IN RE	)	
	)	DOCKET NO. CAA 211-90
DIXIE GAS & OIL COMPANY	)	
d/b/a BAY 269	)	
	)	INITIAL DECISION
Respondent	)	

INTRODUCTION

This is a proceeding for the assessment of a civil penalty for violation of the Clean Air Act, §211, 42 U.S.C.A. 7545 (1978 supp.), and the regulations issued thereunder, 40 C.F.R. Part 80. The civil penalties assessed are pursuant to §211(d) of the act. The proceeding was instituted by a complaint issued by the United States Environmental Protection Agency (EPA) against Dixie Gas and Oil Company (Dixie) charging that the Respondent introduced, caused or allowed the introduction of leaded fuel into a motor vehicle labeled "unleaded fuel only" at Respondent's gasoline retail outlet. A penalty of $6,000.00 is requested.

Respondent filed a timely answer to the complaint and requested an adjudicatory hearing. The matter was set for hearing and was heard on March 13, 1981 in Atlanta, Georgia before Judge Thomas B. Yost, Presiding Officer. A verbatim transcript of the hearing was made. By Order dated March 30, 1981 the Presiding Officer directed the parties to submit briefs in support of their proposed findings of fact and conclusions of law by April 20, 1981. Reply briefs were ordered to be submitted by April 30, 1981. By subsequent Order dated April 14, 1981, the Presiding Officer extended the time for filing initial and reply briefs to April 27, 1981 and

May 7, 1981, respectively. At the hearing, the Complainant was represented by John H. Meyers and Debra K. Woitte, attorneys at law, Washington, D.C., and the Respondent was represented by Seymour S. Owens, attorney at law, Tifton, Georgia.

FACTUAL BACKGROUND

The Tifton Pecan Shop in Tifton, Georgia, filed a complaint which alleged that because the owners of that gasoline retail service station had been refusing to provide customers who requested leaded gas to be introduced into a car that obviously required unleaded, the customers were leaving the station and going to other stations in the area where they were being given leaded gas. The owner of the pecan shop complained that as a result it was losing business. Two EPA inspectors stationed themselves at the Tifton Pecan Shop, and when customers were refused service for the above stated reason, the inspectors followed them to see where they went to obtain the gasoline they desired. After following several customers without success, they ultimately, on August 20, 1979, followed a Toyota Corolla to the Respondent's retail gasoline station and observed the young lady who was driving the vehicle pull up to a pump and proceed to put gasoline into her vehicle. Mark Chapman, who was the pump attendant for the Dixie Gas and Oil Bay 269 service station located on Seventh Street in Tifton, Georgia, was on duty at that time and testified that while he was occupied putting oil in another customer's car, the driver of the Toyota pulled up and proceeded to pump gasoline into her vehicle. The evidence indicates that after she finished filling up her car, Mr. Chapman went over, and while the customer was reaching into her car to get her purse, took the pump nozzle out of the car and replaced it back on the pump and then collected the

money for the gas. Although it is agreed that the vehicle did have a sticker below the gas tank filler inlet which stated "unleaded fuel only", Mr. Chapman testified that he did not see the label and he furthered testified that he did not himself introduce any gasoline into the vehicle but merely removed the nozzle and hung it up on the pump. Mr. Chapman, who is 17 years of age, testified that prior to being employed by the Respondent he had worked for his father at a service station for four or five years and is familiar with the Federal requirements prohibiting the introduction of leaded gasoline into any vehicle which is labeled "unleaded fuel only" and that he has on several prior occasions refused to put leaded gas into a vehicle so labeled. Mr. Chapman also testified that some Toyotas of the particular model and type of the Corolla which the lady was driving take leaded gasoline and some of them take unleaded gasoline and that there was nothing he observed upon looking at the car which would cause him to suspect that this particular car was to take unleaded gas only. The evidence also demonstrated that the filler inlet restriction which is placed there by manufacturers to prevent the insertion of a leaded gas nozzle into the filler inlet had been removed from this vehicle. Mr. Chapman stated that he was not aware of this fact inasmuch as the pump nozzle came out freely from the filler inlet with no hanging up or obstructions thus not causing him to suspect that the device had been tampered with or rendered inoperative.

James Gray, the EPA inspector, who observed the circumstances described above, testified that it was his impression that Mr. Chapman topped up the customer's tank and, therefore, actually introduced the improper gasoline into the vehicle. Mr. Chapman, however, denied this and said that he did not put one drop of gasoline into the vehicle, but merely removed the nozzle and hung it up on the pump. On cross-examinination, Mr. Gray was

unable to point to any circumstances that would cooroborate his impression such as seeing the meter on the pump move, hearing the pump activated, hearing bells ring, or any other indicia of fact that gasoline was being pumped into the vehicle. Based upon the sworn testimony of Mr. Chapman, the allegation that the Respondent's agent actually introduced gasoline into the vehicle himself is not borne out by the evidence. Mr. Gray took photographs of the activities described herein and stated that from a distance of approximately two feet, he was able to see the label "unleaded fuel only" affixed to the vehicle immediately below the filler intake. The evidence does not disclose, nor was it alleged that the Respondent had been found guilty of any prior violation of the law or regulations concerning fuels. Mr. Chapman also testified that he had been instructed by his employers on several occasions how to identify cars that took unleaded gas only and that he was completely cognizant of the Federal requirements relative to this prohibition.

Mr. Thomas Denby testified that he is Vice President of Dixie Gas and Oil Company and that he was in charge of the supervision of the operations of the stations that included the Bay 269 station, which is the subject of this action; that the Company had sent out notices to the managers of the stations including this station which were similar to Respondent's Exhibit No. 2, which is a printed statement admonishing the employees not to put in leaded gas into any vehicle that is marked "unleaded fuel only". He also testified that notices were posted on the pillars immediately adjacent to all the pumps which states in large letters "Federal law prohibits the introduction of any gasoline containing lead or phosphorus in any motor vehicle labeled unleaded gas only". A reproduction of this notice is found as Respondent's Exhibit No. 1. Mr. Denby, upon cross-examination, further testified that the Company trained its service station attendants by having the manager

work with them until it is felt they are qualified to handle a shift by themselves and that the training includes instructions that the introduction of leaded gas into vehicles requiring unleaded fuel is prohibited, and that both the supervisor and the station's manager by observation sees that the attendants are not introducing leaded gasoline into a vehicle that is marked "unleaded fuel only". The Respondent does not contest the fact that a customer did drive up to its facility and introduced leaded gasoline into the vehicle marked "unleaded fuel only", but it does deny that Mr. Chapman, the station pump attendant, himself introduced any gasoline into the vehicle in question. The evidence also shows that at the time of the alleged violation there were several vehicles coming in and out of the station and that Mr. Chapman at the time of the violation was occupied by attending to another customer. It also appears that Mr. Chapman was the only employee on duty at the time of the alleged violation. Although the station in question is a full service station, it appears that it is not uncommon for customers to drive in and serve themselves.

DISCUSSIONS AND CONCLUSIONS

The Respondent in this proceeding has been specifically charged with the violation of 40 C.F.R. 80.22(a) which provides in relevant part that:

> "...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."

Section 80.22(a) thus prohibits not only the introduction of leaded gasoline but the causing or allowing of such an introduction into a vehicle labeled "unleaded fuel only" or which is equipped with a gasoline filler inlet

restrictor. Since the record in this case does not support a conclusion that the Respondent introduced or caused to be introduced leaded gasoline into a vehicle which requires unleaded fuel only, the only issue for decision is whether or not the actions or lack thereof of the Respondent amounted to the allowing of such introduction.

It is EPA's contention that a prima facie case of violation under §80.22(a) has been established here in that Mr. Chapman allowed the introduction of leaded gasoline into a car equipped and designed for the introduction of unleaded gasoline only. Accordingly, Complainant concludes that the Respondent, Dixie Gas and Oil Company, is presumptively liable for the violation. Dixie's primary defense depends upon the construction of the above-quoted section. It argues that the language of the regulation 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 the customer unbeknownst to Respondent or his employee, Mr. Chapman, no such assent or intent may be found to have existed.

Dixie also invokes two defenses to liability found in §80.23 of the regulations which, in pertinent part, provides that:

> "Liability for violations of paragraph (2) 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 as 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." (Emphasis supplied.)

Since the driver of the Toyota and not Mr. Chapman was the person who put the gasoline in the vehicle, Dixie asserts that it falls within the scope of §80.23(b)(1) since neither Dixie nor its agents played an active role and thus did not "cause the misintroduction". Dixie further argues that on August 20th, the station was busy and Mr. Chapman was diverted from the activities of the driver of the Toyota by attending to the needs of another customer and there were no indications on the exterior of the vehicle which would have alerted Mr. Chapman to the type of fuel required.

In support of their respective positions, the parties have also cited the Court's attention to prior decisions of the Agency involving the same violation as alleged herein and the Court introduced an exhibit of its own which consisted of a letter from the Enforcement Office of Region IX, EPA, which set forth, at least, that Region's position on the responsibilities of service station attendants to assure that improper fuel is not introduced to a vehicle.

The Complainant relies primarily on a recent decision of the Agency prepared by Judge Jair S. Kaplan, Administrative Law Judge (retired), issued on April 27, 1981. That case, in re John L. Williams, d/b/a Tifton Mobil, Docket No. CAA(211)-118, involved a set of circumstances similar to those involved in the instant case. In the Williams' case, an EPA inspector observed the introduction of leaded gasoline into automobiles designed to use

only unleaded fuel at the Tifton Mobile station on August 20 and 21, 1979. One violation involved a 1976 Ford Thunderbird which had an inside fuel filter flap and a gas cap both labeled "unleaded fuel only". The second instance involved a 1977 Chrysler Cordoba also with a gas cap labeled "unleaded fuel only". The fuel inlet restrictor on each of the automobiles had been broken and evidence to the damage to the restrictor was visible to the naked eye. Both cars appeared otherwise to be in excellent condition. The station in the Williams' case is a self-service operation with three islands of pumps with the cashier's booth on the center island. The 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 instances 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 upon arrival at the station, without first speaking with or otherwise contacting an attendant. In the past, Williams' employees had prevented some customers from misintroducing leaded gasoline into unleaded automobiles; nevertheless, such occasional misfuelings were still occurring.

The contentions of the parties in the Williams' case were practically identical to those asserted by the parties in this case. In the discussions and conclusions, Judge Kaplan was of the opinion that:

> "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."

Judge Kaplan concluded by saying that:

"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)."

Respondent, in turn, relies upon the holding in the case of Hudson Oil Company, Respondent, Docket No. 033715, written by John H. Morse, Presiding Officer. In that case, which involved the same violation as the instant case, the Presiding Officer concluded that:

"The regulation in question is 40 C.F.R. 80.22(a) is not intended to impose absolute liability for introduction of leaded gasoline into a motor vehicle labeled 'unleaded gasoline only' or equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline; the introduction of leaded gasoline into such a vehicle is a culpable violation only if done knowingly or as a consequence of negligence involving disregard of facts or circumstances observable or ascertainable by the retailer, his employee or agent in the exercise of due care, and sufficient in themselves to indicate to the retailer or his employeee or agent the vehicle was one of the prescribed types, or to impose upon him the responsibility for such further inquiry or investigation as could reasonably be expected to disclose the pertinent facts concerning the vehicle type."

The Court's Exhibit No. 1 which was written to the Executive Secretary of Serve Yourself and Multiple Pump Associations, Inc. of Los Angeles, California by Mr. Ed Kendig, staff attorney, Enforcement Division, Region IX, EPA, San Francisco, California, stated that:

> "The attendants or operators at self-service stations are not required to know the fuel requirements of every car that pulls into the station, nor do they have to closely monitor all their customers dispensing gasoline. However they do have to supervise the gas station to the extent required by their job, and in many cases as required by municipal fire codes. They must exert some control and supervision, and if they can prevent a customer from putting leaded gas into a car designed for unleaded when they know that that is happening, they must do so by refusing to sell. If the attendant at a self-service station does not know that a customer has put leaded gas into an unleaded only car then he is not liable." (Emphasis supplied.)

Needless to say, both parties take the position that the cases cited by them are determinative of the result to be found in this case.

One primary difference between this case and the above-cited Williams' case is that in the Williams' case the service station was a self-service station and in the instant case it was a full-service station. Although that difference, in itself, may not be necessarily determinative, it should be noted that Georgia regulations require that self-service stations incorporate approved controls for the operation of the fuel pumps, that is, either remote console controlled or key-lock controls on each dispenser. The Williams' station did not have the required controls, which if present, would have probably prevented the violation that Judge Kaplan found in that case. Although it is not clear what effect that failure had on Judge Kaplan's opinion, he did state on pg. 9 that:

> "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."

It appears to me that Judge Kaplan was to some extent influenced in his decision by the failure of Williams to have installed and used the required control systems. Judge Kaplan's decision in the Williams' case is not necessarily at odds with the holding in the Hudson case, supra, in that Mr. Morse also uses the exercise of due care as the standard by which the actions of the Respondent are to be judged. Another difference between the Williams' case and the case at hand is that in the Williams' case, the EPA inspectors observed two violations on successive days and the evidence apparently demonstrated that other misfuelings had also occurred. In the instant case, we have no prior history of violations and only one alleged violation is claimed by the Complainant.

The Complainant argues that to ignore the "allowing" language of the regulation would be contrary to the intent of the regulations and thus permit the introduction of improper fuels through negligence or the lack of due care on the part of operators of retail gasoline outlets to prevent customers from pumping improper fuels into their own vehicles while the station operators are otherwise occupied. While I agree with the Complainant in that meaning and credence must be given to all the terms of the Agency's regulations, to follow Judge Kaplan's rationale would require the decision maker to ignore the provisions of §80.23(b)(1), supra, which states that the retailer shall not be liable if he can demonstrate the violation was not caused by him or his employee or agent. One must wonder what sort of case could be presented by a Respondent which would bring him within the purview of the defense provided

by the above-cited regulation. One can envision a scenario where a customer comes on to the premises and pumps his own gas while the attendant is in the restroom, or one where the customer physically threatens the attendant with mayhem or physical violence if he interferes with the placing of improper fuel into his vehicle and other situations where, despite reasonable care, the service station operator was helpless to prevent the improper introduction of fuel. I agree with Judge Kaplan that the law can not cognizance unbridled access to gas pumps by customers serving themselves that apparently was shown in the Williams' case, but on the other hand, some meaning must be given to the language of the above-mentioned regulations, which apparently was intended by the Agency to provide a defense to service station operators under some circumstances.

My problem with Judge Kaplan's decision is that if followed to its logical conclusion it would result in a "Catch 22" situation wherein the operators of retail gasoline establishments would be found guilty of a violation no matter how extensive or comprehensive their training program and oversight is to prevent improper introductions if, in fact, a customer pumps improper fuel into his own vehicle. This appears to be so since Judge Kaplan's rationale seems to be that no matter what measures the station operator took to prevent such introductions if such an misintroduction occurs, obviously the preventive measures instituted by the station operator were not sufficient.

It is obviously no defense to merely say that the station attendant was too busy taking care of another customer to prevent a misintroduction, but in the instant case Mr. Chapman testified that he saw nothing on the exterior of the Toyota in question to alert him to the fact that it may require unleaded fuel since his experience and information indicates that such vehicles come in different models, some of which require unleaded fuel and some of which do

not. The imposition of civil penalties in these cases must, in my judgement, be tempered with some rule of reason which would not require the imposition of a sanction in every case where through, for one reason or another, leaded fuel finds its way into a tank of a vehicle requiring unleaded fuel only. As indicated above, one has no way of knowing to what extent the failure of Williams to have installed the proper pump locking mechanisms had on Judge Kaplan's ultimate decision, but it obviously had some persuasive effect.

In the face of Mr. Chapman's uncontroverted testimony that some Toyota Corolla's require unleaded fuel and some do not, I am of the opinion that since there was nothing readily observable about the vehicle to alert him to the automobiles fuel requirements, that Respondent in this case has not violated that level of due care and reasonable caution which the regulations require him to exercise. Accordingly, I find that the Agency has failed to prove a violation in this case and the complaint is hereby dismissed.

ORDER

Upon consideration of the entire record, including the briefs filed and based upon the preponderance of the evidence in the foregoing discussion and findings, it is concluded that the Complainant has failed to establish a violation of 40 C.F.R. §80.22(a) and the Respondent is therefore absolved from liability for the alleged violation.

WHEREFORE, IT IS ORDERED, subject to review by the Administrator on appeal, or sua sponte, as provided by §22.30 of the Consolidated Rules of Practice (40 C.F.R. §22.30), that: the complaint heretofore issued by the Administrator of the Environmental Protection Agency on April 4, 1980 is hereby dismissed.

DATED: May 18, 1981

T. B. Yost

Thomas B. Yost
Administrative Law Judge