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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
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KANSAS CITY, MISSOURI 64108

IN THE MATTER OF:	)	DOCKET NO. 070045
	)	
STAN'S 66,	)	
LUPPES BLOCK OIL COMPANY,	)	
PHILLIPS PETROLEUM COMPANY,	)	
	)	
Respondents	)	

INITIAL DECISION OF PRESIDING OFFICER

This matter was initiated on February 18, 1977, by complaints issued by the Director, Enforcement Division, United States Environmental Protection Agency, Region VII (Complainant), alleging that, on or about February 9, 1977, the retail outlet, Stan's 66 (a Phillips Petroleum Company branded retail outlet) offered for sale unleaded gasoline containing in excess of .05 grams per gallon lead content, said gasoline having been supplied by Luppes Block Oil Company, distributor (also identified as Luppes Oil Company, hereinafter Luppes). The actions were alleged to violate 40 CFR 80.22(a) and 80.23(a).

Counsel for Stan's 66 (Stan's) and Luppes filed separate answers on March 9, 1977, denying on behalf of Stan's that Stan's offered for sale unleaded gasoline as alleged, and stating that, regardless of the former allegation, if any unleaded gasoline was so offered for sale, it was without the knowledge, consent, permission, or authorization of Stan's, and that if any unleaded gasoline in excess of .05 grams per gallon lead content was found on Stan's premises, it was placed there by mistake. The answer on behalf of Luppes denied that Luppes offered for sale unleaded gasoline in excess of .05 grams per gallon lead content, that Luppes supplied Stan's with unleaded gasoline in excess of .05 grams per gallon lead content, and stated that, regardless of the foregoing allegations if gasoline in excess of .05 grams per gallon lead content was offered for sale by Stan's, the violation was not caused by Luppes or his employee or agent. Phillips Petroleum Company (Phillips) filed an answer on March 11, 1977, denying that there had been a violation of the relevant regulations by Phillips in that Phillips sells gasoline direct to Luppes and does not directly supply and deliver any leaded or unleaded gasoline to Stan's,

nor does it operate, control or supervise such service station. Phillips further alleged that the violation, if it occurred, was caused by action of Luppes or Stan's, in contravention of a contractual undertaking imposed upon Luppes by a contract, and despite reasonable efforts by Phillips, including periodic sampling, to ensure compliance with the contractual obligation and relevant regulations.

Each of the parties requested a hearing. By motion of March 22, 1977, counsel representing Luppes and Stan's requested on behalf of each of those parties that the hearing be held in Des Moines, Iowa, or Webster City, Iowa, based upon statements that the parties are small businessmen, that they had a meritorious defense to the complaint, and that it would be unduly expensive and burdensome for the respondents to be required to go to Kansas City, Missouri, for a formal hearing in that they would be required to pay expenses for their attorney and witnesses and would be away from their businesses for a period of time and would have expenses for additional help while away.

The undersigned was designated as Presiding Officer in this matter on March 22, 1977, by Charles V. Wright, Acting Regional Administrator.

Pursuant to the motion of counsel for Stan's and Luppes, an Order to Set Hearing and Granting Motion to Convene Hearing in Des Moines, Iowa, was issued on March 25, 1977. In the order, the parties were encouraged to reach settlement prior to formal hearing, and were asked, in order to identify specific issues and to expedite a possible stipulation of facts and documents, that counsel furnish a summary of the facts relied upon to establish or refute liability, identify records or other documents which would be introduced as evidence, and provide a list of proposed witnesses and a brief statement of the expected testimony of each. Counsel were requested to review any such statements, reach agreement, and advise the Presiding Officer of any such stipulations.

Counsel for Stan's and Luppes did not respond to this order, but, upon the opening of the hearing, offered on the record to stipulate that Stan's did offer for sale, on or about February 9, 1977, unleaded gasoline with more than .05 grams per gallon lead content, and that the violation was caused by Stan's. It was further suggested by counsel that there was no liability on behalf of Luppes.

After several off-the-record discussions, it was agreed by all counsel that certain matters could be made the subject of stipulation. The intent of those agreements was dictated into the record, and subsequently formalized by execution of several documents by the parties. On April 26, 1977, a stipulation was entered which acknowledged that the samples taken by the Complainant showed that the gasoline offered for sale to the public by Stan's 66 on February 9 and 10, 1977, contained more than .05 grams per gallon lead content, that the unleaded gas so offered was a branded motor fuel of Phillips Petroleum Company, that the excessive lead content in relation to Environmental Protection Agency (EPA) regulations was caused by Stan's and not by Luppes, and that the complaint against Luppes should be withdrawn. A separate document received by the Regional Hearing Clerk on April 29, 1977, also executed by all parties, acknowledged that the information in each of Complainant's Exhibits 1, 2, and 3 was true, that these exhibits and other stipulations established Complainant's case as to the existence of a violation of 40 CFR 80.22(a) at Stan's on February 9, 1977.

The hearing proceeded with the presentation of witnesses by Phillips, seeking to establish the affirmative defense of 40 CFR 80.23(b)(2), and an examination of one EPA employee by counsel for Stan's and Luppes. Subsequent to the close of hearing and the presentation of proposed findings of fact and conclusions of law, and briefs in support thereof by Complainant and Phillips, counsel for Luppes and Stan's directed a letter to counsel for Complainant, with a copy to counsel for Phillips. The copy to Complainant was furnished to the Regional Hearing Clerk on May 26, 1977. In the letter, counsel for Stan's and Luppes stated that he was in possession of Complainant's proposed findings of fact and conclusions of law, and order and brief in support thereof, and had no serious disagreements with it as it related to Stan's and Luppes, and therefore did not feel it necessary to file any proposals of his own.

The conclusions of law submitted by Complainant contain a finding that Stan's violated 40 CFR 80.22(a), and the order based thereupon provides that Stan's shall pay a civil penalty in the amount of $500.00. It is further provided that the complaint issued to Luppes shall be dismissed.

In light of the foregoing, it must be concluded that Stan's is liable for the violation as alleged, and a civil penalty must be imposed as set forth below, and that the complaint against Luppes must be dismissed.

It remains for consideration whether Phillips has established an affirmative defense as provided by 40 CFR 80.23(b)(2), which provides in pertinent part as set forth below:

> (2) In any case in which a retailer or wholesale purchaser-consumer, a reseller (if any), and any gasoline refiner would be in violation under paragraph (a)(1) of this section, the refiner shall not be deemed in violation if he can demonstrate:
>
> (i) That the violation was not caused by him or his employee or agent; and
>
> (ii) That the violation was caused by an act in violation of law (other than the Act or this part), or an act of sabotage, vandalism, or deliberate commingling of leaded and unleaded gasoline, whether or not such acts are violations of law in the jurisdiction where the violation of the requirements of this part occurred, or
>
> (iii) That the violation was caused by the action of a reseller or a retailer supplied by such reseller, in violation of a contractual undertaking imposed by the refiner on such reseller designed to prevent such action, and despite reasonable efforts by the refiner (such as periodic sampling) to insure compliance with such contractual obligation.

Upon consideration of the entire record, including the transcript, the proposed findings of fact and conclusions of law submitted by the parties, and other relevant documents, I have concluded that Phillips has not established the affirmative defense referred to in these sections, and must be assessed a civil penalty based on the following findings of fact and conclusions of law.

Findings of Fact

1. Phillips Petroleum Company is a refiner in the definition of 40 CFR 80.2(i), and was so on the dates relevant herein.

2. Phillips sold unleaded gasoline to Luppes Oil Company, Inc., pursuant to a Branded Jobber Sales Contract dated June 21, 1976. Pursuant to the terms of the contract, Luppes agreed to handle, distribute, and sell all petroleum products sold under the contract which are subject to the jurisdiction of EPA, in strict compliance with the laws and all regulations issued by such agency, and to assure compliance with the same by any retailer supplied by Luppes.

3. By an attachment to the Jobber Sales Contract, known as Exhibit A, Luppes agreed to observe several practices in connection with the sale and handling of unleaded gasoline, including the following:

(a) To follow specified procedures in the storage of unleaded gasoline, taking specific action upon the initial delivery of unleaded gasoline, and acknowledging that the original fill of unleaded gasoline must be tested for compliance with EPA regulations prior to sale of any of the product to any customer.

(b) To keep painted at all times according to a color code the covers of underground tank filling points, and

(c) To observe certain loading and unloading procedures by identifying tank vehicles according to their ability to be drained.

4. At the time of the violation, Phillips was observing the practice of sampling its branded retail outlets for compliance with EPA unleaded gasoline regulations at the frequency of approximately once each six months. A representative of Phillips had tested the unleaded gasoline offered for sale at Stan's on September 3, 1976, at which time it was found to be in compliance with EPA regulations.

5. Stan's was sold by Phillips on or about January 21, 1977, to Luppes Oil Company, Webster City, Iowa.

6. Stan's has acknowledged responsibility for the violation of February 9, 1977, and agreed to a civil penalty of $500.00.

Conclusions of Law

1. The record does not contain any showing of the cause of the offer for sale of unleaded gasoline containing in excess of .05 grams per gallon lead content by Stan's on February 9, 1976.

2. The agreement existing between Phillips and Luppes Oil Company on February 9, 1977, did impose a contractual obligation on Luppes to conduct the sale and handling of unleaded gas in such a manner as to prevent violations such as the one which is the subject of this matter.

3. Phillips failed to exercise a program of reasonable oversight of such contractual obligations sufficient to enable it to establish the affirmative defense contemplated by 40 CFR 80.23; therefore, it is concluded that the violation was caused by Phillips, and it must be held responsible.

Discussion

Phillips argues in its brief that it has established the necessary affirmative defense of 40 CFR 80.23(b)(2)(i) and (iii). Phillips points to

the Jobber Sales Contract and Exhibit A thereto which provide extensive requirements for the jobber, in this case, Luppes, in its handling and storage of Phillips unleaded gasoline. Phillips suggests that the test of subparagraph (iii) is met in that it did perform periodic sampling, and suggests that all paragraph (iii) requires is "1. That the refiner by contract require the reseller to comply with the unleaded gasoline requirements; and 2. That the refiner make reasonable efforts to insure compliance by the reseller with such contractual obligation, which will be satisfied by periodic sampling by the refiner." Not resting with this argument, Phillips suggests alternatively, that if "reasonable efforts" requires more than periodic sampling, that additional test has also been met by Phillips, as evidenced by the program of mailing memoranda of instructions to its jobbers and dealers referring to the unleaded gas requirements, and by the personal contacts made by Phillips' representatives with Luppes and Stan's.

It has been acknowledged that the unleaded gasoline regulations at issue in this matter serve a valid and important public health protection role in the assurance to the general public of unleaded gasoline which will not contaminate catalytic converters fitted on 1975 and later model year automobiles. In the implementation of the congressional goal of the achievement of clean air, EPA has seen fit to impose on refiners of unleaded gasoline the requirement that they meet a high standard of conduct in relation to the offer for sale of unleaded gasoline, and have required refiners whose unleaded gasoline product is offered for sale in violation of such regulations to be held liable unless they can establish that certain facts existed at the time of sale which provide them with an affirmative defense. As was observed in a similar proceeding, this standard of conduct owed by the refiner does not cease when unleaded gasoline is transferred from the refiner to the jobber or the retail outlet, but extends beyond that point, perhaps even until the unleaded product is delivered to the motorist's tank (In the Matter of Amoco Oil Company, Docket No. 030085). That reasoning seems sound and is adopted as applicable to this proceeding. The applicable EPA regulations originally provided for strict liability of refiners, but that

requirement was modified by the Court in Amoco Oil Company, et al v. EPA, 501 F.2d 722, wherein it was held:

> A refiner which can show that its employees, agents, or lessees did not cause the contamination at issue, and that the contamination could not have been prevented by a reasonable program of contractual oversight, may not be held liable under 40 CFR Section 80.23(a)(1). (emphasis added)

As Phillips has presented its argument, it believes initially that the affirmative defense of subparagraph (iii) is met by the existence of a contract between Phillips and Luppes, and the exercise by Phillips of "reasonable efforts" to ensure compliance with such contractual obligations, "which will be satisfied by periodic sampling by the refiner." That this construction is not consonant with the intent of the regulations is evidenced by the interpretation which must be placed on the term "reasonable." As expressed by Black's Law Dictionary, "reasonable" is to be construed as "fit and appropriate to the end in view." Under the circumstances of this case, it cannot be accepted that a sampling program of six months' frequency is reasonable to ensure compliance, since such a program may be as well interpreted as an assurance by Phillips that it will not inquire into the compliance of its jobbers and retailers with respect to the sale of unleaded gasoline on a more frequent basis. Apparently seeking to buttress its argument that the existing contractual relationships plus the sampling program are sufficient to satisfy the requirements of reasonable efforts to ensure compliance, Phillips suggests in its brief that paragraph A-5 of Exhibit A to the Jobber Sales Contract requires Luppes also to test and sample unleaded gasoline. Although doubt must be expressed whether such a contractual requirement would enable Phillips to qualify for the affirmative defense without further demonstration of the oversight exercised by Phillips, it is sufficient to notice for this proceeding that the contractual obligation referenced is ambiguous and does not clearly indicate that Luppes does have a responsibility to sample the unleaded product at its premises. The contract may be as easily interpreted as placing an obligation on Phillips to sample and test the unleaded product, since the pertinent language reads as follows:

> To test the integrity and continued compliance with regulations of the supply of unleaded gasoline in the tank, sampling and testing of the unleaded product

must be accomplished periodically (at intervals established and followed by Seller for such purpose). (emphasis added)

At any rate, should Phillips choose to interpret this contractual language as placing an obligation on Luppes, it has not provided any demonstration of the oversight which it exercised regarding this requirement, and there is, thus, no showing of reasonable efforts to ensure compliance.

Recognizing that the initial argument must fall short, Phillips has argued in the alternative that it did conduct a program of continuing education and admonition through letters, memoranda, instructions, publications, and personal contact to enforce the contractual obligations. It is not apparent from the record in this matter whether the violation under consideration may have been caused by faulty procedures in a changeover to the offer for sale of unleaded gasoline, or whether unleaded gasoline had been offered for some time, and the events leading to the violation occurred through careless practices by the employees at Stan's subsequent to the changeover. Several of the documents in the memoranda mailed by Phillips to its jobbers, dealers, and other business associates touch on these problems, and, in particular, a memorandum of November 16, 1976, seems comprehensive, understandable, and comprehensible. However, the impact of these mailings on the various responsible parties in terms of the significance attached to the instructions contained therein is unclear; and the only indication of personal contact with the personnel at Stan's by a Phillips representative regarding unleaded gas requirements is through the testimony that a sample was taken from the station by a Phillips' representative on September 3, 1976. Mr. McClure, another Phillips' witness, testified that he does attempt to inform jobbers and dealers of the unleaded gas program, because he is "interested in it" and does feel it is worthwhile. While this attitude is exemplary and to be commended, there is no indication in the record that any such efforts were directed at Stan's.

In short, there has been a failure by Phillips to demonstrate that it exerted the type of contractual oversight that is necessary to amount to reasonable efforts to ensure compliance with the applicable contractual obligations, and it must be held responsible for the violation under consideration.

The absence in the record of any indication of the actual cause of the violation does not serve to excuse Phillips. What is more relevant is the similar absence in the record of the type of aggressive and unyielding efforts to foster the provision of uncontaminated unleaded gasoline to the public that is required by EPA regulations. Accordingly, Phillips must be assessed a civil penalty.

Proposed Civil Penalty

In evaluating the civil penalty against Phillips, consideration must be made of the elements of 40 CFR 80.330(d) and the guidelines of August 29, 1976 (40 FR 39973). I have considered the mitigating factors included in the record, and the gravity of the violation from the standpoint of the misconduct and the potential harm which might result from the misconduct.

First, it is significant that Phillips did not act in bad faith in creating the circumstances which led to the violation in this matter, but failed through its agents to exercise an adequate program of contractual oversight which might have prevented the violation.

Secondly, the gravity of the violation is somewhat exacerbated by the fact that the atomic absorption tests performed by complainant revealed that the lead content of the sample taken was .230 gram per gallon, or well over four times the amount allowed under applicable EPA regulations. This factor is negated to some extent by the indication that Phillips acted promptly to stop the sale of the contaminated product, and to correct the situation.

By reason of the foregoing, I find that a civil penalty of $3,500.00 is appropriate and should be assessed against Phillips Petroleum Company.

By reason of the facts agreed to between Complainant and counsel for Stan's 66, I find that a civil penalty of $500.00 must be assessed against Stan's 66.

Proposed Final Order

This initial decision and the following proposed final order assessing a civil penalty shall become the final order of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided by 40 CFR 80.327(c).

Final Order

It is hereby determined that respondents Phillips Petroleum Company and Stan's 66 have violated 40 CFR 80.22(a) as alleged in the complaints issued herein, and a civil penalty is hereby assessed against respondent Phillips Petroleum Company in the amount of $3,500.00 and a civil penalty is hereby assessed against Stan's 66 in the amount of $500.00, and respondents are ordered to pay said amounts by Cashiers or Certified Check payable to the United States Treasury within sixty (60) days of receipt of this order. The complaint against Luppes Block Oil Company is hereby dismissed.

This initial decision is signed and filed this 1st day of July 1977 at Kansas City, Missouri.

David R. Tripp
Presiding Officer