UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR
Washington, D.C.

In re	)	
	)	
JOHN L. WILLIAMS, d/b/a TIFTON MOBIL	)	DOCKET NO. CAA(211)-118
	)	
	)	
Respondent	)	

Respondent found to be liable for violation of the governing statute and regulation as alleged in the complaint. A somewhat lesser civil penalty than that proposed found proper. Order entered assessing such penalty.

APPEARANCES:

Tom W. Thomas, Griffin & Thomas, for Respondent
John H. Myers and John Fehrenbach for Complainant

INITIAL DECISION BY JAIR S. KAPLAN
ADMINISTRATIVE LAW JUDGE(RET.)

I. INTRODUCTION

This matter arises from a complaint issued by the United States Environmental Protection Agency, Office of Enforcement (EPA) on May 20, 1980. The complaint, as amended, alleges that Respondent John L. Williams, d/b/a Tifton Mobil, (Williams) has violated Section 211 of the Clean Air Act (the Act) and the regulations promulgated thereunder (40 CFR Part 80). More specifically, the complaint avers that Respondent's employees have in two instances introduced or caused or allowed the introduction of leaded gasoline into motor vehicles which were labeled "unleaded gasoline only" or which were equipped with gasoline tank filler inlets designed for the introduction of unleaded gasoline, in violation of 40 CFR 80.22(a). Hearing was held on January 13, 1981, in Albany, Georgia. Originally, John L. Williams Company, d/b/a Tifton Mobil, was named as Respondent. By order dated February 25, 1981, Complainant's motion to amend the complaint, by changing the caption of the case and substituting

as Respondent John L. Williams, as an individual, in lieu of his company, in conformity with the evidence, was granted. Both parties have filed initial and reply briefs, with the latter pleading due on March 17, 1981.

II. STATEMENT OF FACTS

Williams is a gasoline "retailer" operating a "retail outlet", as those terms are defined in 40 CFR 80.2(j) and (k). On August 20 and 21, 1979, an EPA inspector observed the introduction of leaded gasoline into automobiles designed to use only unleaded fuel, at the Tifton Mobile station owned by Williams and located at Second Street and King Road in Tifton, Georgia. The first incident on August 20 involved a 1976 Ford Thunderbird which had an inside fuel filler flap and a gas cap, both labeled "unleaded fuel only". The second incident on August 21 involved a 1977 Chrysler Cordoba also with a gas cap labeled "unleaded fuel only". The fuel inlet restrictor, the device which physically prevents the introduction of a leaded gasoline nozzle into the inlet, on each of the automobiles had been broken and evidence of damage to the restrictor was visible to the naked eye. Both cars appeared otherwise to be in excellent condition.

The station is a self-service operation, with three islands of pumps, with a cashier's booth on the center island. A person in the booth has a 360-degree field of vision of the fuel pumps. On the days in question, the station was quite busy, as apparently it had usually been during the hours in which the two incidents occurred. The two employees present at the time could not completely oversee the activities at each of the three islands, since they were mainly occupied with collecting money. Each of the incidents involved a driver filling his own tank immediately after arrival at the station, without first speaking with or otherwise contacting an attendant. Following the incidents, Williams hired extra attendants for the station. It also appears that since the occurrences, Williams has installed an automated system whereby all pumps may be controlled and turned on and off from the central booth by the single attendant located there who acts mainly as cashier.

Williams, as an individual and sole proprietor, owns and operates a total of 13 retail self-service gasoline stations. His affiliated company is engaged exclusively in the gasoline wholesale distribution business. The station involved here is open 24 hours a day and employs a manager and three attendants working in shifts. Williams has had no formal training program

to instruct employees on the regulations governing leaded and unleaded gasoline. However, from time to time, informal discussions are held and memoranda are circulated to make employees aware of the requirements of the regulations and of Williams' general policy not to permit the introduction of leaded gasoline into a vehicle designed to use unleaded gasoline. In the past, Williams' employees had prevented some customers from misintroducing leaded gasoline into unleaded automobiles; nevertheless, such occasional misfuelings were still occurring.

III. CONTENTIONS OF THE PARTIES

EPA contends that each of the prima facie elements of a violation under §80.22(a) has been established here, i.e., that (a) Williams' employees (b) allowed the introduction of leaded gasoline (c) into cars equipped and designed for the introduction of unleaded gasoline only. Accordingly, Complainant concludes that Williams is presumptively liable for the two violations.

Williams' primary defense depends upon the construction of §80.22(a). He argues that the pertinent language of the regulations -- prohibiting a retailer from "allowing the introduction" of leaded gasoline into motor vehicles designed to use unleaded gasoline -- should be interpreted to require specific intent, or conscious assent of acquiescence in the conduct giving rise to the misintroduction; and that where, as here, the immediate cause of the misintroduction was action taken by a customer unbeknownst to Williams or his employees, no such assent or intent may be found to have existed. Williams maintains that the economic realities of self-service gasoline retailing preclude the application of a more rigorous standard than that specified above.

In a closely related argument, Williams invokes two affirmative defenses to liability pursuant to §80.23, which, as pertinent, provides:

> Liability for violations of paragraph (a) of §80.22 shall be determined as follows:
>
> (a)(1) Where the corporate, trade or brand name of a gasoline refiner or any of its marketing subsidiaries appears on the pump stand or is displayed at the retail outlet or wholesale purchaser-consumer facility from which the gasoline was sold, dispensed,

> or offered for sale, the retailer or wholesale purchaser-consumer, the reseller (if any), and such gasoline refiner shall be deemed in violation...
>
> * * * * *
>
> (b)(1) In any case in which a retailer or wholesale purchaser-consumer and any gasoline refiner or distributor would be in violation under paragraphs (a)(1)... of this section, the retailer or wholesale purchaser-consumer shall not be liable if he can demonstrate that the violation was not caused by him or his employee or agent.
>
> * * * * *
>
> (e)(1) In any case in which a retailer or his employee or agent or a wholesale purchaser-consumer or his employee or agent introduced leaded gasoline from a pump from which leaded gasoline is sold, dispensed, or offered for sale, into a motor vehicle which is equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, only the retailer or wholesale purchaser-consumer shall be deemed in violation.

Because the two drivers of the two vehicles, and not Williams or his employees, were the immediate physical cause of the misintroductions, Respondent asserts that he falls within the scope of §80.23(b)(1) (on the theory that he "played no active role" and thus did not "cause" the misintroduction) and §80.23(e)(1) (on the theory that he did not actually "introduce" leaded gasoline into the two automobiles).

Finally, Williams notes that the station was quite busy on August 20 and 21, 1979; that the drivers of the cars simply commenced pumping gasoline before an attendant could check their fueling requirements; and that there were no indications on the exterior of either automobile which would have alerted the attendant of the type of fuel required. All of these circumstances allegedly demonstrate the absence of any causal link between the misintroduction and the conduct of Williams or his employees.

EPA's overall position is that Williams' construction of the regulations is inappropriate; that the Act is a remedial statute requiring neither intent, nor assent, nor acquiescence, as a prerequisite for liability; and that, on the contrary, the regulations impose a standard of strict liability on retail outlets at which misintroductions of fuel occur. It further maintains that Williams had incorrectly read and interpreted the cited provisions of §80.23(b)(1) and (e)(1), stripping the words "cause or allow the introduction" contained in §80.22(a) of any real significance.

EPA also maintains that the regulations impose an affirmative duty applicable to all gasoline retailers, whether operating self-service stations or not, to actively supervise, control and oversee all fueling operations on their premises; and that, if necessary to fully discharge this duty, retailers must hire sufficient help and instruct their employees as to how to determine the fueling requirements of motor vehicles on the basis of indicia such as physical appearance or type or model of car, presence of a fuel inlet restrictor, and "unleaded only" labels. Complainant contends that Williams' operation of the station and his employee training program were deficient in all of these respects. As to economic factors, EPA asserts that the obligations imposed by the regulations must be fully observed, even if inconvenient or financially burdensome, and that such factors cannot excuse Williams from compliance with the law. Complainant maintains that the duty already imposed on self-service filling station operators by the fire safety regulations of the State of Georgia (requiring attendants to supervise, observe and control dispensing of gasoline into containers) and by an opinion of the State of Georgia Comptroller General (holding that attendants at such establishments must have "positive control" over the dispensation of fuels) is at least as burdensome as the duty imposed under the fuel regulations. Complainant argues that the fact that the station was busy at the time the incidents occurred and that the attendants could not completely oversee the fueling of the automobiles underscores Respondent's failure to adequately monitor the operations at the station.

IV. DISCUSSION AND CONCLUSIONS

There appears to be no dispute with respect to the basic facts that leaded gasoline was introduced at the Williams station into two automobiles designed to use unleaded gasoline only; and that the fuel was dispensed from the pumps by the respective drivers themselves, while the station attendants present at the time were busy with other vehicles or customers. The primary issue here, therefore, is whether in such circumstances Williams "allowed the introduction of leaded gasoline" into the unleaded automobiles within the meaning and in violation of §80.22(a). That section reads, in pertinent part, as follows:

> ...no retailer or his employee or agent...shall 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 a gasoline tank filler inlet which is designed for the introduction of unleaded gasoline.

Based on the contentions of the parties, the controlling three questions here in resolving this issue are the following: (a) Must EPA establish a specific intent or conscious assent or acquiescence by Williams in the misintroduction of fuel at his station?*/ (b) If no such intent or acquiescence is required, what legal duty is applicable to self-service retail outlets to prevent misintroduction of fuel? (c) Did Williams' efforts to prevent misintroduction meet that duty?

A. Do the Regulations Require Either Specific Intent or Conscious Acquiescence or Assent?

Both parties agree that the interpretation of the phrase "allow the introduction of unleaded gasoline" is critical to determining Williams' liability. Respondent's contention that this phrase should be read as implicitly including a requirement of conscious assent or acquiescence is untenable; and Williams' argument that his lack of specific intent to violate the regulations absolves him from liability must also be rejected. Apparently, Williams takes the position that the Act imposes a quasi-criminal standard of liability for which specific intent is generally required. The Act, however, as EPA correctly notes, is a remedial, and not a punitive, statute under which only civil penalties may be imposed. Indeed, no particular state of mind is a prerequisite to liability under the Act and the regulations promulgated thereunder. There is no explicit or implicit requirement that the action or inaction giving rise to any alleged violations must have been intentional, willful, or with knowledge aforethought. United States v. Balint, 258 U.S. 260 (1923). Cf., United States v. Ward, 448 U.S. __(1980). An additional flaw in Williams' approach is that the standard he would impose appears to be mainly, if not entirely, subjective, excusing any misintroduction, so long as the retailer remained or proceeded in ignorance, without regard as to whether or not any good faith attempts to ascertain the fuel requirements of the vehicles have actually been made. Such a standard would tend to reduce or negate the affirmative obligations of the retailer under the Act and the regulations and improperly shift his own responsibilities to the whim of the ultimate customer. In effect, the retailer would be left in substantial control over, and be free to determine, whether, how, and to what extent he would

*/ In this discussion, any reference to Williams denotes Williams in his proprietary capacity and includes the action or inaction of his employees.

comply with the regulations. A mandatory legislative policy would be transformed into a voluntary program. This approach is quite incompatible with the basic regulatory objective of the Act, to prevent the introduction of leaded gasoline into cars designed for use solely with unleaded gasoline and thereby avoid pollution and promote and improve the quality of the environment. Williams has not presented any valid reasons nor has he cited any persuasive authority to support an interpretation leading to such incongruous results.

B. What is the Duty of a Self-Service Retailer to Comply with the Regulations?

At the outset it must be emphasized that the regulations make no distinction between full-service and self-service retail outlets. The same provisions and requirements apply equally to both. Although EPA's arguments are not stated in precisely these terms, the gist of its position -- that Williams did not adequately "supervise, oversee and control" vehicle fuelings at his station -- is that Respondent's conduct should be governed by an objective standard of due care. Under such a test, Williams, or any other self-service retailer, similar to any full-service retailer, has an affirmative duty to take reasonable steps to ascertain the type of fuel required by a vehicle and reasonable precautions to guard against misintroduction of fuel. It is noted that such a standard is analagous to the negligence standard in tort law and, there as here, it reduces the element of the immediate physical cause to its proper relative position and significance. Application of any other standard would potentially excuse,not only wanton and reckless behavior, but also indifferent, careless, negligent, or unreasonable actions taken,or the failure to act, as long as the retailer was not the final link in the causal chain.

By the same token, Williams' contention that §§80.23(b)(1) and (e)(1) absolve him from liability, because his employees were not the immediate actual or the last physical cause of the subject misintroductions of gasoline, must be found wholly inappropriate and erroneous. As correctly pointed out by EPA, paragraph (b)(1) expressly refers to "violation", which would embrace not only "introduce" or "cause", but also "allow", as specified in §80.22(a); and paragraph (e)(1) merely indicates the parties (only the retailer or wholesale purchaser-consumer, but not the refiner or distributor) deemed liable in the case of the described misintroduction. While not being the direct and immediate physical

cause of misintroduction may be a condition for avoiding liability, this condition alone may by no means be sufficient in any and all circumstances. A retailer must, in addition, establish that he acted with care and prudence, taking all reasonable precautions, to prevent misintroduction of gasoline. In other words, to escape liability, he must show that he did not cause or allow the violations, in the broad sense of these terms -- that he was not or could not be found at fault for the occurrences by reason of the measures taken which would have been reasonably expected to prevent the violations.

C. Were Williams' Efforts Sufficient to Discharge the Duty Imposed by the Regulations?

As noted, the regulations require reasonable steps and precautions to be taken by a retailer to prevent misintroduction of fuel. The two incidents here involved drivers who commenced fueling their cars immediately after entering the station and stopping at a leaded gasoline pump, without any hindrance or the necessity of first notifying an attendant on duty and obtaining permission to do so. Assuming that Williams has had an articulated general policy against introducing leaded fuel into cars designed to use unleaded gasoline only and that he has instructed his employees and issued confirming memoranda with respect to that policy, these measures have obviously failed to prevent the two subject misintroductions of gasoline, or similar ones which admittedly have been occurring from time to time. The remaining issue, therefore, is whether these efforts were reasonably sufficient to discharge Williams' duty under the regulations, or whether liability should be attributable to Williams because of his failure to take other or additional reasonable measures to prevent such misintroductions.

A general company policy and a training program, no matter how earnestly administered, will be ineffective where a customer can, and is permitted to, circumvent the regulatory requirement with respect to leaded and unleaded gasoline merely by driving into a self-service station during a usually busy hour of the day and filling up the tank of his car at an open pump. Clearly, more safeguards were called for and needed here. The attendants on duty should have been required and afforded the opportunity to observe each vehicle to determine its gasoline requirements before the commencement of the actual fueling, no matter how busy the station may be. In effect, Williams has conceded the inadequacy of his staff in this respect by hiring additional attendants subsequent to the two incidents. Furthermore,

self-service cannot and should not be deemed to mean unbridled, unsupervised and uncontrolled dispensation of gasoline to customers. There are practicable and reasonable mechanical means whereby an attendant may allow or withhold the flow of gasoline from a pump. Again, Williams seems to have installed such a system only after the alleged violations had occurred. In this connection, EPA has drawn attention to a 1975 interpretation by the Comptroller General of Georgia of certain state fire regulations applicable to self-service gasoline retailers. Specifically, the opinion construed the requirement that pumps at such outlets must be under the "control" of an attendant and states, insofar as here pertinent, that:

> Georgia Regulations require that the attendant supervise, observe and control the dispensing of motor fuels at self-service service stations. Experience gained during the first four years of legal self-service has shown that the most misunderstood requirement is that of 'control'.
>
> In approving self-service stations we make certain that approved controls are installed. These are generally in two classes of remote 'console' controls and 'key lock' or 'security key trip' controls on each dispenser. The purpose of these systems is to provide a means for the attendant to have positive control whereby a customer cannot activate a dispenser except by the attendant taking a positive action permitting activation when the customer is fit and ready to dispense fuel. Dispensers shall not be left in a ready for use condition. A ready for use dispenser is not under control of the attendant as required by alw.
>
> We appreciate your desire to keep your customers happy and that sometimes delays will occur before the attendant activates a dispenser. However, safety is paramount and most disgruntled customers will return; dead customers will not.

In other words, Georgia law already prohibits customer activation of self-service pumps and does not recognize delay as justification for leaving a pump in a condition where it can be activated without an attendant. Under these circumstances, to require Williams as a self-service retailer to maintain effective control over his pumps against indiscriminate self help by customers, and thus avoid improper dispensation of fuel, seems to be appropriate and reasonable and not unduly burdensome. Indeed,

compliance with the Comptroller's opinion might well have prevented here the violations from occurring. As previously noted, Williams now has a remote control system by which pumps are switched on and off from the cashier's booth.

Accordingly, it is found that Williams, in the two involved instances, has made his pumps available for use by customers, without an adequate opportunity by an attendant to first observe and determine the fueling requirements of the vehicles and without providing and retaining at all times full control and supervision over the operations of his pumps. And it is further found that Respondent has therefore failed in his duty under the regulations to exercise due care and take reasonable precautions against misintroductions; and that he has thus caused or allowed the introduction of leaded gasoline into vehicles requiring unleaded gasoline, within the meaning and in violation of §80.22(a).

D. Amount of Penalty

The maximum statutory penalty per day for each violation of the unleaded gasoline regulations is $10,000. However, pursuant to the governing Guidelines for the Assessment of Civil Penalties under Section 211(d) of the Clean Air Act, EPA proposes the assessment of $2,000 for each violation, or a total of $4,000 for the two separate violations which occurred on two different but consecutive days. The five factors to be considered in determining the size of a penalty are found in §22.34(e) of the Consolidated Rules of Practice (40 CFR §22.34(e)). They are: (1) the gravity of the violation, (2) the size of the Respondent's business, (3) the Respondent's history of compliance with the Act, (4) the action taken by Respondent to remedy the specific violation, and (5) the effect of the proposed penalty on Respondent's ability to continue in business.

The civil penalty assessment table contained in the Guidelines and Schedule No. 1 assigned there to liability for violations of Section 80.22(a) indicate that EPA considers such offenses to be of the highest gravity, on the basis of their potential to cause vehicle emission to exceed standards, pollute the air and lead to harmful effects upon health. Williams' size business, falling within Category II, (measured by gross annual revenues of between $250,000 and $1,000,000) and having had no prior violations result in the specified proposed penalty of $2,000 for each of the two violations. Williams does not contest the penalty on any of these grounds, nor does he claim that its payment would affect in any way his ability to continue in business. Respondent merely alleges that the specified penalty is harsh and disproportionate to the violations charged, emphasizing the fact that he has no prior history of violations. As noted, the Guidelines have already taken into account the potential serious-

ness of the violations and the lack of any previous infractions by Williams. In fact, the two subject incidents have been treated in EPA's complaint as if they were contemporaneous, each one being considered as if it were Respondent's very first violation. Thus, the Guidelines penalty table provides for an assessment, per each day over which a violation continued, of $2,000 when there has been no prior violation, $4,000 when there has been one prior violation, $6,000 when there have been two prior violations, and $10,000 when there have been three or more prior violations, for a Category II size business.

The only factor which may be given weight here, in partial mitigation of the proposed penalty, is Respondent's action taken to remedy the conditions which gave rise or caused the violations and, thus, insure that similar infractions may be less apt to occur in the future. Although Williams expressed some doubt that similar incidents could be completely eliminated, nevertheless construing the evidence in a light most favorable to Respondent, it seems that he reacted appropriately by promptly hiring extra help for the station involved. In addition, installation of an automated and computerized system should facilitate more effective control of the pumps by his employees. This action, together with improved instruction and training, should tend to reduce substantially the chances of such violations reoccurring. Accordingly, it is found that the proposed total penalty for the two violations should be decreased from $4,000 to $3,000, which penalty appears to be appropriate under the particular circumstances presented herein.

ULTIMATE CONCLUSIONS AND ORDER

Upon consideration of the entire record, including briefs filed, and based upon a preponderance of the evidence and the foregoing discussion and findings, it is concluded that:

(1) Respondent John L. Williams, d/b/a Tifton Mobil, is liable for the violations of 40 CFR §80.22(a) and, as a result, for violations of Section 211 of the Clean Air Act, as alleged in the complaint.

(2) Respondent has failed to establish an adequate defense under 40 CFR §80.23 to be absolved from liability for the indicated violations.

(3) Respondent should, accordingly, be assessed a civil penalty in the amount of $3,000, and that such penalty is just, reasonable, and warranted in the circumstances presented herein.

WHEREFORE, IT IS ORDERED, subject to review by the Administrator on appeal, or sua sponte, as provided by Section 22.30 of the Consolidated Rules of Practice (40 CFR §22.30), that:

(A) A civil penalty in the amount of Three Thousand Dollars ($3,000) be, and it is hereby, assessed against Respondent John L. Williams, d/b/a Tifton Mobil.

(B) Payment of the above-specified amount shall be made in full within sixty (60) days after service of this order by forwarding to the Hearing Clerk a cashier's check or certified check payable to the United States of America.

Jair S. Kaplan

By the Presiding Officer
April 27, 1981

Jair S. Kaplan
Administrative Law Judge (Ret.)