UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Administrative Law Judges
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In the matter of	)	
	)	
Gasoline Marketers, Inc., and	)	Docket Nos. (Region VI)
Arkansas Transport Company	)	A677-0065 and A677-0181

INITIAL DECISION

These are consolidated cases initiated and heard under Section 211 of the Clean Air Act (42 U.S.C. 7545), and implementing regulations, 40 CFR Part 80. The proceedings were instituted by complaints dated June 16, 1977, and November 1, 1977, against respondents, Gasoline Marketers, Inc., as a retailer of certain gasoline represented to be unleaded, and Arkansas Transport Company as a distributor of unleaded gasoline. The complaints alleged that on March 15, 1977, certain gasoline represented to be unleaded was offered for sale at the retail outlet named Western #36, West Pine, Warren, Arkansas, and the gasoline contained approximately 0.153 gram of lead per gallon whereas the applicable Environmental Protection Agency regulation (40 CFR 80.2(g)) defines unleaded gasoline as containing not more than 0.05 gram of lead per gallon. Violations of 40 CFR 80.21(a) and 80.22(a), which prohibit the sale or, in the case of 80.22(a), the offering for sale of gasoline, represented to be unleaded, which contains more than 0.05 gram of lead per gallon, were alleged.

The respondents filed answers denying liability and requesting a hearing. A hearing was held in Dallas, Texas, on June 7, 1978.

DISCUSSION

Once the existence of a violation of 40 CFR 80.22(a), which prohibits a retailer from selling or offering to sell as unleaded gasoline that which does not meet the EPA definition, is shown, the regulations specify that certain parties are deemed to be in violation. Apposite parts of 40 CFR 80.23 are set out below:

> (a)(2) . . . the retailer . . . and any distributor who sold that person gasoline contained in the storage tank which supplied that pump at the time of the violation shall be deemed in violation.
>
> (b)(1) In any case in which a retailer. . . or distributor would be in violation under paragraphs (a)(1) or (2) of this section, the retailer. . . shall not be liable if he can demonstrate that the violation was not caused by him or his employee or agent.
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> * * * * *
>
> (d) In any case in which a retailer. . . and any gasoline distributor would be in violation under paragraph (a)(2) of this section, the distributor will not be deemed in violation if he can demonstrate that the violation was not caused by him or his employee or agent. (Emphasis supplied.)

Hence, under the regulations, once it is concluded that Western #36 was offering for sale as unleaded gasoline a product which did not meet the unleaded definition established by EPA, the retailer, Gasoline Marketers, is deemed to be in violation and hence liable unless it "can demonstrate that the violation was not caused by [Gasoline Marketers] or [its] employee or agent." The distributor, Arkansas Transport, is in a like position.

The evidence was essentially uncontradicted that the unleaded gasoline offered for sale by Western #36 on March 15, 1977, contained

0.153 gram of lead per gallon, and therefore exceeded the lead limit established by EPA. Furthermore, the evidence was uncontradicted that Arkansas Transport was the only distributor to put gasoline in the unleaded gasoline storage tank for several months prior to March 15, 1977.

Before passing to a discussion of the liability determinations as to each of the respondents some comments are appropriate as to the background of the regulations which place the burden of proof on the respondents once the violation is shown to have occurred.

The Court of Appeals for the District of Columbia has had two occasions to review the 80.23 provisions, particularly as applied to refiners. An examination of 80.23, as it now appears in the Code of Federal Regulations, shows that the burden placed on a refiner under circumstances similar to those here is greater than that placed on the distributor and retailer. The refiner not only has to demonstrate the "violation was not caused by him or his employee or agent," but also, in many cases, must show that it was caused by the action of someone else in violation of a contract obligation established by the Refiner which the Refiner took reasonable steps to enforce. See 40 CFR 80.23(b)(2). These burdens are only placed on the refiner if its corporate, trade, or brand name is displayed at the retail outlet.

The first Court of Appeals case (Amoco I) was Amoco Oil v. EPA, 501 F.2d 722, 6 ERC 1481 (D.C. Cir. 1974). In this case several sections of 40 CFR Part 80 were questioned and the regulations were generally sustained. However, as to 80.23, a part of it as then written was held to be invalid. 80.23, as considered in Amoco I, deemed liability

differently depending on whether or not the refiner's brand name was displayed at the retail outlet; if it was displayed, the retailer and the refiner were deemed liable. If it was not displayed, the retailer and the distributor were deemed liable. The retailer was permitted to avoid liability if he could show that the "violation was not caused by him or his employee or agent." The distributor could avoid liability if two or more supplied the retail outlet storage tank, and "any of such distributors . . . can demonstrate that the violation was not caused by him . . . . ." See the regulations appended to the Amoco I decision; 6 ERC 1500 et seq. In summary, the liability deeming provisions were not too different from what exist currently, except that the refiner, under the regulations as then written, was deemed in violation regardless of who caused the violation.

The Court of Appeals held that the imposition of a strict vicarious liability on the refiner was not reasonable. It held this with respect to both refiners and distributors since it wasn't clear as to whether or not distributors would not in certain instances also be held strictly liable. It said at 6 ERC 1499:

> . . . Refiners and distributors must have the opportunity to demonstrate freedom from fault. A distributor which can show that its employees and agents did not cause the contamination at issue may not be held liable under 40 CFR Sec. 80.23(a)(2). 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 Sec. 80.23(a)(1). (Footnote omitted.)

The basis for the imposition of this burden on the refiners and distributors is found in the following from the Court's opinion (6 ERC at 1498):

> . . . In their briefs, and particularly at oral argument, petitioners conceded that lead contamination of gasoline sold at retail is typically caused in the pre-retail stages of the distribution chain. Given that it would be extremely difficult for the Agency to locate the source of contamination in each instance, petitioners conceded that a presumption of liability would be reasonable with respect to the retail outlet's immediate supplier or-- in the case of branded gasoline--with respect to the refiner of the outlet's product. . . .

In short, Amoco I approved of the imposition of the burdens of proof which the regulations place on Gasoline Marketers and Arkansas Transport in this case.

The next time the Court of Appeals for the District of Columbia considered the liability provisions of 40 CFR Part 80 was in 1976 in a case referred to as Amoco II, Amoco Oil v. EPA, 543 F. 2d 270, 9 ERC 1097. EPA had changed the liability regulations following the decision in Amoco I, and many of the same refiners attacked the new liability provisions. Two facets of the regulations as then written were objected to:

1. The proviso that for a refiner to avoid strict liability he had to prove affirmatively that the violation "was caused" by another party; and

2. The imposition of strict liability on the refiner in most cases if the retail outlet was one "substantially owned, leased, or controlled" by the refiner.

The first issue listed above was mooted by agreement of the parties reached at the court's suggestion. Footnote 8 to the opinion records this (9 ERC 1099):

> . . . it was argued that the statute does not allow the Administrator to impose absolute liability on one who fails to prove that he is not a "nonviolator." Therefore, petitioners maintained that the regulations should be revised to make it clear that the burden of proof lies with the Administrator.
>
> At the suggestion of this court, the parties met following oral argument and drafted the following additional subsection which they agree disposes of the "burden of proof" issue in a manner satisfactory to both sides:
>
> (viii) In subparagraphs (ii) through (vi) hereof, the term "was caused" means that the refiner must demonstrate by reasonably specific showings by direct or circumstantial evidence that the violation was caused or must have been caused by another.

EPA made this subparagraph 80.23(b)(2)(viii) part of the regulations by publication in 42 Federal Register 45306 on September 9, 1977.

As to the second issue, the court split with the majority holding that it was arbitrary for EPA to impose strict liability. The result is that the refiner may avoid liability by showing that neither it nor its employees or agents caused the violation, and that the violation was caused by someone else, in spite of contractual or other efforts of the refiner to prevent violations.

Both Amoco I and II accept the burden shifting provisions of 80.23 insofar as retailers and distributors are concerned. And the Court of Appeals, at least by implication, approves an interpretation

of the "was not caused" language that appears in portions of 80.23 as requiring the retailer and distributor to "demonstrate by reasonably specific showings by direct or circumstantial evidence that the violation was caused or must have been caused by another."

From the foregoing I conclude that the evidence in these consolidated cases must be weighed to see if, by a preponderance of the evidence, Gasoline Marketers or Arkansas Transport have demonstrated "by reasonably specific showings by direct or circumstantial evidence that the violation was caused or must have been caused by another." The preponderence of the evidence test is specified in 40 CFR 80.324. I conclude that Gasoline Marketers did carry this burden and that no liability is to be attached to it; and that Arkansas Transport did not carry this burden and liability does attach to it.

Gasoline Marketers is not liable.

The testimony of Jack H. Wright, Executive Vice President of of Gasoline Marketers, and Clinton Threlkeld, Manager of Western #36, was persuasive. From that testimony I have concluded that Gasoline Marketers has impressed upon its station managers the need to exercise due care to prevent contamination of unleaded gasoline sold the public, and has established reasonable procedures to prevent and detect contamination of its unleaded gasoline. I am convinced that Mr. Threlkeld, in the operation of Western #36, followed those procedures which had been established by Gasoline Marketers.

The principal procedures which lead me to conclude that the contamination was caused by someone other than Gasoline Marketers in this case are:

1. The stick readings made before and after deliveries of gasoline to be sure that unleaded gasoline as ordered was delivered to the unleaded tank.

2. The practice of not ordering the same quantities of unleaded gasoline as is ordered for leaded gasoline in any one delivery.

3. Daily stick readings and bookkeeping entries which would show the introduction of any large amount of foreign substance into a storage tank.

To be effective the procedures must be followed. The testimony of Mr. Threlkeld indicates they were, and the accounting records introduced as Gasoline Marketer Exhibit A support his testimony. In other words, looking at the accounting records, it is shown that the orders of unleaded gasoline for the period immediately preceding the March 15, 1977, date were never in the same quantity as the orders for leaded gasoline made at the same time, and the stick readings during this same period do not reflect any evidence that any quantity of gasoline other than that associated with the unleaded gasoline orders was added to the unleaded gasoline storage facilities.

EPA's brief in support of a finding of liability argues that Gasoline Marketers did not discuss several possible sources of contamination; e.g., the possibility that the storage tanks are connected; and whether or not the tanks were locked. Counsel for EPA did not go into any of these matters at the hearing, and it is too much to expect the retailer to raise every possible source of

contamination and then show that it didn't occur. The burden of the regulations is to demonstrate by reasonably specific showings that the violation was caused or must have been caused by another. Gasoline Marketers has shown the gasoline pumped from the unleaded storage tank on March 15, 1977, was probably placed there by its distributor, Arkansas Transport, and that the gasoline placed in the storage tank by Arkansas Transport in the 30-day period prior to March 15, 1977, was represented to be unleaded gasoline. During that time about 10,000 gallons of unleaded gasoline were delivered into a running inventory of about 4,000 to 5,000 gallons.

The burden established by the regulations is not for the retailer to show who actually did cause the contamination, it is to show that he did not cause it. The preponderance of the evidence leads me to conclude that neither Gasoline Marketers nor its employees or agents caused the violation in this case, and, accordingly, there is no liability assessed to Gasoline Marketers.

Arkansas Transport Company is liable.

I am not satisfied from the evidence as to how the contamination occurred, and do not hold Arkansas Transport liable because of a conclusion that it caused the contamination. It is held liable because of the "liability deeming" provision of the regulations which shifts the burden of proof to Arkansas Transport once the violation is shown to have occurred. Arkansas Transport did not show by a preponderance of the evidence that it did not cause the contamination, or that it must have been caused by another.

Arkansas Transport is caught between a persuasive showing by the retailer that it didn't cause the contamination, and the records of the refiner which make it appear that unleaded gasoline meeting EPA standards was delivered to Arkansas Transport at the refinery. This places a heavy burden on Arkansas Transport, and the possibilities for contamination to have occurred in connection with delivery from the refinery to the storage tanks of Western #36 are numerous.

The testimony of James Siegler, President of Arkansas Transport, as to how the drivers were supposed to ensure there is no contamination outlined an approach which, if followed, should prevent contamination. However, I am not persuaded that these procedures are forcefully brought to the attention of the drivers; for example, there is no indication in the record that written instructions are given to the drivers, or that they are reminded from time to time to follow the procedures outlined by Mr. Siegler. And, it would appear that in unloading at Western #36 during early 1977 the drivers were not careful to be sure that all tanks were empty before leaving. See testimony of Clinton Threlkeld, transcript pages 124, 125. In short, I am not convinced by the testimony that the drivers that delivered to Western #36 during the period preceding March 15, 1977, always followed the procedures outlined by Mr. Siegler. Their affidavits (AT Exhibit (D)) would indicate they did, but the weight to be given affidavits where there is no chance for cross-examiantion on the type issues involved here is very little. And the weight I give to the affidavits is not enough to overcome the fact that contamination did come from some source and I am persuaded that it did not come from the refinery or the retailer.

Also some doubt is established as to the effectiveness of the instructions given the drivers by the incident of the cross-dump that occurred on March 11, and the incident of the driver starting to unload at Western #36 on February 18, 1977, before anyone from the station knew he was there, and presumably before anyone at the station told him where to place the gasoline. See transcript pages 92, 93, 94, 121, 132, 133. For example, even though Mr. Siegler testified that his drivers were instructed that storage tank caps for premium gasoline under the American Petroleum Institute color code is red for premium (transcript pages 63, 64), one of his drivers put premium gasoline in a blue capped storage tank on March 11. It also appears from the accounting records of Gasoline Marketers for February 18 that some regular gasoline was erroneously dropped into the premium storage tank on that date. The point is that if this number of errors occurred at this single station during this relatively short period of time, I question whether Arkansas Transport engages in an adequate oversight program to see that its drivers follow the procedures outlined by Mr. Siegler.

A penalty of $3,000 is appropriate.

The regulations provide that I shall recommend an amount of civil penalty after considering several elements set out in 40 CFR 80.330(b) and that I may consult and rely on Guidelines published in 40 Federal Register 39973 on August 29, 1975. See 40 CFR 80.327.

The Guidelines, which were relied on by the Director, Enforcement Division, Region VI, Dallas, Texas, in proposing a civil penalty of

$6,000 against Arkansas Transport, take into consideration 3 of the 5 elements listed in 80.330(b); that is, the Guidelines provide an objective way of assessing a penalty considering the gravity of the violation, the size of the respondent's business, and the respondent's history of complying with the unleaded gasoline regulations. The purpose of the Guidelines is to achieve general uniformity throughout the United States in the assessment of penalties and to exercise discretion as to those factors which are considered under the Guidelines in arriving at the penalty. I believe the Guidelines provide a fair method of arriving at the so-called unadjusted penalty. Since the Guidelines were correctly applied in arriving at a $6,000 penalty and considered the elements referred to above, there is no need for me to consider further those matters.**

The Guidelines leave open for consideration two other specific criterion (action taken to remedy the violation, and ability to continue in business) and one open-ended criterion which in essence permits the application of an equitable factor whenever the special circumstances of the case makes it appropriate to do so. Arkansas Transport has not claimed the $6,000 assessment would interfere with

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**The affidavit of attorney Kathleen Butler who applied the Guidelines at the time the complaint was issued gives no specific reason for using the $6,000 figure from a Guidelines range of $5,000 to $6,000. The Guidelines provide that this range is to take care of the degree to which the 0.05 gram of lead per gallon is exceeded. The 0.153 gram figure here warrants the selection of the $6,000 figure.

its ability to continue in business and therefore this factor is unimportant. As to the other specific factor, Arkansas Transport acted responsibly after the contamination was discovered to remedy the immediate situation and is entitled to some reduction in the penalty because of this action.

The Guidelines allow the reduction of the unadjusted penalty by as much as 60% after consideration of the respondent's "cooperation with EPA to quickly remedy both the violation and the conditions which caused the violation and to initiate action to ensure that similar violations will be less apt to occur in the future." Section I.C., 40 Fed. Reg. 39975. Arkansas Transport acted to remedy the immediate situation, and also to ensure that no leaks existed between tanks on its trucks that had made deliveries to Western #36. However, nothing at the hearing indicated any action by Arkansas Transport to take steps to see that its drivers exercise greater care to see that contamination does not occur in the future; consequently, the mitigation to be applied in this case should not be close to the 60%, and a mitigation of $1,000 is adequate.

A further reduction is appropriate since liability is not premised in this case upon a factual finding that Arkansas Transport caused the contamination. If there was a basis for making such a finding, the penalty as reduced because of the remedial action taken by Arkansas Transport would be fair. But, where uncertainty exists as to the cause, and liability is imposed because of the public policy of ensuring close

surveillance by those in the marketing chain, some reduction should be made. In this case, a further reduction of $2,000 is considered appropriate with a resulting final penalty of $3,000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After consideration of the entire record and the proposed findings and conclusions submitted by the parties, I make the following findings of fact and conclusions of law. To the extent proposed findings and conclusions are not included, I have rejected them as either not being supported by a preponderance of the evidence, or as being unnecessary for the ultimate decision reached.

Findings of Fact.

Violation

1. On March 15, 1977, an agent for EPA sampled the unleaded gasoline offered for sale at a retail outlet owned and operated by Gasoline Marketers, Inc., known as Western #36, in Warren, Arkansas.
2. Upon analysis the sample was found to have a lead content of 0.153 gram per gallon.

Functions and Procedures of Arkansas Transport Company

3. Arkansas Transport Company, hereafter ATC, is a common carrier of motor fuels, presently operating approximately 65 trucks over an area that includes generally the State of Arkansas and the western one-third of the State of Tennessee.

4. During the period beginning sometime in November of 1976 and continuing through March 15, 1977, ATC served as the only distributor for Western #36.

5. During the period of time beginning in November of 1976 and continuing through March 15, 1977, the fuel delivered to Western #36 was received by ATC from the refinery of the Lion Oil Company at El Dorado, Arkansas, and was transported to Western #36 without interim stop for loading or unloading of fuel.

6. ATC instructs its drivers to check the compartments on the trailer to make sure they are empty, to unload the no-lead first if they are going to unload one product at a time, and to drain their hoses after each delivery. The drivers are instructed to open the dome lids for vent purposes prior to loading and to check the trailer to make sure that the compartments are empty.

7. Only single-bulkhead trailers were used to serve Western #36, although the double-bulkhead system would possible be safer and perhaps a more appropriate system to use for the simultaneous transportation of leaded and non-leaded products. Employees of the Lion Refinery load the ATC trucks pursuant to the instructions given by the driver. It is essentially a process of memory on the part of the driver as to what compartment contains what product. ATC is aware of the color code system for different types of gasoline. ATC drivers are instructed with regard to the color code system. There could be five gallons of residue in a drain line if the compartment were unloaded properly.

8. At all relevant times, fuel was unloaded by ATC into tanks of Western #36 as directed by agents of Gasoline Marketers, except for two instances which did not involve non-leaded gasoline.

Procedures of Gasoline Marketers

9. Gasoline Marketers, Inc., hereafter GMI, requires its station managers to measure the levels in its storage tanks immediately before and immediately after a gasoline delivery. There was no discrepancy with regard to the stick measurements for non-leaded products during the relevant time period.

10. GMI does not order the same amount of non-leaded gasoline as it does of leaded gasoline for any particular delivery.

11. GMI has a regular, daily bookkeeping system relying in part on stick measurements of tanks which shows the amount of gasoline on hand. For the relevant period, the bookkeeping entries did not show any irregularity in the non-leaded stored product.

12. Western #36 was constructed in 1976; the tanks were installed new at that time and the type of product stored has never been changed in the respective tanks. The tanks are individual and are separated from one another by two feet. When an ATC truck arrived at the station for a drop, the station manager would usually ask how much of each individual product the driver had, would help uncap the tanks and show the driver where to unload the product, but would not observe the driver while he unloaded the product.

Procedures at Western #36

13. The station manager would usually stick measure the amount in the tanks immediately before and after the drop.

14. The station uses the color code - white for no-lead, blue for regular, and red for premium; the tank tops are painted approximately every three months; the metal ring outside of the cap is also painted so the caps cannot be switched.

15. The manager was present on all but one occasion for the drops during the 30-day period prior to the violation. The manager fills out the station reports on a daily basis.

Unloading Observations in Early 1977

16. In early 1977, the station was experiencing a slight variation on stick measurements before and after each drop, reflecting an underage rather than the usual overage, leading the manager to believe that the truck tanks were not completely draining when they were unloading. The manager subsequently recommended that ATC change the parking position of the trucks so that the trucks would be level when dropping loads of gasoline. Since that time the underage has ceased.

17. On February 18, 1977, an ATC driver started discharging gasoline into Western #36 storage without being told where to discharge the gasoline. The accounting records on the same date show 500 gallons of regular gasoline pumped into the premium tank.

18. On March 11, 1977, an ATC driver discharged the regular and premium gasoline into the wrong storage tanks at Western #36.

Conduct after notice of violation.

19. After receiving notice of the EPA complaint, ATC examined its maintenance records and ascertained that none of the trailers in question had been to the shop for repairs. Also high pressure hose checks were made of pertinent compartments and visual inspections were made and no leaks found.

20. GMI and ATC acted responsibly to insure that no more gasoline was sold from the source alleged to be contaminated after being notified of the alleged contamination by EPA.

EPA complaint against Lion Oil Company, and Lion Oil Company laboratory tests.

21. On November 28, 1977, a Final Order was entered in the matter of United States Environmental Protection Agency v. Lion Oil Company, Docket No. A677-0048, approving a Consent Agreement whereby Lion Oil Company paid a civil penalty of $21,000, for violations of the EPA regulations pertaining to non-leaded gasoline which were discovered on December 29, 1976, January 14, 1977, January 19, 1977, January 25, 1977, April 15, 1977, and March 14, 1977. Three of the allegations against the Refiner in that proceeding were withdrawn; these pertained to violations which were discovered on January 19, 1977 and March 15, 1977. The withdrawn allegations were withdrawn because Lion Oil was not a retailer or distributor and its brand name was not displayed at the Retail Outlet. The alleged violations for which the penalty was paid occurred at retail outlets.

22. An affidavit of the Chief Chemist, Lion Oil Refinery, El Dorado, Arkansas, shows the results of tests for gasoline lead content during the period 10/31/76-3/12/77 at the Refinery. The highest lead content shown is .020.

Factors pertinent to penalty.

23. Neither respondent has in the past been served with a complaint alleging a violation of the regulations of EPA pertaining to non-leaded gasoline, with the exception of the complaints in this proceeding.

24. The volume of business of each respondent for the time pertinent was at least $1,000,000 to $5,000,000 gross income per year.

Conclusions of Law

1. Western #36 at West Pine, Warren, Arkansas is a retail outlet, as defined in 40 CFR 80.2(j). Respondent, Arkansas Transport Co., was the distributor for this retail outlet as defined in 40 CFR 80.2(l) for several months prior to and after the violation. Respondent, Gasoline Marketers, Inc., is the retailer for this retail outlet, as defined in 40 CFR 80.2(k).

2. On March 15, 1977, gasoline offered for sale at this retail outlet and represented as unleaded gasoline, exceeded the allowable lead content requirements of 40 CFR 80.2(g), and therefore a violation of 40 CFR 80.22(a) occurred.

3. Respondent Gasoline Marketers, Inc. has met the burden of proof placed on it by 40 CFR 80.23(b)(1), and is not liable for the violation.

4. Respondent Arkansas Transport has not met its burden pursuant to 40 CFR 80.23(d), and is liable for the violation.

5. An appropriate civil penalty to be assessed against the Arkansas Transport Company is $3,000.

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 in 40 CFR 80.327(c):

"FINAL ORDER

Gasoline Marketers, Inc., is not liable for the violation of 40 CFR 80.22(a) that occurred at retail outlet Western #36 on March 15, 1977. Arkansas Transport Company is liable for this violation and a civil penalty is hereby assessed against Arkansas Transport Company in the amount of $3,000 and Arkansas Transport is ordered to pay the same by cashier's or certified check, payable to the United States of America, within 60 days of receipt of this final order."

Dated: 8/1/78

David W. Miller
Administrative Law Judge