

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY



IN THE MATTER OF: )  
 ) DOCKET NO. 063981  
 )  
STAN KNIPPELMIER d/b/a )  
James Oil Company )  
JAMES OIL COMPANY )  
APCO OIL CORPORATION )  
 ) Marvin E. Jones  
 ) Administrative Law Judge  
 ) 1735 Baltimore  
 ) Kansas City, MO 64108

INITIAL DECISION

By Complaint issued August 11, 1977, Respondent APCO Oil Corporation (hereinafter APCO) was charged with violation of 40 CFR 80.22(a), promulgated pursuant to Section 211<sup>1/</sup> of the Clean Air Act, as amended (the "Act") in that on or about August 2, 1977, the retail outlet Stan Knippelmier d/h/a James Oil Company (Knippelmier), an APCO branded retail outlet offered for sale unleaded gasoline containing in excess of 0.05 grams per gallon lead content, said gasoline having been delivered (to Knippelmier) by James Oil Company (James), an APCO distributor handling both APCO products and unleaded gasoline purchased from American Petrofina (Fina).

Complaints arising from the subject alleged violation were also filed against said Knippelmier, retailer, and against James, distributor. The Complaint against Knippelmier was resolved on payment by it of \$300.00 under a Consent Agreement executed on October 22, 1977. The Complaint against James was by the Complainant withdrawn. The decision herein concerns only the remaining Complaint against APCO.

An Adjudicatory Hearing was first scheduled for November 1, 1977 in Omaha, Nebraska; when Complaints against

-----  
<sup>1/</sup> 40 U.S.C. 1857f-6c(c).

Knippelmier and James were resolved, the Hearing was moved to Kansas City, Missouri and set for November 30, 1977. Prior to said date, at their request, the parties were permitted to submit said cause on a Stipulation of Facts, dated November 18, 1977, which provides as follows:

1. Respondent, Apco Oil Corporation (Apco) is a refiner within the definition of 40 CFR 80.2(i) and was so on August 2, 1977.
2. James Oil Company, Falls City, Nebraska, is a distributor as defined in 40 CFR 80.2(l), and a reseller as defined in 40 CFR 80.2(n).
3. Stan Knippelmier, operating the retail outlet at 818 J Street, Auburn, Nebraska is a retailer as defined in 40 CFR 80.2(k).
4. The premises at 818 J Street, Auburn, Nebraska operated by Stan Knippelmier, is a retail outlet as defined in 40 CFR 80.2(j).
5. The brand name under which Respondent Apco Oil Corporation markets gasoline is "APCO".
6. The brand name APCO is displayed at the retail outlet at 818 J Street, Auburn, Nebraska.
7. Stan Knippelmier sells unleaded gasoline at 818 J Street, Auburn, Nebraska.
8. Said unleaded gasoline is supplied by James Oil Company.
9. Said unleaded gasoline supplied by James Oil Company is purchased from Respondent Apco pursuant to a written unleaded gasoline agreement, dated February 15, 1977. Respondent also purchases gasoline from American Petrofina, Inc. The last load of unleaded gasoline that was delivered by James to 818 J Street was purchased by James from American Petrofina, Inc.
10. Said unleaded gasoline agreement requires James Oil to take certain steps to prevent contamination of unleaded gasoline.
11. No employee of Stan Knippelmier, including Mr. Knippelmier, or of James Oil Company is an employee of Apco Oil Corporation.
12. Neither Stan Knippelmier nor James Oil Company is an agent of Apco Oil Corporation.

13. On or about August 2, 1977, EPA's authorized representatives inspected Mr. Knippelmier's retail outlet at 818 J Street, collected a sample of the unleaded gasoline offered for sale and represented as unleaded gasoline.
14. On or about August 2, 1977, the gasoline identified by the Apco brand name and offered for sale at the retail outlet and represented as unleaded gasoline exceeded the lead content requirements of 40 CFR 80.2(g), in that it contained .083 grams per gallon lead content.

Thereafter APCO and Complainant timely filed their proposed Findings of Fact, Conclusions of Law, Brief and Argument which have been considered along with all other parts of this record.

The affidavit of Stan Knippelmier substantiates Respondent's proposed Finding No. 16 that Knippelmier leases subject retail outlet from James. Said affidavit is authority for Respondent's statement at Page 5 of its brief: "APCO does not own or operate the (subject) retail outlet".

APCO's answer filed herein is to the same effect. APCO's argument (Discussion, p. 9) states that: "The station in question is not owned, operated, or leased by Respondent".

This record further reveals that James is a "split" jobber handling unleaded gasoline supplied by both APCO and American Petrofina (Fina). The APCO sign is displayed at the subject retail outlet and was provided by James who makes its own deliveries to Knippelmier of the gasoline supplied. The load of unleaded fuel delivered by James on August 2, 1977, the last delivery prior to the EPA inspection and test, was not obtained from APCO but from American Petrofina.

The above is apparent from this record and is adopted, with the Stipulations of Fact, as my Findings of Fact.

CONCLUSIONS OF LAW

1. As APCO does not own, lease, operate or control, or supervise subject retail outlet, it is not, on this record, a "retailer" as that term is defined in applicable regulations [40 CFR 80.22(a); 80.2(k)].

2. As APCO is not a retailer it does not come within the purview of 40 CFR 80.22(a) and is therefore not chargeable with the violation of said section as alleged in the Complaint herein.

DISCUSSION

In alleging in the Complaint that APCO violated said Section 80.22(a), Complainant is in effect alleging that Respondent is a "retailer" under Section 80.2(k). [40 CFR 80.22(a) and 80.2(k)].

Said Sections provide as follows:

"80.22 Controls applicable to gasoline retailers and wholesale purchaser-consumers.

"(a) After July 1, 1974 no retailer or his employee or agent and after January 31, 1975 no wholesale purchaser-consumer or his employee or agent shall sell, dispense, or offer for sale gasoline represented to be unleaded unless such gasoline meets the defined requirements for unleaded gasoline in Section 80.2(g); nor shall he introduce or cause or allow the introduction of leaded gasoline into any motor vehicle which is labeled "unleaded gasoline only," or which

is equipped with gasoline tank filler inlet which is designed for the introduction of unleaded gasoline."

"80.2(k) 'Retailer' means any person who owns, leases, operates, controls or supervises a retail outlet."

Complainant does not, in its proposed Findings of Fact contend that APCO is a "retailer" nor do the parties so stipulate. It is agreed that APCO is a refiner as defined in Section 80.2(i).

It is apparent that since APCO is not a retailer, as contemplated by said Section 80.22(a), said Section is not here applicable. Further, Section 80.23, as demonstrated below, is likewise not applicable [In the matter of Amoco Oil Co., Docket No. A677-0031, Region VI, September 27, 1977; and B&H 66 (Phillips Petroleum), Docket No. 080067, Region VII, January 6, 1978].

"80.23 'Liability for Violations.'  
Liability for violations of paragraph (a) of Section 80.22 shall be determined as follows: ..."

It is apparent that since APCO is not chargeable with a violation under Section 80.22(a), 80.23, a section complementary to 80.22 is also not applicable and the issues with respect to provisions therein are not here pertinent.

In B&H 66, supra, at page 5, we stated:

"In this, and in every case, the burden rests with the Complainant to prove that Respondent is, by rule, subject to the regulatory sanctions proposed by it to be invoked (Section 80.324). In numerous

cases, previously here decided the issue of whether the Respondent is a retailer under the definition [Section 80.2(k)] was not raised. Those cases were submitted on the agreed premise that the only issue outstanding is whether Respondent had proven a defense under Section 80.23(b)(2). In such case, it is rightfully assumed that the Respondent is a retailer subject to the sanctions of Section 80.22(a) which liability thereunder is then determined after consideration of any defense contended for by Respondent under the provisions of said Section 80.23.

"In contrast where, as here, the fact of whether Respondent is a retailer is not proven by Complainant and, in addition, is controverted, such issue must be resolved and determined as by applicable regulations provided."

We further stated, l.c. 6:

"It should be further observed that any other construction of said regulations will present a patent ambiguity which must appropriately be resolved in Respondent's favor."

[See also 73 CJS, p. 426, Section 106].

By reason of the foregoing, I find that Respondent APCO is not answerable for the violation charged, and that no penalty should be assessed.

PROPOSED FINAL ORDER

This Initial Decision and the following proposed Final Order shall become the Final Order of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided in 40 CFR 80.327(c):

"Final Order

It being hereby determined that Respondent APCO Oil Corporation is not answerable for the violation charged in the subject Complaint, no penalty is assessed against it."

This Initial Decision is signed and filed this 25<sup>th</sup> day of January 1978, at Kansas City, Missouri.

  
ALJ