

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR

1/20/79

In the Matter of

SUN OIL COMPANY OF PENNSYLVANIA;

A.R. SANDRI, INC.;

MERRILL TRANSPORT CO.; and

N. DEANE CUSHMAN, and
HAROLD J MURRAY,
d/b/a C & M SUNOCO SERVICE,

Respondents.

Docket No. I UNG-354C

INITIAL DECISION

These are consolidated cases initiated and heard under Sec. 211(c) of the Clean Air Act (42 U.S.C. 7545) and regulations promulgated thereunder, 40 CFR Part 80.

This consolidated proceeding was instituted by individual complaints dated April 26, 1978 against each of the named Respondents, i.e., Sun Oil Company of Pennsylvania (Sun) as a "refiner", A.R. Sandri, Inc. (Sandri) as a "distributor", Merrill Transport Co. (Merrill) as a carrier of gasoline under contract or tariff and N. Deane Cushman, and Harold J. Murray, d/b/a C & M Sunoco Service (C & M Sunoco Service) as a retailer of gasoline.

The complaint alleged that on or about March 6, 1978, C & M Sunoco Service, 278 South Main Street, Rutland, Vermont, offered for sale and sold certain gasoline represented to be unleaded, but which in fact failed to meet the defined requirements for unleaded gasoline.

It was alleged that the gasoline represented as unleaded actually contained 0.72 gram of lead per gallon whereas Sec. 80.2(g) defines unleaded gasoline as gasoline containing not more than 0.05 gram of lead per gallon and not more than 0.005 gram of phosphorus per gallon.

The penalties proposed by Complainant were as follows:

Sun	\$10,000
Sandri	7,000
Merrill	5,000
C & M Sunoco Service	500

Respondents filed answers denying liability and requesting a hearing. Said hearing was held in Boston, Massachusetts on October 17, 1978.

At the conclusion of Complainant's case in chief the complaint against Sandri was withdrawn. Therefore, Sandri is no longer a party to this proceeding.

Discussion

Violations of 40 CFR 80.21 and 40 CFR 80.22(a) were alleged. Once the existence of a violation of 40 CFR 22(a), which prohibits a retailer or wholesale purchaser-consumer from selling, dispensing or offering for sale unleaded gasoline which does not meet the definition contained in Sec. 80.2(g) is shown, the regulations specify that certain parties are deemed in violation. The essential element which Complainant has the burden of going forward with and proving prior to any need to determine which party or parties are

liable for any violation is that the gasoline which was represented and sold as unleaded gasoline on March 1, 1978 by C & M Sunoco Service, did in fact contain lead in an amount in excess of 0.05 gram per gallon. The preponderance of the evidence in the record before me precludes a finding that such was the case.

On March 6, 1978, Robert Knowles, a fuel inspector of Complainant, removed a sample of unleaded gasoline from the unleaded pump at C & M Sunoco Service. On March 17, 1978, Mr. Knowles tested this sample of gasoline using the atomic absorption spectrometry method. The analytical result of the atomic absorption test was a lead content reading of .072 gram per gallon, well above the lead content prescribed in 40 CFR 80.2(g). Complainant bases its cases against all respondents on this test result. As will be demonstrated, this test result and others discussed herein are considered to be suspect and insufficient to prove that the lead content of the sample was actually greater than .05 gram per gallon.

Prior to the atomic absorption test referred to above, the lead content of gasoline is analyzed by use of a field test kit, the test being performed by the fuel inspector, who in this case was Robert Knowles. Dr. Thomas Spittler, one of Complainant's expert witnesses, testified that the field test kit is designed primarily as a screening tool and that it has a margin of error of approximately plus or minus twenty percent.

At the hearing, Mr. Knowles testified that the results of the field test were "marginal." His own inspection report is more precise. It reveals that the result of the field test performed by him indicated a lead content of .04 gram per gallon. At this point, it may be appropriate to point out that this test result is even lower than that achieved by distributor A. R. Sandri's test after a delivery on February 22, 1978 (.044), which test Complainant relies upon to prove that the gasoline in the unleaded tank of C & M Sunoco Service was not contaminated on that date. The only delivery of unleaded gasoline to C & M Sunoco Service after February 22, 1978, was the delivery on March 2, 1978, which was ultimately sampled by Mr. Knowles.^{1/} Applying the usual margin of error for a field test kit of plus or minus 20% as related by Dr. Spittler, to the result obtained by Mr. Knowles (.04), one arrives at a lead content of the gasoline sampled on March 6, 1978, of anywhere from .03 to .05 gram per gallon. Both of these figures are within the permissible level for unleaded gasoline, as that term is defined in Sec. 80.2(g).^{2/}

^{1/} See EPA Exhibit #1. Item #4 of this Inspection Report, entitled "Test Results", shows a result of .04 FTL (Field Test Lead). The Report was signed by Mr. Knowles.

^{2/} Sec. 80.2(g) defines unleaded gasoline as gasoline containing "not more" than 0.05 gram of lead per gallon. Thus, in order to fail to comply with these defined requirements, a sample must contain more than .05 gram of lead.

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It is readily apparent that the two different tests performed by Mr. Knowles on the same sample are inconsistent with each other. One test (field test kit) shows a lead content of anywhere from .03 to .05 gram per gallon, while the other test (atomic absorption) resulted in .072 gram per gallon. The field test shows no violation of Sec. 80.2(g), while the atomic absorption test allegedly establishes a quite significant violation. Since the margin of error has already been taken into account in arriving at the outer parameters of the field test result, there obviously is no way of reconciling the two tests. It should be pointed out that the court is aware of the fact that Mr. Knowles' field kit test is merely a screening test and that Complainant does not rely upon it to support its allegations herein.

However, one of the pieces of evidence upon which Complainant is relying is another field kit test performed by distributor A. R. Sandri on February 22, 1978, immediately after it delivered unleaded gasoline to C&M Sunoco Service previous to the Merrill delivery on March 2, 1978, which test purportedly revealed a lead content at that time of .044 gram per gallon. Complainant is relying upon this Sandri field kit test to assert the inference that if the unleaded gasoline conformed after the Sandri delivery, any subsequent contamination must have been caused by Merrill during or at the time of its March 2, 1978, delivery. The Sandri test result (.044) was actually higher than

Complainant's field kit test (.04) and yet Complainant claims the Sandri test proves that the unleaded gasoline delivered by Sandri on February 22, 1978, was conforming, while at the same time arguing that the unleaded gasoline delivered by Merrill on March 2, 1978, was nonconforming when Complainant's lower test result was obtained. With respect to the two field kit test results, Complainant appears to be taking completely opposite positions with respect to the validity of these results. To prove a case against Merrill, the Complainant is defending the validity of the Sandri test. It is in the position of attacking the validity of a field kit test performed by one of its own inspectors while defending the validity of a similar field kit test performed by a presumably less professional third party.

Merrill asserts that there is good reason why the field test performed by Complainant is more reliable than the atomic absorption test in this case. The atomic absorption testing procedures employed by the inspector were those set forth in 40 CFR 30, Appendix B, Test For Lead In Gasoline By Atomic Absorption Spectrometry. On March 17, 1978, utilizing these procedures, Mr. Knowles tested the same sample upon which he had previously performed a field kit test with a result of .04 gram per gallon, the result from this test being a lead content of .072 gram per gallon. On April 5, 1978, Mr. Knowles, again using the same procedures and testing the same sample, found a lead content of .080 gram per gallon. This is a difference of .008 gram per gallon between the two atomic absorption test results.

During cross-examination, Mr. Knowles was asked:

Q. Why would there be a difference on those two dates?

A. I don't know, sir.

Q. Do you have any idea why?

A. I really don't. (T. 24)

Section 8.1.1 of Appendix B provides:

"Repeatability - Duplicate results by the same operator should be considered suspect if they differ by more than 0.005 g/gal."

The two atomic absorption tests performed on the sample were carried out by the same operator, Robert Knowles, and the results differed by .008 gram per gallon, or sixty percent (60%) more than that considered acceptable by Section 8.1.1 of Appendix B. Thus, according to Complainant's own regulations, the results of the atomic absorption test performed by Robert Knowles "should be considered suspect."

The field test, even taking into consideration the normal twenty percent (20%) margin of error, establishes that there was no violation of the regulations. The two atomic absorption tests both show a significant violation. However, the difference between the two atomic absorption test results, under the regulations, provide that such test results should be considered suspect. Mr. Knowles was unable to explain this disparity nor was there any evidence that the field test kit is not perfectly reliable within its normal twenty percent (20%) margin. While not essential to the case of the Complainant it would seem that there should be some correlation between the results.

of the field kit test and the results of the atomic absorption test or tests, which has not been shown. The Complainant partially is relying upon a field kit test by Sandri to prove its case. Complainant has the burden of proving by a preponderance of the evidence that the unleaded gasoline being offered for sale at C & M Sunoco Service failed to comply with 40 CFR 20.2(g). Complainant has not sustained its burden of proving that the unleaded gasoline had a lead content of greater than .05 gram per gallon when the very tests it is relying upon to prove that fact are themselves regarded as suspect under its own regulations, especially in the absence of any explanation of the variance in the results between the two atomic absorption tests and a lack of any correlation between these tests and the field kit test performed by Mr. Knowles on March 6, 1978. In the absence of proof of this most essential element by Complainant, it is not necessary to resolve the other points of law and fact raised by the parties. Therefore, the complaint against all three respondents must be dismissed.

FINDINGS OF FACT

1. On March 6, 1978, an EPA fuel inspector, Robert Knowles, purchased a sample of unleaded gasoline being offered for sale at C & M Sunoco Service in Rutland, Vermont.

2. On March 13, 1978, the inspector tested the sample with a field test kit. This test revealed a lead content of .04 gram per gallon. The results of a field kit test may contain a margin of error of plus or minus 20%.

3. On March 17, 1978, the inspector performed an atomic absorption spectrometry test on the sample, which test revealed a lead content of .072 gram per gallon. A similar test on the same sample was performed on April 5, 1978 by the same inspector, which test revealed a lead content of .080 gram per gallon.

4. Complainant's inspector did not explain the discrepancy between the results of the two atomic absorption tests. Section 8.1.1 of Appendix B of 40 CFR 80 governing these proceedings provides that a difference in result of greater than .005 gram per gallon in duplicate tests performed by the same operator "should be considered suspect."

5. Given the differences between the atomic absorption test results and the lack of any correlation with the results of the field test which showed no violation of 40 CFR 80.2(g), it is found that the atomic absorption test results are unreliable and cannot support the conclusion that the sample of gasoline failed to conform to the defined requirements of 40 CFR 80.2(g) of the Regulations.

CONCLUSIONS OF LAW

1. The EPA has the burden of proving by a preponderance of the evidence that the gasoline which it sampled and tested failed to comply with the defined requirements of 40 CFR 80.2(g).

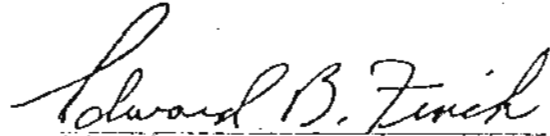
2. The EPA has failed to prove by a preponderance of the evidence that the gasoline which it collected on March 6, 1978 from the unleaded gasoline pump at C & M Sunoco Service, Rutland, Vermont, had a lead content greater than .05 gram per gallon.

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 is hereby ordered that, pursuant to the above conclusions, the complaints issued against Sun Oil Company of Pennsylvania, Merrill Transport Co. and H. Deane Cushman and Harold J. Murray, d/b/a C & M Sunoco Service are dismissed.



Edward B. Finch
Administrative Law Judge

January 30, 1979