gasoline). These results exceeded the RVP regulatory standard of 7.8 psi. Thus, we find that the two violations alleged in the second count of the amended complaint were indeed detected at a retail outlet.

The third count of the amended complaint alleges that an additional nine violations were detected at the Union W 70 station. In support of this allegation, Air Enforcement offers the following evidence: HWRT's bills of lading, Commercial Cartage's delivery tickets, and HWRT's test log. These documents do not provide evidence of RVP levels for gasoline sampled from Union W 70 and therefore do not establish that any additional violations were detected at the retail station. We uphold the Presiding Officer's dismissal of the third count of the amended complaint.

### 3. *Did Commercial Cartage Cause the Two Violations Detected at Union W 70?*

The causation element of 40 C.F.R. § 80.28(e)(3) requires more than proof of mere transportation of gasoline in order to hold a carrier liable for a violation at a retail station. The carrier must have "intentionally or negligently brought gasoline above the RVP standard to an area subject to the standard." *In re Commercial Cartage Co.*, 5 E.A.D. 112, 118 (EAB 1994) ("CCC I"). In considering the causation element under section 80.28(e)(3), we are cognizant of the D.C. Circuit's finding, "carriers \* \* \* are not responsible for the conduct of others in the [gasoline distribution] chain." *National Tank Truck Carriers*, 907 F.2d at 183. Our focus is on the carrier's unique role as a transporter of gasoline and the standard of care that carriers can reasonably be expected to adhere to in performing this role.

First, we dispense with the suggestion that this case involves an issue of causation based upon intent. The Presiding Officer found no evidence that Commercial Cartage intentionally delivered noncomplying gasoline to Union W 70. Initial Decision at 51. Although Air Enforcement contests the Presiding Officer's findings on appeal, *see* Air Enforcement's Brief at 33, it provides no serious argument regarding Commercial Cartage's intent other than stating, "Commercial Cartage fully intended to comply with Unocal's request to pick up gasoline from HWRT and to transport the gasoline to the branded retail outlet." *Id.* at 36. While this statement appears to be true, it does not establish that Commercial Cartage intended to deliver noncomplying gasoline. Air Enforcement's argument would, in effect, trans-

form liability based upon intent into liability based upon mere transportation, a theory that we rejected in *CCC I*. We concur in the Presiding Officer's finding that Commercial Cartage did not intentionally cause the violations at Union W 70.

In assessing whether Commercial Cartage negligently caused the RVP violations detected at Union W 70, we find that the RVP disclaimer and warning printed on each of the bills of lading are significant.<sup>13</sup> The two RVP statements are sufficient to alert a reasonably prudent gasoline carrier to the need for diligence regarding RVP compliance. When faced with the potentially ambiguous statements: "GASOLINE NOT MARKETABLE IN 7.8 RVP CONTROL AREAS" and "GASOLINE MEETS FEDERAL R.V.P. REGULATIONS" a carrier would be well-served to take steps to ensure that it does not engage in illegal transport of noncomplying gasoline. For example, the carrier could check a map to confirm the regulatory standard for the intended destination of the gasoline. The carrier could also inquire of the refiner and/or the distributor regarding the RVP of the gasoline to be delivered. These diligence activities are not unreasonably burdensome to a carrier who has reason to be concerned about the RVP status of either the delivery destination or the gasoline to be delivered.<sup>14</sup>

Commercial Cartage argues that requiring carriers to take some responsibility for compliance with the RVP regulations as to gasoline that they deliver conflicts with the common law and statutory duties of common carriers. *See CCC's Brief at 23*. We see no such conflict. Although common carriers must provide certain services by virtue of their status and ICC certificates, they are not obligated to provide carriage where to do so would be illegal. The D.C. Circuit addressed a similar argument in the course of the judicial challenge to the liability regulations at issue in this case:

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<sup>13</sup> Although we declined to consider the bills of lading in determining the RVP level of gasoline at the carrier's facility or the retail outlet, this information can properly be used in determining whether Commercial Cartage caused the violations actually detected at the retail outlet. Unlike the issue of "detected at a carrier's facility," neither the text nor the structure of the liability regulations suggest limitations on the type of evidence that may be used to prove causation. Thus, any relevant evidence, admitted at hearing, may be used to establish that a carrier caused a violation detected downstream.

<sup>14</sup> Under a similar factual scenario, an administrative law judge held that a distributor/retailer contributed to a violation of the volatility regulations. *See In re Bell Thunderbird Oil Co.*, Docket No. CAA-95-H-005 (ALJ, May 20, 1996). The bills of lading in *Bell Thunderbird* contained statements indicating that the gasoline at issue there had a maximum RVP of 9.0. The gasoline was to be sold by the respondent in an RVP 7.8 area, and the respondent's awareness of the RVP of gasoline, as evidenced by the statement on the bills of lading, led the ALJ to conclude that the respondent caused a violation.

The fact that they [carriers] do not take legal title to the gasoline or otherwise exercise dominion over the peculiar qualities of each batch of gasoline is irrelevant to the question of whether a carrier is or is not transporting unlawful gasoline in its truck \* \* \*.

*National Tank Truck Carriers*, 907 F.2d at 183. Common carrier status does not permit a carrier to abdicate its obligation to take care not to engage in transportation of illegal cargo.<sup>15</sup> The carrier need not ensure the compliance of others in the distribution network, but must avoid negligence and ignorance while performing its services.<sup>16</sup> Carriers can avoid liability for negligently causing a violation of the RVP standard by conducting minimal diligence activities when they receive information that would cause a reasonably prudent carrier to question the RVP compliance status of a load of gasoline.

Here, Commercial Cartage's president testified that he was aware of the RVP regulation and that he provided reminders to his drivers regarding the RVP limits. Tr. Part II at 108. He instructed the drivers to contact Commercial Cartage's dispatcher if "they had any reason to suspect that the gasoline that they were going to deliver \* \* \* was not consistent with the regulations \* \* \*." *Id.* Despite these admonitions, however, neither Commercial Cartage's driver nor the company made any inquires in light of the RVP statements printed on the bills of lading. Commercial Cartage delivered gasoline to Union W 70 on a regular basis throughout the summer of 1992, but never inquired as to the RVP standard for Foristell or the RVP of the gasoline it was carrying. Thus, Commercial Cartage did not make minimal efforts to guard against transportation of illegal gasoline, even when the bills of lading contained RVP warnings that were sufficient to put a reasonable carrier on notice of a potential problem. Commercial Cartage's failure to engage in reasonable diligence is an indication of negligence.

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<sup>15</sup> Testimony at the hearing was generally in agreement with this statement. The president of National Tank Truck Carriers, Inc., a trade association for the tank truck industry, appeared on behalf of Commercial Cartage in this proceeding. He testified that carriers are not compelled to transport a substance illegally. Tr. Part II at 47, 51. The president of Commercial Cartage also testified, describing certain illegal services that carriers were sometimes asked to provide, such as filling premium gasoline tanks with regular gasoline. He explained that Commercial Cartage's drivers were absolutely prohibited from engaging in such activities, despite the customer's request. *Id.* at 109.

<sup>16</sup> The obligation to avoid negligence or ignorance may also be described as an affirmative duty to take reasonable precautions to guard against transportation of noncomplying gasoline. *Cf. In re Tifton Mobil*, Docket No. CAA(211)-118 (ALJ, Apr. 27, 1981) (holding that retailers' affirmative duty to guard against violations of the unleaded gasoline regulation is analogous to a negligence standard).

Finally, we note that Commercial Cartage claims that the gasoline sampled by EPA's contractor at the Union W 70 station on September 4, 1992, was not delivered by Commercial Cartage. Commercial Cartage suggests that some other carrier may have delivered gasoline to Union W 70 prior to the inspection. Commercial Cartage points out that there are no bills of lading or delivery tickets evidencing deliveries by Commercial Cartage between July 24 and August 31, and that Union W 70 would have run out of gas before August 31 had it not received any deliveries in the interim. CCC's Brief at 33-34.

The president of the retail station testified that Commercial Cartage was the carrier that supplied the station with its gasoline during the summer of 1992. Tr. Part I at 151-52. The Fuels Field Inspection Report filled out by the inspector at the time of sampling contains a notation, "Last delivery 8/31/92, bill-of-lading atch'd." C Ex. 4. Air Enforcement also introduced into evidence a bill of lading and delivery ticket documenting a delivery by Commercial Cartage to Union W 70 on August 31, 1992. The combination of this evidence leaves us with little doubt that Commercial Cartage delivered the gasoline tested by the inspectors.

By failing to exercise due care and diligence, Commercial Cartage negligently contributed to the delivery of gasoline to the Union W 70 station in excess of the applicable RVP standard. Although Commercial Cartage was by no means the only party responsible for this error, it is not excused from exercising due care and attention to RVP requirements in providing gasoline transportation. Commercial Cartage did not exercise an appropriate level of care in this case and therefore, we find Commercial Cartage liable for two violations of the RVP regulation pursuant to 40 C.F.R. § 80.28(e)(3).

#### *E. Penalty*

The Presiding Officer did not assess a penalty in this matter because he dismissed all counts of the amended complaint. In this order, the Board reverses the Presiding Officer's liability determination as to the second count of the amended complaint and finds that Commercial Cartage is liable for two violations of the gasoline volatility regulations detected at the Union W 70 station. The Board's normal practice in such situations is to remand the case to the Presiding Officer for a penalty determination. In the interest of expediting the resolution of this matter, however, which has been pending for five years, which is now before the Board for the second time, and which involves a company no longer in business, the Board chooses to assess a penalty directly.

EPA's regulation regarding administrative penalty assessments requires penalties to be assessed in accordance with "any criteria set forth in the Act relating to the proper amount of a civil penalty" and to take into account "any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). Although these directions apply specifically to a penalty assessed by the Presiding Officer, the Board has in fact taken into account both the relevant statutory criteria and any penalty policy when conducting its own penalty assessments. *See, e.g., In re Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 601 (EAB 1996).

Penalties for violations of the gasoline volatility regulations are authorized by Clean Air Act section 211(d)(1), 42 U.S.C. § 7545(d)(1). The penalty may not exceed "the sum of \$25,000 for every day of \* \* \* violation and the amount of economic benefit or savings resulting from the violation." *Id.* In addition, such penalties are to be assessed in accordance with the Clean Air Act's Title II penalty provisions. *See* CAA § 205(b), (c), 42 U.S.C. § 7524(b), (c). In determining the amount of an administrative penalty, the following statutory factors must be taken into account: (1) the gravity of the violation; (2) the economic benefit or savings resulting from the violation; (3) the size of the violator's business; (4) history of compliance with the Clean Air Act's motor vehicle emissions and fuel standards; (5) actions taken to remedy the violation; (6) the effect of the penalty on the violator's ability to continue in business; and (7) other matters as justice may require. CAA § 205(c)(2); 42 U.S.C. § 7524(c)(2).

EPA has issued a penalty policy regarding the assessment of administrative penalties for violations of the gasoline volatility regulation. U.S. EPA, Office of Air and Radiation, Civil Penalty Policy for Administrative Hearings (Jan. 14, 1993) ("Volatility Penalty Policy"). The Volatility Penalty Policy sets forth two methods of calculating penalties. The first method is principally geared toward refiner violations and yields a penalty based upon the number of gallons of non-complying gasoline. Volatility Penalty Policy at 4. The second method of penalty calculation is based on a matrix which takes into account the size of the violator's business, the degree to which the RVP of the noncomplying gasoline exceeded the applicable standard, and the number of previous violations. *Id.* at 5. The penalty policy states that the matrix method is generally applicable to violations found at retail outlets. *Id.* at 2, 3. Moreover, the matrix method is to be used when it would yield a larger penalty than the per gallon method. *Id.* at 4. In this case, we begin our penalty assessment using the matrix method because the violations were detected at a retail station and because there is insufficient evidence in the record from which to determine

the number of gallons of gasoline in violation at the Union W 70 station at the time the violations were detected.

In order to select a penalty amount under the matrix method, three pieces of information are required: (1) the violator's business size, (2) the amount by which the noncomplying gasoline exceeded the applicable RVP standard, and (3) the number of prior violations of the volatility regulations. Volatility Penalty Policy at 5. Business size is defined as the "violator's gross income \* \* \* for the prior fiscal year." *Id.* at 3. In this case, tax returns and testimony from Commercial Cartage's president established that Commercial Cartage's total income for 1992 and 1993 fell within the size II business category, *i.e.*, \$1,000,000 - \$10,000,000. *See* Tr. Part II at 121; C Exs. 8 & 8A. The RVP 7.8 standard was exceeded by different amounts for the two violations detected at the Union W 70 station. The premium unleaded gasoline exceeded the standard by 0.85 psi, and the regular unleaded gasoline exceeded the standard by 1.02 psi. C Ex. 5. Finally, Air Enforcement did not allege or establish any prior violations by Commercial Cartage. Thus, the Volatility Penalty Policy matrix yields a total penalty amount of \$10,500 (\$4,500 for the premium gasoline violation and \$6,000 for the regular gasoline violation). The higher penalty for the regular gasoline violation reflects the fact that the RVP test result for the regular gasoline was higher than that of the premium gasoline.

Although our regulations require that a penalty policy be considered in the course of penalty assessment, a decisionmaker may deviate from a policy where circumstances warrant. *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995). In particular, the Board, as the final decisionmaker in administrative penalty cases, is not bound by the formula set forth in a penalty policy. *Id.* at 190 n.10; *Rybond*, 6 E.A.D. at 639; *In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 702 n.11 (EAB 1995) (the Board is not bound by penalty guidelines, but "guidelines provide a useful frame of reference for the Board's exercise of its discretion, and therefore the guidelines are in fact considered by the Board in formulating its own penalty assessment \* \* \*").

Calculation of a penalty pursuant to the matrix in the Volatility Penalty Policy explicitly takes into account certain of the statutory factors, including: gravity of the violation; the size of the violator's business; and history of compliance. Other factors, however, are not reflected in the penalty derived from the matrix. Of the other statutory factors, the one that is most relevant to this case is the effect of the penalty on the violator's ability to continue in business. We give that factor additional consideration here.

The “ability to continue in business” factor from section 205(c)(2) of the Clean Air Act is analogous to the “ability to pay” factor found in other statutory penalty provisions. The evidentiary burdens associated with establishing ability to pay were examined in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994). There we held that:

Once the respondent has presented *specific* evidence to show that \* \* \* it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the “appropriateness” of the penalty must respond either with the introduction of additional evidence to rebut the respondent’s claim or through cross examination it must discredit the respondent’s contentions.

*Id.* at 543 (emphasis in original).

In this case, Commercial Cartage’s president testified that the company was still incorporated but no longer in business at the time of the hearing. Tr. Part II at 68, 110. In November 1994, the ICC revoked Commercial Cartage’s authority to operate as a common carrier. *Id.* at 73; R Ex. E. The president also testified that the company’s assets were sold to pay off creditors beginning in the fall of 1994. Tr. Part II at 127-128, 131. Debts remaining at the time of the hearing were approximated at \$500,000. *Id.* at 112. The president further testified that the company had a few hundred dollars in the bank. *Id.* at 110.

Air Enforcement did not introduce any evidence or testimony to counter Commercial Cartage’s showings at the hearing. Instead, Air Enforcement argued in its post-hearing brief that Commercial Cartage did not provide sufficient information from which Air Enforcement could show that the proposed penalty was appropriate. U.S. EPA’s Post-Trial Brief at 43. Specifically, Commercial Cartage did not supply Air Enforcement with all of the tax returns that Air Enforcement requested. However, Commercial Cartage did supply three years of tax returns and other financial documents. C Exs. 8, 8A, 8B. It also explained that it had received extensions of the filing deadline for one outstanding return. Tr. Part II at 122.

Air Enforcement also suggested that Commercial Cartage’s inability to pay claim was “probably a fraud.” U.S. EPA’s Post-Trial Brief at 45. Air Enforcement did not substantiate its allegations of fraud and we find no support for them in the record. Rather, it appears that Commercial Cartage has simply gone out of business. In sum, Air Enforcement did not support its proposed penalty by rebutting or discrediting Commercial Cartage’s testimony and evidence regarding its



ability to pay or to continue in business. Based on the state of the record, we have difficulty finding support for the \$10,500 penalty derived from the Volatility Penalty Policy matrix.

Given that Commercial Cartage is no longer in business, and that any penalty assessed in this case will likely be added to Commercial Cartage's already substantial debt, a reduction in penalty is appropriate. However, in recognition of the fact that Commercial Cartage has been found liable for two violations of the gasoline volatility regulations, which the penalty policy rightly describes as serious, more than a token penalty is in order. Commercial Cartage's evidence and testimony regarding ability to pay did not establish that Commercial Cartage cannot pay *any* penalty. By now, the company may have residual funds available to pay the penalty,<sup>17</sup> or it may decide to resume operations at some future date. Based on the above considerations, an appropriate penalty amount is 25% of the total penalty for these violations as derived from the Volatility Penalty Policy. Accordingly, we hereby assess a penalty of \$2,625 against Commercial Cartage for two violations of EPA's gasoline volatility regulations as detected at the Union W 70 station in Foristell, Missouri on September 4, 1992.

### III. CONCLUSION

The Presiding Officer's dismissal of the first count of the amended complaint is upheld. Air Enforcement did not establish that the violations alleged in the first count were detected at a carrier's facility because Air Enforcement did not introduce evidence of RVP test results on gasoline samples obtained from the carrier's facility. Therefore, Commercial Cartage may not be held liable under 40 C.F.R. § 80.28(b)(1).

The Presiding Officer's dismissal of the second count of the amended complaint is reversed. Air Enforcement established that two violations of the applicable RVP standard were detected at a retail outlet. The Board finds that Commercial Cartage negligently caused those violations by failing to take reasonable steps to guard against the transportation of gasoline in excess of the RVP standard. Thus,

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<sup>17</sup> Commercial Cartage's president testified regarding the possibility of receiving funds from a class action settlement of claims arising out of the Mississippi River flooding in 1993. Tr. Part II at 145-147. There is no indication in the record as to whether Commercial Cartage ever received any funds from this settlement, and our penalty assessment in this case is not contingent upon Commercial Cartage's possible receipt of such funds.

Commercial Cartage is liable for two violations of the gasoline volatility regulations pursuant to 40 C.F.R. § 80.28(e)(3).

The Presiding Officer's dismissal of the third count is upheld. The evidence offered to establish that nine violations were detected at a retail outlet did not include results of gasoline sampling and testing from the retail station. Therefore, Air Enforcement did not establish that the violations alleged in the third count were detected at a retail outlet. Commercial Cartage may not be held liable for these alleged violations.

A penalty of \$2,625 is assessed against Commercial Cartage. Commercial Cartage shall pay the full amount of the civil penalty within sixty (60) days of receipt of this order. Payment shall be made by forwarding a cashier's check, or certified check payable to the Treasurer, United States of America at the following address:

EPA - Washington, D.C.  
Hearing Clerk  
P.O. Box 360277  
Pittsburgh, PA 15251-6277

So ordered.