UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Commercial Cartage Company	)	**Docket No. CAA-93-H-002**
	)	
	)	
Respondent	)	

Clean Air Act--Fuel Volatility Standards--Common Carrier Liability--Detected

Regulation at 40 C.F.R.§ 80.28(b) contemplated that violations of volatility (RVP) standards by carriers would be detected by sampling and testing gasoline at the carrier's facility. Assuming, arguendo, that violations of gasoline volatility (RVP) standards may be "detected at a carrier's facility" within the meaning of 40 C.F.R. § 80.28(b) by inspecting documents rather than drawing and testing samples, violations were not detected at the carrier's facility where no fuel samples were taken, and delivery ticket documents found by the inspectors at the facility did not include information which indicated violations.

Clean Air Act--Fuel Volatility Standards--Common Carrier Liability--Causation

Violations of RVP standard for high ozone season were detected at a branded retail outlet based upon gasoline samples taken from pump nozzles at the facility by EPA inspectors. Where a carrier delivered gasoline allegedly exceeding the 7.8 psi RVP standard to a retail outlet in an area subject to the standard in accordance with instructions of the shipper, its liability in accordance with 40 C.F.R.§ 80.28(e)(3) for having "caused the gasoline to violate the applicable standard" required a showing that the carrier either deliberately or negligently delivered gasoline exceeding the standard to an area subject to the standard. Where the evidence did not establish either of these two elements, counts of complaint based on the contention that

the carrier caused the gasoline to violate the applicable standard were dismissed.

Appearances for Complainant: Jocelyn L. Adair, Esq.

Marc Hillson, Esq.

U.S. EPA

Air Enforcement Division

Washington, D.C.

Appearance for Respondent: Gary R. Letcher, Esq.

The Harker Firm

Washington, D.C.

INITIAL DECISION

This proceeding under Section 205(c) of the Clean Air Act (CAA, the Act), 42 USC § 7524(c), was commenced on June 2, 1993 by the issuance of a complaint which charged Respondent, Commercial Cartage Company, (CCC) with violations of Section 211 of the Act and the Federal gasoline volatility regulation at 40 CFR § 80.27. The complaint alleged that, during the period from June 1, 1992 to August 31, 1992, CCC transported eleven loads of gasoline which had a Reid Vapor Pressure (RVP) exceeding 7.8 psi (pounds per square inch) to a retail facility located in an area in which gasoline having an RVP exceeding 7.8 psi is prohibited during the summer months. The retail facility, Union W 70, is a branded retail outlet in Foristell, Missouri, which is located in the St. Louis Designated Volatility Nonattainment Area.[(1)] For these alleged violations, Complainant proposed to assess CCC a penalty totaling $81,000.

CCC answered, denying the facts alleged in the complaint for lack of knowledge, raising certain defenses, contesting the penalty as excessive, and requested a hearing.

Accompanying the answer was a motion to dismiss upon the ground that the complaint failed to state a claim upon which relief could be granted. The motion was premised upon the contention that CCC as a carrier could be found liable only if it "caused the gasoline" to violate the applicable RVP standard within the meaning of 40 CFR § 80.28(e) or (f), and that causation was

neither alleged in the complaint nor could causation be reasonably inferred from the facts alleged.

Noting that the complaint did not allege that the violations were detected at CCC's facility within the meaning of 40 CFR § 80.28(b) and holding that a cause of action against a carrier under 40 CFR § 80.28(e) must do more than allege the transportation of noncomplying gasoline, the complaint was dismissed by an order, dated September 23, 1993. Notwithstanding the fact that Complainant had not moved to amend, the Environmental Appeals Board (EAB) ruled that Complainant must be given a further opportunity to amend the complaint, In re Commercial Cartage Company, CAA Appeal No. 93-2, 5 E.A.D. 112 (EAB, February 22, 1994). The EAB agreed with the ALJ's conclusion that a mere allegation of the transportation of noncomplying gasoline was insufficient to state a claim and observed that the complaint must allege that the carrier either intentionally or negligently brought gasoline above the RVP standard to an area subject to the standard.

Complainant filed an amended complaint on March 21, 1994. The amended complaint contains three claims for relief. The first claim is based on the contention that the violations were "detected at the carrier's [CCC's] facility," within the meaning of 40 C.F.R. § 80.28(b). Complainant charges CCC with nine violations of 40 C.F.R. § 80.27 for delivery to Union West 70 during the period June 5 through August 31, 1992 of nine loads of regular and premium unleaded gasoline having an RVP in excess of 7.8 psi.

The second claim alleges that two violations of 40 C.F.R. § 80.27 were "detected at a branded retail outlet", Union West 70, within the meaning of 40 C.F.R. § 80.28(e) and that CCC, as the carrier, "caused the gasoline to violate the applicable standard," within the meaning of § 80.28(e)(3). This claim alleges that during EPA's inspection of the Union West 70 retail outlet on September 4, 1992, samples of gasoline were taken which established that the Union W 70 service station was selling regular and premium unleaded gasoline with an RVP in excess of 7.8 psi. CCC allegedly was the sole carrier making deliveries to that facility. Therefore, the complaint alleges two violations for causing the premium and regular unleaded gasoline to violate the RVP standard.

The third claim also charges Respondent with having "caused the gasoline to violate the applicable standard" within the meaning of 40 C.F.R. § 80.28(e)(3). However, this claim alleges nine

violations of 40 C.F.R. § 80.27, which are based upon the nine deliveries of the regular and premium unleaded gasoline referenced in the first claim, in violation of the 7.8 RVP standard. The proposed penalty of $81,000 was unchanged.[(2)]

CCC filed an answer on April 4, 1994, denying the violations. Under date of April 15, 1994, CCC filed a motion to dismiss the amended complaint upon the ground that it also failed to state a prima facie case showing a right to relief by Complainant. CCC essentially argued that "detected at a carrier's facility" within the meaning of 40 C.F.R. § 80.28(b) in this instance meant sampling and testing from the carrier's tank truck, and that a carrier could not cause gasoline to violate the applicable standard merely by delivering it as directed by the owner or consignor. The motion was denied by Order, dated October 11, 1995.

After further proceedings not here relevant, the parties were ordered to file prehearing exchanges. Concomitant with its prehearing exchange, Complainant filed a motion for an accelerated decision, contending it was entitled to judgment as a matter of law as to CCC's liability. This motion was denied by an order, dated June 18, 1996.

An evidentiary hearing on this matter was held in St. Louis, Missouri, on November 19 and 20, 1996.

Based upon the entire record, including the briefs and the proposed findings and conclusions of the parties,[(3)] I make the following:

FINDINGS OF FACT

1. Respondent, Commercial Cartage Company, is a corporation organized under the laws of the State of Missouri. At all times relevant to the complaint, CCC was a common carrier by tank truck of gasoline, petroleum products and other bulk products. Stipulations for Hearing, Joint Exhibit A (Stip.) ¶¶ 1, 2.

2. CCC is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e). Stip. ¶ 3.

3. During 1992, CCC operated a truck terminal, shop and offices at 301 East Marceau Street, St. Louis, Missouri. Lawrence Lewis, Transcript Volume II (Tr. II) 71.

4. During 1992, Union Oil Company (Unocal, a/k/a Unoven) owned a branded retail outlet known as Union W 70, located at 3265 North Service Road, Foristell, St. Charles County, Missouri. Stip. ¶ 5. St. Charles County is in the St. Louis non-attainment area for ozone. 40 C.F.R. § 81.326. Union W 70 is located three-tenths of a mile from the Warren County line which is an attainment area for ozone.

5. Beginning in the high ozone season, June 1-September 15, of 1992, the applicable RVP standard for nonattainment areas for ozone in Missouri is 7.8 psi. 40 C.F.R. § 80.27(a)(2)(ii); Tr.I 167-169. For attainment areas in Missouri, the applicable RVP standard is 9.0 psi for 1992 and subsequent years. 40 C.F.R. § 80.27(a)(2)(i). During the high ozone season, no person may, inter alia, sell or transport gasoline exceeding the applicable RVP standard. The "applicable RVP standard" for this purpose means "9.0 psi for all designated volatility attainment areas; and (t)he standard listed in this paragraph for the state and time period in which the gasoline is intended to be dispensed for any designated volatility nonattainment area within such state..." 40 C.F.R. § 80.27(a)(2)(i) and (ii).

6. During 1992, Hartford Wood River Terminal, Inc. (HWRT) owned and operated a petroleum distribution terminal located at 900 North Delmar Street, Hartford, Madison County, Illinois. Stip. ¶ 8; (Tr.I 16). Mr. Frank Weber, terminal manager, explained the operation of the terminal. He testified that gasoline is received at the terminal through two pipelines in batches from various suppliers such as Unoven, Coastal, Shell, and Conoco, and that there was no set quantity for batches which could be 25,000 or [as much as] 50,000 barrels (Tr.I 108-09, 112). A barrel in the petroleum industry is 42 gallons.

7. Mr. Weber stated that the terminal normally processed 500,000 gallons of gasoline a day through the [truck loading] racks (Tr.I 112). The gasoline was delivered to retail service stations in Illinois and Missouri primarily within a 100-mile radius (Tr.I 113). Asked who owned the gasoline in tanks at the terminal, Mr. Weber replied: "Several people. We have Union that buys their own gasoline, we have Shell that we through put for, and we also own product ourself."(Id.).

8. Although Madison County, Illinois is a nonattainment area for ozone, the applicable volatility standard for gasoline in that area is 9.0 psi during the high ozone season, June 1 through September 15.[(4)]

9. During the summer months of 1992, HWRT stored premium unleaded gasoline in one tank, designated as 80-9, and stored regular unleaded gasoline in two tanks, designated as 80-10 and 80-7 (Tr. I 88, 93, 131-133, 138). Tank No. 80-10 has a capacity of 80,000 barrels or approximately three and a-half million gallons (Tr.I 119). Mr. Weber estimated that on average Tank 80-10 contained about two million gallons (Id.). He described this tank as being equipped with a pressure relief valve and a floating roof, in his words "[t]he roof sits right on the product." (Tr.I 119-20). The roof has both a primary and a secondary seal. Tank 80-7 was used to transfer gasoline to other tanks, and did not connect to the loading racks (Tr. I 138). Although Mr. Weber answered in the negative the question of whether HWRT received deliveries of gasoline [during the period June 1, 1992, through August 31, 1992] not shown in the log book (CX 1) (Tr.I 89, 136), some doubt on the accuracy of this testimony is created by his assertion that he could not tell the RVP of the gasoline in Tank 80-10 on August 31, because if there were another delivery, "it's not on this sheet." (Tr.I 104). The log book does not contain any entries for August 28 through 31 for the regular unleaded tanks, Nos. 80-10 and 80-7. (CX 1).

10. Incoming batches of gasoline at HWRT were sampled by Mr. William Stack through a sample box or spigot on the pipeline (Tr.I 87, 108, 140, 143). Mr. Stack analyzed the samples for RVP, and entered the test results in the log book (CX 1; Tr. I 88, 108, 141, 145-156). Results of these tests on occasion showed an RVP equal to or less than 7.8 psi. For example, premium unleaded gasoline was measured at 7.2 psi on June 1, and regular unleaded was measured at 7.0 psi on June 1, 7.2 psi on July 27, 7.0 psi on August 10, and 7.1 psi on August 26, 1992 (CX 1; Tr.I 93-94, 101, 102, 103, 115). These test results, while necessary for HWRT to demonstrate compliance with RVP requirements, are not controlling here, because incoming gasoline was commingled with gasoline already in the tanks, and tank trucks were filled from the tanks (Tr.I 105, 109, 116, 117, 119). The point at which gasoline is drawn to fill tank trucks is approximately two feet from the bottom of the tank (Tr.I 119).

11. After a pipeline delivery is completed at HWRT, tanks receiving the delivery are allowed to set for two hours (Tr. I 87). Samples, referred to as "running samples", were drawn from the tanks by Mr. Stack to determine, inter alia, the RVP of the gasoline. A "running sample" is taken through a hatch at the top of the tank by dropping a one-quart bottle in a weighted wire cage rather quickly until it hits the bottom. The bottle has

holes in the cap and is then pulled up at a uniform rate to obtain a composite sample of the entire tank (Tr.I 89, 105, 118, 130-131, 139-140, 147-148). This composite sample is not an indication of the RVP of the gasoline at any particular point in the tank.[(5)] The samples were analyzed by Mr. Stack utilizing ASTM-323, and the results entered into a log book (CX 1; Tr.I 108, 139).

12. The RVP "running-sample" test results for unleaded gasoline during June, July and August 1992 for tanks 80-10, 80-7 and 80-9 are as follows:

Date	Tank	Grade	RVP (psi)
June 1	80-10	Regular	8.3
June 2	80-9	Premium	8.2
June 6	80-10	Regular	7.9
June 13	80-10	Regular	7.0
June 16	80-10	Regular	8.1
June 21	80-10	Regular	7.5
June 24	80-9	Premium	8.1
July 1	80-10	Regular	8.0
July 10	80-7	Regular	7.2
July 14	80-7	Regular	8.0
July 17	80-7	Regular	8.3
July 17	80-10	Regular	8.5
July 28	80-10	Regular	8.0
August 5	80-7	Regular	7.7
August 7	80-7	Regular	7.8
August 13	80-10	Regular	8.2
August 23	80-10	Regular	8.4

August 25 80-7 Regular 8.2

August 27 80-10 Regular 8.2

August 31 80-9 Premium 8.3

(CX 1).

Because of a 0.3 psi test tolerance, tests had to show at least 8.1 psi to result in enforcement action. See Ackerman, infra, finding 40; 40 C.F.R. Part 80, Appendix E, ¶ 7.1.1 and the 1992 Volatility Q & A Document at 34-36.

13. Mr. William Stack was responsible for all sampling and testing at HWRT (Tr.I 138-139). He has been employed at HWRT since October 1988 and has had on the job training in sampling and testing procedures from Mr. Weber, who in turn received his training from an independent laboratory (Tr.I 108, 142). Mr. Stack's testimony includes a brief description of HWRT's laboratory practices, which appears to substantially conform with the testing procedures specified in 40 C.F.R. Part 80, Appendix E (Tr.I 145). He testified, however, that he wore rubber gloves "quite a bit" and that he "usually rinsed [the sampling apparatus] out a little bit" (Tr.I 143, 144). Sampling Procedures for Fuel Volatility, 40 C.F.R. Part 80, Appendix D, provide, inter alia, at ¶ 7.1 "Clean hands are important [in obtaining samples]. Clean gloves may be worn only when absolutely necessary, such as in cold weather, or when handling materials at high temperature, or for reasons of safety." Paragraph 7.3 provides that "[w]hen sampling relatively volatile products (more than 2 pounds (0.14 kgf/cm^2) RVP), the sampling apparatus shall be filled and allowed to drain before drawing the sample."

14. Messrs. Stack and Weber testified that the RVP testing method used at HWRT was ASTM D-323 (Tr.I 105, 141). That method was replaced in the volatility regulations of 1989 by ASTM P-176, which is "nearly identical to ASTM D-323 except that it is designed to eliminate contact of the fuel sample with water," for purposes of testing gasoline-oxygenate blends. 52 Fed. Reg. 31300 (August 19, 1987); 54 Fed. Reg. at 11877. Although the regulations in effect in 1992 stated that ASTM D-323 cannot be used to determine the vapor pressure of gasoline-oxygenate blends which contain water-extractable oxygenates, use of ASTM D-323 was not prohibited for testing of straight gasoline. 40 C.F.R. Part 80 Appendix E ¶ 3.1 (1991). It may be inferred that

HWRT's tanks 80-7, 80-9 and 80-10 contained straight gasoline rather than oxygenated blends (Tr.I 88, 111, 122).

15. Mr. Stack testified that HWRT sent [exchanged] monthly gasoline samples in "round robins" so that we can tell if our equipment is "working all right" (Tr.I 142). These comparison tests included the RVP and the octane of the gasoline (Tr.I 149). He stated that if the [outside test results] were within a tenth or two [of HWRT's] "you know [that] you're doing your job" (Id). He further stated that he had never been out of tolerance on the [RVP] test.

16. Tank truck carriers picked up gasoline at HWRT at a loading rack (Tr.I 122, 123). Mr. Weber explained that what was referred to as a "loading rack" was actually a "loading spot" and that there were four loading spots in the same enclosure. A truck driver activated dispensing equipment at a loading rack by inserting a four-digit card, similar to a small credit card, into a card reader (Tr.I 125). Among other things, the card identified the driver, the carrier for whom he was employed, and whether he was authorized to load gasoline. The driver selected the grade of gasoline desired by punching numbered buttons which turned on the pumps (Tr.I 126). The quantity was preset by a meter on or connected to the loading arm. When the preset quantity was dispensed, the meter and the pump would automatically shut off. Although there is an attendant on duty at HWRT at all times, in the absence of a loading or mechanical problem, a truck driver has no occasion to contact the attendant (Tr.I 123). Mr. Weber averred that [loading of] blends was different, because a special code had to be inserted into the card reader and there were a separate set of buttons to activate the blenders (Tr.I 127). HWRT apparently randomly sampled only loaded tank trucks containing blends, i.e., gasahol, an ethanol blend, and Illini, a three-product blend (Tr.I 95, 120-21; CX 1).

17. On September 3, 1992, Mr. William Simpkins, an EPA contract inspector, accompanied by Mr. Rodney Goreman, conducted and inspection of HWRT (Tr.I 16-18, 22, 45, 84). During the inspection, Mr. Simpkins interviewed Mr. Frank Weber, terminal manager, and examined records. Among documents reviewed and copied were HWRT's Gasoline Log for the period June 1, 1992, through August 31, 1992 (CX 1), and Motor C[arri]er Straight Bill(s) of Lading or Loading Ticket(s) which indicated the transport by CCC of regular and premium unleaded gasoline, during the high ozone season, to Union W 70, Foristell, Missouri (Tr.I 17, 18, 22, 24; CX 2).

18. During the inspection of the HWRT facility, Mr. Simpkins copied bills of lading Nos. 61602, showing a delivery by CCC of regular and premium unleaded gasoline to Union W 70 on June 5, 1992; 62296, showing a delivery of regular and premium unleaded gasoline on June 12, 1992; 62927, showing a delivery of regular and premium unleaded gasoline on June 17, 1992; 63396, showing a delivery of regular and premium unleaded gasoline on June 23, 1992; 66103, showing a delivery of regular and premium unleaded gasoline on July 20, 1992; 66725 showing a delivery of regular and premium unleaded gasoline on July 24, 1992; and 71385, showing a delivery of premium and unleaded gasoline by CCC to Union W 70 on August 31, 1992 (CX 2, 3-A, 2, 3-B through 3-F). HWRT Bill of Lading No. 71385 for the delivery on August 31, 1992, reflects that CCC's truck clocked in at HWRT at 11:46 am on that date and clocked out 16 minutes later at 12:02 pm. HWRT drew a sample from the tank containing premium gasoline (80-9), on August 31 (finding 12), but there is no evidence of whether this was before or after CCC's pickup. If the CCC pickup was prior to the HWRT sampling, the most recent sampling of the premium tank (80-9) was on June 24, 1992 (finding 12).

19. Although Mr. Simpkins testified that "..we found nine invoices of (sic) bills of lading indicating that Commercial Cartage had made deliveries,..." (Tr.I 22), the seven bills of lading identified in finding 18 are the only ones in evidence. Asked on cross-examination whether he found any record showing deliveries by Commercial Cartage [to Union W 70] during the period between June 23 to July 20, 1992, and July 24 to August 31, 1992, he replied in the negative (Tr.I 64-66).

20. Preprinted on the bills of lading referred to in finding 18 is the statement: "Gasoline Meets Federal R.V.P. Regulations." Printed above these statements below an emergency response number is the following: "Gasoline Not Marketable in 7.8 RVP Control Areas." Mr. Weber testified that this statement was placed on the bills of lading, "[b]ecause at that period of time, we had gas that did not meet those requirements." (Tr. I 106). While this is not an assertion that all gasoline on hand at HWRT at that time had an RVP exceeding 7.8 psi, on redirect examination, in response to a leading question from Complainant's counsel, Mr. Weber answered in the affirmative whether all regular and premium gasoline supplied [by HWRT] during the summer months of 1992 had [an RVP] which exceeded 7.8 psi (Tr.I 137). Mr. Simpkins testified that, from these statements on the bills of lading, he would presume that Foristell, Missouri was not in an 7.8 area, unless he checked a map (Tr.I 67). Because the map showed that Foristell, Missouri

was in an 7.8 area, he stated that "we proceeded to Commercial Cartage to conduct an inspection". (Tr.I 22).

21. In 1992, CCC's business office was located at 301 East Marceau Street, St. Louis, Missouri (Tr.I 22). The inspection of CCC was conducted on September 4, 1992. The person in charge at CCC on that date was Mr. Kenneth Baer, safety director, who gave permission for the inspection (Tr.I 23). Mr. Simpkins told Mr. Baer that "we" wanted to check some invoices and make some copies (Id.). He stated that they were able to "match up" bills of lading obtained from HWRT [showing deliveries to Union W 70] with bulk transport or billing documents found at CCC (Tr.I 23, 26; CX 3).

22. The bulk transporter documents or "delivery tickets" found at CCC are forms, which contain the letterhead "Commercial Cartage Co. Bulk Transporters", refer to a bill of lading number, and, inter alia, state the date and quantities of gasoline (regular and premium) transported, the point of origin as Hartford Wood River Terminal, Hartford, Il., the "Deliver to" point as Union 70 West, Foristell, MO., and the "Bill to" address as Union Oil Company, Schaumburg, Il. These documents also included the mileage, empty and loaded, traveled by the tank truck, the quantity of gasoline in each compartment of the truck, stick readings of the tanks into which the gasoline was delivered before and after unloading, the signature of the driver, and a signature on behalf of the retail outlet, Union 70 West, beneath the following: "Bill of lading has been examined. The commodity, quantity, unloading location and hookup, have been approved. Driver instructed to unload."

23. Bulk transporter documents reflecting deliveries on July 20 and 24, 1992, referred to in finding 18, were apparently not located by the inspectors and are not in the record. The copies in the record of the bulk transporter documents showing deliveries on June 23 and August 31, but not on other dates, appear to include the notation: "Gasoline Not Marketable In 7.8 RVP Control Areas". It is concluded, however, that this notation was not included on any of the CCC bulk transporter documents or delivery tickets and that the appearance that the notation was so included was created by combining in the copying process HWRT bills of lading and the CCC delivery tickets. Evidence that HWRT bills of lading and CCC delivery tickets were combined when copied is reflected on the delivery tickets and invoices for the deliveries to Union W 70 on June 17, June 23, and August 31, 1992, upon which portions of the HWRT bills of lading are visible (CX 3).

24. Mr. Baer, who was deceased at the time of the hearing, gave the following statement to Mr. Simpkins: "To the best of my knowledge, Commercial Cartage Co. was never made aware of the regulation pertaining to transporting gasoline @9.0 R.V.P. to an area that can only accept 7.8 R.V.P. Please place our name on the mailing [list] for volatility regs." (CX 10)

25. Mr. Simpkins testified that after making copies of the [HWRT] bill(s) of lading "we" thanked Mr. Baer for his cooperation and departed (Tr.I 44). Asked on cross-examination if he recalled in particular what documents he had examined at Commercial Cartage, Mr. Simpkins replied: "I examined the bulk transport documents, and mainly what we're looking for [was] to compare with the documents we received at Hartford Wood River Terminal" (Tr.I 80). He answered in the affirmative the question of whether he recalled finding the carrier's copy of the bill of lading (Id.). Although CCC's copies of the HWRT bills of lading are not in the record, this testimony finds some support in the fact HWRT bills of lading and CCC delivery tickets and invoices were combined in the process of making of copies (finding 23).

26. Messrs. Simpkins and Goreman then proceeded to the Union West 70 station in Foristell, Missouri. After presenting their credentials to the manager, Mr. Robert Haveslip, they took two samples, Sample No. 1 of the regular (87 octane) and Sample No. 2 of the premium (92 octane) gasoline from the pump nozzles (Tr.I 46, 47; Fuels Field Inspection, CX 4). The Fuels Field Inspection [report] contains a handwritten notation: "Last delivery 8/31/92, Bill-of-Lading att'd." The Fuels Field Inspection report in the record does not include the attachment. The samples were then sealed with chain of custody seals (Sample Nos. 1035982-1, 2) and shipped by air mail to the EPA laboratory in Ann Arbor, Michigan. There are two tanks for gasoline at Union W 70, the tank for regular having a capacity of 20,000 gallons, while the capacity of the tank for premium gasoline is 10,000 gallons (Tr.I 46, 80; CX 4). Mr. Simpkins testified that he counted 24 [pump] nozzles at the station. Asked whether he found the station's copy of the bills of lading at Union W 70, he replied; "I believe yes, I did". (Tr.I 80).

27. The affidavit of Mr. Carl A. Scarbro, the EPA chemical engineering technician who performed volatility tests on the samples from Union W 70, is in evidence (CX 5). Mr. Scarbro states that on September 8, 1992, he received at the laboratory two samples, having the custody seals intact, identified as 1035982-1, 2. Using the testing methodologies specified at 40 C.F.R. § 80.27(b), he conducted two Herzog Semi-Automatic-Method

2 tests on each sample to determine the RVP of the gasoline. Sample No. 1 had an RVP of 8.82 psi, the average of RVP test results of 8.81 psi and 8.83 psi. Sample No. 2 had an RVP of 8.65 psi, the average of RVP test results of 8.61 psi and 8.69 psi. The samples were also tested for the presence of alcohol and none was found. (CX 4).

28. Mr. Mark Kaiser testified that he was and had been president of St. Louis West 70 Truck Plaza, Incorporated since 1978 (Tr.I 151). He stated that the Plaza was open 24 hours a day and sold about 2,000 gallons of gasoline each day (Tr.I 151-52). He testified that Commercial Cartage delivered gasoline to the Plaza "between" the months of June and August 1992 (Id.). Asked whether anyone else delivered gasoline to the station [during that period], he replied: "[n]ot that I'm aware of." He could not recall the frequency of deliveries to the station by Commercial Cartage during the summer of 1992 and did not know the most recent delivery of gasoline prior to the EPA inspection on September 4, 1992. To his knowledge, Commercial Cartage [its truck driver] always left a copy of the bill of lading at the station when making deliveries (Tr.I 154).

29. In further testimony, Mr. Kaiser explained the Truck Plaza's relationship to Unocal in 1992. He stated that Unocal owned the land, the building, and the underground tanks which "we" leased (Tr.I 155). Unocal also owned the gasoline and diesel fuel in the tanks. The station carried the Union 76 brand name. Inventory was monitored by Plaza personnel and Commercial Cartage. Orders for gasoline deliveries, however, were directed through Commercial Cartage from Unocal's offices in Schaumburg, Illinois (Tr.I 157).

30. Mr. Kaiser described the fill ports for the tanks at the Plaza as located off the north service road in the fuel pad area and as being like "small metal manholes" (Tr.I 158). He stated that there was a fill port for each of the gasoline tanks and three for diesel fuel. The gasoline ports were marked for regular and super unleaded gasoline, but did not contain any warnings or markings reflecting RVP limitations. Mr. Kaiser was not aware of federal RVP regulations until the EPA inspection [on September 4, 1992] (Tr.I 161). He described the Plaza as being located approximately 45 miles from St. Louis in a rural community, surrounded "mostly by farm land." (Id.)

31. A sign posted on the wall in the "driver's room" at HWRT stated that the gasoline was not marketable in 7.8 RVP control areas. (Tr.I 107). The sign listed the control areas, and stated

that there would be a penalty if gasoline were delivered to a 7.8 RVP area. According to Mr. Weber, the [sign was posted] because gasoline supplied by HWRT during the summer of 1992 did not meet that requirement (finding 20). It is noted, however, that samples of regular gasoline taken from tank 80-10 on June 13, June 21, July 1, and July 28, 1992, showed an RVP of less than 7.8 psi or within the 0.3 psi test tolerance (finding 12). Although tank trucks were not loaded from tank 80-7, regular gasoline in this tank tested at or below 7.8 psi or within the 0.3 tolerance on July 10, July 14, August 5, and August 7, 1992 (finding 12). Presumably a tank truck driver would need to visit the "driver's room" or office at HWRT after his truck was loaded for the purpose of signing a bill of lading or other receipt for the gasoline. Other than an inference from general practice (infra, finding 36), however, there is no evidence that this is so.

32. Mr. Clifford Harvison, President of National Tank Truck Carriers, Incorporated, a trade association, testified as to

the general practice of tank truck common carriers (Tr.II 5, 9, 10-12). He described the carriage of gasoline by tank truck as primarily a "short-haul" business and estimated that the average round-trip by such carriers would be approximately 70 miles, only half of which would be loaded (Tr.II 12, 13). He stated that this was particularly true in urban areas such as St. Louis. Asked whether a particular tank truck would make more than one delivery per day, he replied: "Oh, absolutely. Hopefully. If you make one delivery of gasoline per day, you're about out of business."[(6)] Mr. Harvison asserted that maximum utilization of the vehicle is [must be] the prime management goal in the tank truck industry.

33. Mr. Harvison explained the obligation of a common carrier at the time the deliveries at issue here were made (Tr.II 14-16). He testified that a trucking company [desiring to do business as a common carrier] in a particular area applied to the Interstate Commerce Commission (ICC), which in his terminology was "sunsetted" on January 1 of this year [1996], for a certificate of public convenience and necessity. Assuming the application were granted, an obligation of law followed the certificate, that is, if the firm or person held itself out to the public to perform transportation services, it had an obligation to comply with its tariff, which was a listing of the specific services and the prices therefor [filed with the ICC]. The carrier could not charge rates other than those specified in its tariff and it could be penalized by the ICC if it refused to transport goods

listed in its tariff (Tr.II 18, 19). On cross-examination, Mr. Harvison acknowledged that a carrier was under no obligation to transport an illegal cargo (Tr.II 47, 48, 51). He maintained, however, that the statements on the bills of lading at issue here, i.e., "Gasoline Meets Federal R.V.P. Regulations" and "Gasoline Not Marketable in 7.8 R.V.P. Control Areas", created no obligation by CCC or its driver to inquire as to whether the gasoline was destined for a proper [ozone attainment] area (Tr.II 55, 56).

34. Mr. Harvison explained the process by which a carrier normally received an order for the transportation of gasoline (Tr.II 20-23). He stated that an oil company or shipper would call the carrier's terminal or primary place of business, and probably talk to the dispatcher, explain what its needs were in terms of quantity and when and where the product was to be picked up and dropped off. The carrier then had to assure itself that it had the proper equipment and a properly licensed and trained driver or drivers. Asked how the driver knew where to go, what to pick up and where to deliver it, Mr. Harvison replied that the driver generally received a piece of paper from his dispatcher, which he referred to as a bill of lading "or consist" and which generally described the point of pickup and anticipated a point of delivery (Tr.II 22). There is no evidence in the record that the driver for the deliveries at issue here received any paper from CCC or its dispatcher describing quantities of gasoline, point of origin, or destination of the gasoline. See finding 53 infra.

35. Mr. Harvison described the typical manner of loading a tank truck at an automated terminal substantially as Mr. Weber described the loading process at HWRT (finding 16). He (Harvison) testified that the driver would use a credit-card-like device to gain access to the terminal and to [activate] an automated loading device to fill his tank (Tr.II 27, 28). He stated that loading racks were typically multi-armed, having, for example, separate arms or hoses for 87-octane and 92-octane gasoline, arranged so that separate compartments of the tank truck could be filled simultaneously (Tr.II 29, 30). The driver indicated the quantities to be loaded by punching numbers on a key pad. (Tr.II 31). With the advent of "closed loop" vapor recovery systems, the driver never sees the product and has no control over its grade or other characteristics (Tr.II 33-35). In Mr. Harvison's words, the driver would not personally know if it were "corn starch". (Tr.II 35).

36. Mr. Harvison testified that, after a truck is loaded, the driver typically received a multi-copy electronic printout displaying the quantities and grades of gasoline loaded (Tr.II 35, 36). He explained that this document would serve as a shipping paper--required by DOT because the product was hazardous--or a bill of lading and that generally these papers were generated automatically by means of a printer at a computer. Assuming that the truck driver continued working for the same truck terminal or carrier, Mr. Harvison estimated that a typical driver might make hundreds of deliveries during the course of a year to 50 or 60 different sites [stations] (Tr.II 44). He opined that it would be unreasonable to expect a driver to be familiar with the ozone attainment status of the various destinations. His reasons for this opinion included the fact that the driver had no expertise in this area, he was not trained and, in Mr. Harvison's opinion, should not be trained to make judgments of that type (Tr.II 45). He emphasized that the regulations were very complex and that the driver on his own would have no way of knowing whether particular gasoline met federal specifications for RVP. Asked whether a professional [truck] driver would normally know the county he was [then] in or the county to which he was going [to make a delivery], Mr. Harvison replied: "No. Nor would I. I don't know what county I am in right now." (Tr.II 59)

37. Mr. Richard Ackerman, Acting Chief of the Mobile Source Enforcement Branch of EPA's Office of Regulatory Enforcement, Air Enforcement Division, is responsible for overseeing compliance investigations and enforcement in EPA's Mobile Source Enforcement Program (Tr.I 162-163). He defined volatility as a measure of the evaporative quality of gasoline and testified that this was important because gasoline emits volatile organic compounds (VOCs), which are one of three primary constituents in the formation of ground-level ozone (Tr.I 164). He stated that ozone was primarily a warm weather problem and that, because the evaporative characteristics of gasoline are most affected by climate, EPA attempted to control the volatility of gasoline [during the "high ozone season"] based on geography (Tr.I 165).

38. Mr. Ackerman explained the difference between an attainment and a nonattainment area by the fact that under the Clean Air Act "safe limits" are established for various pollutants (Tr.I 166). Areas [Air Quality Control Regions] that do not meet these limits, including those for ozone, are nonattainment areas. Referring specifically to gasoline volatility limits in effect during the 1992 "control season" (June 1 through September 15), he testified that the maximum [RVP] was 9.0 psi in the northern

part of the country and 7.8 psi in the southern half of the country (Tr.I 167-68). The Clean Air Act of 1990 (§ 211(h)(2)) prohibited EPA from requiring an RVP of less than 9.0 psi in ozone attainment areas and Mr. Ackerman pointed out that the effect of this prohibition was to "carve out" 7.8 psi areas, which might be surrounded by 9.0 psi areas, if the rest of the state [Region] were in attainment (Tr.I 168). He stated that all 7.8 psi areas were surrounded by or adjacent to 9.0 psi areas. An apparently anomalous situation in this regard is Bond County, Illinois, which is in the St. Louis Interstate Air Quality Control Region (40 C.F.R. §81.18), but, nevertheless, is designated "Unclassifiable/Attainment" for ozone (40 C.F.R.§ 81.314; Tr.I 192-93). Mr. Ackerman explained that, because there were "northern states and southern states", the entire State of Illinois was a 9.0 psi area irrespective of its attainment status (Tr.I 193-94).

39. Asked how EPA conducted volatility investigations in 1992 for those areas of the country where 7.8 psi areas were in proximity to 9.0 psi areas, Mr. Ackerman replied that these areas were the focus of EPA's attention, because of the potential for violation, and because they had the greatest air quality problems for ozone (Tr.I 173). He testified that "[w]e did inspections at terminals in those areas, particularly in those which were carrying product that might be misrouted, we did inspections at gas stations and fleet facilities to make sure they had the right product in their tanks." (Id.). (Emphasis added).

40. Mr. Ackerman stated that he first became aware of the instant CCC matter in September or October of 1992 when he received a report of investigation from "our contract teams", which indicated potential violations (Tr.I 174). He reviewed the file including the Fuels Field Inspection report (CX 4) of the inspection of St. Louis West 70, conducted on September 4, 1992 (Tr.I 174-75). He pointed out that analysis of the samples taken at this inspection indicated that both the regular and the premium gasoline were well in excess of the 7.8 standard applicable to that county at the time. He asserted that "we" are generally conservative and will only proceed [with an enforcement action] when violations are well in excess of "our" standard (Tr.I 177-78). Because of testing uncertainties, he explained that they allowed a 0.3 psi tolerance and would not proceed as to a violation of the 7.8 psi standard, unless [test results] showed at least 8.1 psi and that they would not proceed with a violation of the 9.0 psi standard, unless [test results] showed at least 9.3 psi (Tr.I 178).

41. Asked how EPA determined the nine other violations for which it had cited CCC, Mr. Ackerman referred to the Gasoline Log maintained by HWRT (CX 1) reflecting analyses of incoming product and analyses of "tank blends" once the product had been received (Tr.I 176). He also referred to HWRT bills of lading indicating pickups by CCC and deliveries to this "Unoven" (Unocal) station (Union W 70) and HWRT invoices, companions to those confirming the pickups with bill of lading numbers.[(7)] He testified that we examined the invoices and when pickups occurred from tanks having RVP levels in excess of the standard, we considered that to be the transport of noncompliant product.[(8)]

42. Mr. Ackerman testified, however, that "[t]here were some pickups [by CCC during the summer of 1992] that were done where the tank blends [at HWRT] at the time [the blends were sampled and tested] most recent[ly] prior to the delivery [to Union W 70] was [sic] not in excess of the [7.8] standard and we did not proceed [to issue a complaint or notice of violation] with those cases." (Tr.I 177). On cross-examination, he acknowledged that delivery of particular gasoline in those instances to a 7.8 control area would be proper even though the HWRT bills of lading also contained the notation "Gasoline Not Marketable In 7.8 R.V.P. Control Areas" (Tr.I 186-89). In further testimony, he maintained that a prudent supplier and customer [under the circumstances at issue here] would not rely on day-to-day variations in testing, because the gasoline was in fact marketed for the higher RVP regions of the country (Tr.I 210).

43. Mr. Ackerman testified that Unocal paid a penalty for the violations herein, because it was a distributor of the gasoline (Tr.I 203). He recalled that the amount of the penalty paid by Unocal was $39,000. He described HWRT as a "common carrier" under the regulations and stated that it was not cited for the violations, because it had an oversight program [sampling and testing] and had taken reasonable steps through [posting] warnings to preclude violations.[(9)]

44. Mr. Lawrence Lewis, vice-president of Montgomery Tank Lines and president of CCC, testified that, although he had held a variety of jobs, he had worked "pretty much" full-time in the transportation business since 1974 (Tr.II 65,66). He stated that CCC was founded in 1946 by his father, that he assumed the presidency in 1991 or 1992, and that, although the corporation still existed, CCC was no longer operational (Tr.II 67, 68). Mr. Lewis is the sole stockholder of CCC. He described CCC's business as providing transportation services for bulk

materials, including liquid petroleum products (Tr.II 71, 75). He explained the process of obtaining a certificate of public convenience and necessity from the ICC, which allowed CCC to operate as a common carrier in interstate commerce (Tr.II 72). He testified that the certificate issued to CCC has been surrendered (RX E) and had not been reinstated (Tr.II 72,73).

45. Mr. Lewis estimated that CCC had about one thousand customers in 1992 and that approximately 30% to 35% of the transactions out of its St. Louis terminal involved the transportation of gasoline (Tr.II 75,76). He indicated that this could involve from 500 to 1,000 consignees or delivery points during the course of a year. Asked how many tractors CCC owned in 1992, Mr. Lewis replied: "I think we owned one." (Tr.II 76). He explained that the remainder of the 60 to 65 tractors used by CCC were owned by various leasing companies or owner/operators. Of the 140 to 150 tank-trailers used by CCC [in 1992], the company owned perhaps ten, the remainder being owned by leasing companies (Tr.II 76,77).

46. An example of a lease for a "Westernstar" tractor between M & R Trucking and Commercial Cartage Co. entered into in June, 1993 is in the record (RX F). Mr. Lewis testified that M & R Trucking leased equipment to CCC in 1992 as well as in 1993 (Tr.II 78,79). Among other things, the lease provides that the owner shall drive himself or provide a licensed, qualified and experienced driver and that the owner, his drivers or helpers are not agents or employees of CCC (¶¶ 7 & 8). When asked, however, if employees of M & R Trucking and company drivers were agents of CCC, Mr. Lewis replied: "[a]gents". However, when his attention was called to the specific terms of the lease, he answered the foregoing question in the negative.[(10)] Mr. Lewis identified Charles McKernan, an employee of M & R Trucking, the driver for the deliveries from HWRT to Union W 70 at issue here, as the usual driver of the tractor described in the mentioned lease (Tr.II 81). He indicated that, while Mr. McKernan was not an employee of CCC at the time, he may have become an employee of CCC subsequent to the expiration of the lease.

47. Under the terms of the lease referred to in finding 45, M & R Trucking received 62.1 percent of line-haul revenue generated by the tank truck (Tr.II 82). Mr. Lewis testified that CCC would have to pay insurance, taxes, and other operating expenses out of the remaining 38 percent (Tr.II 83). He stated that tank-trailers were typically owned by leasing companies and that, unlike the tractors, payments for the trailers were due

irrespective of whether the trailers were used [to transport product] (Tr.II 83, 84).

48. CCC had borrowed money against receivables from a factoring company and payments for the transportation services of concern here were made to CCC, Rockefeller Station, New York City (Tr.II 101, 118; delivery ticket, RX G; invoice, RX H). Mr. Lewis recited the disposition of the $141.96, the sum due CCC at 1.71 cents per gallon for transporting 8,302 gallons of gasoline from HWRT to Union W 70 on June 12, 1992 (RX G & H). He testified that M & R Trucking received about $80.00, the factor retained about $20.00, and that CCC received the remaining $40.00 [plus] dollars (Tr.II 102-03). He asserted that CCC's rate for the mentioned delivery was 1.71 cents per gallon pursuant to a tariff on file and that this rate was not affected by the vapor pressure of the gasoline.

49. Mr. Lewis described the training CCC provided its drivers (Tr.II 85, 86). He stated that drivers were trained as to DOT [safety requirements], in such matters as first aid, and as to meeting the requirements of various facilities as to access and loading. He explained that CCC had a very active quality program, that they attempted to provide drivers who were a "bit better" qualified and service that was "bit better" [than their competitors] and that they emphasized [to drivers] the importance of good customer relationships. He indicated that significant training was provided to drivers handling noxious [hazardous] chemical cargos and insisted that the actual employer of the driver made no difference in the status of his training (Tr.II 86, 87).

50. Mr. Lewis testified that he was aware of EPA's fuel volatility regulations and that among steps taken by CCC to alert drivers to seasonal changes in this regard was the posting of a sign outside the dispatcher's office (Tr.II 107-08). He further testified that with the payroll he included a letter which emphasized environmental and safety issues including the season for changes in RVP regulations [requirements].[(11)] Drivers were instructed that, if they had any reason to believe that the gasoline they were going to deliver was not in compliance with those regulations, they were to contact the dispatcher. Under cross-examination, Mr. Lewis acknowledged that he knew where St. Charles County, Missouri was located and that he knew it required 7 [.8 psi] volatility gasoline [during the high ozone season] (Tr.II 114-15). He was not asked and did not testify that he knew Union W 70 was located in St. Charles County. Mr. Lewis had no personal knowledge of a [CCC] driver ever

refusing fuel because of the volatility regulations (Tr.II 115-16).

51. Mr. Lewis testified that in 1992 CCC had approximately 50 customers or shippers for gasoline which it served from its St. Louis truck terminal (Tr.II 88). He estimated that gasoline was picked up from 12 to 15 terminals and delivered to several hundred points or stations (Tr.II 88, 92). He described the preliminary arrangements with a shipper as including trading [exchanging] documents required for obtaining the quantities of gasoline expected to be shipped, terminals where the gasoline was to be picked up, delivery points, and billing addresses. He pointed out that CCC would need access to the distributor facilities and that this would include loading cards, insurance certificates, driver records and similar documents (Tr.II 89).

52. After the arrangements described in finding 51 were completed, individual deliveries could be arranged by a simple phone call. Mr. Lewis testified that these calls were usually received by, or transmitted to, CCC's dispatcher and involved the origin and destination and grades and quantities of the gasoline, whether there was a specific time by which the delivery must be made, and other pertinent information such as events which might make for unusually heavy traffic or delivery problems. (Tr.II 90). He explained that drivers were assigned to particular accounts and then secondarily from the general pool, which required ascertaining driver availability, whether they were qualified to handle the product, whether they had access to the terminal, and whether they were within DOT limits as to hours of service (Tr.II 91).

53. Referring to a CCC bulk transporter document or "delivery ticket" (RX G), Mr. Lewis described it as an internal document that was produced for every shipment made by CCC describing the transaction (Tr.II 96). He testified that delivery tickets were used to verify loading and delivery [of particular cargo] and for billing purposes. He stated that the tickets were typically filled out by the driver, that the drivers had a pad of these forms, and that drivers were encouraged to [begin] filling out the form as instructions were received from the dispatcher (Tr.II 97).

54. Because of the conclusions reached herein, no findings are made as to CCC's financial status.

CONCLUSIONS

1. The tank truck used by CCC to transport gasoline from HWRT to Union W 70 during the summer months of 1992 is a "carrier's facility" within the meaning of 40 C.F.R. § 80.28(b). Stip. ¶ 12.

2. The regulation (40 C.F.R. § 80.28(b)), providing that "where a violation of the applicable standard set forth in §80.27 is detected at a carrier's facility" the carrier shall be deemed in violation, contemplated that the violation would be detected through sampling and testing of the gasoline from the carrier's facility [tanks].

3. Assuming arguendo, that, as the ALJ initially ruled, a violation at the carrier's facility within the meaning of § 80.28(b) may be detected solely by the examination of documents, Complainant has failed to carry its burden of proof in this regard. The evidence does not show that delivery tickets found by the inspectors at CCC's facility included information which indicated violations of the RVP standard. Complainant's first claim for relief (Count I) based upon the contention violations of the RVP limit were detected at CCC's facility must and will be dismissed.

4. CCC as the carrier may be held liable for the two violations alleged in Complainant's second claim for relief (Count II), which are based upon sampling of the branded retail outlet, Union W 70, on September 4, 1992, only if it "caused the gasoline to violate the applicable standard" within the meaning of 40 C.F.R.§ 80.28(e)(3). Assuming arguendo, that Complainant has established that CCC delivered the gasoline sampled by the inspectors, CCC delivered the gasoline ordered by Unocal to the destination specified by Unocal, and may be held liable only if it is shown to have deliberately or negligently delivered gasoline exceeding the 7.8 psi RVP standard to an area subject to the standard. Complainant has failed to establish either of these elements and its second claim for relief (Count II) will be dismissed.

5. Complainant's contention that CCC may be held liable for the transportation of noncompliant RVP gasoline based upon sampling and testing by HWRT of gasoline in its tanks on dates nearest to the dates CCC picked up gasoline at HWRT is rejected, because the gasoline in CCC's tank truck was not sampled and the samples taken by HWRT have not been shown to be representative of the gasoline picked up and delivered by CCC. Complainant's third claim for relief (Count III) will be dismissed.

DISCUSSION

I. Whether violations of 40 C.F.R. § 80.27 were detected at Respondent's facility

Complainant's first claim alleged that as a result of the inspections and examinations of records at HWRT and CCC, EPA detected nine violations of 40 C.F.R. § 80.27 based on 40 C.F.R. § 80.28(b). Complaint ¶ 25. The latter paragraph of the regulation states in pertinent part as follows:

(b) Violations at carrier facilities. Where a violation of the applicable standard set forth in § 80.27 is detected at a carrier's facility, whether in a transport vehicle, in a storage facility, or elsewhere at the facility, the following parties shall be deemed in violation:

(1) The carrier, except as provided in paragraph (g)(1) of this section . . . .

Paragraph (g)(1) requires a demonstration that the violation was not caused by the carrier or his employee or agent; and (ii) [e]vidence of an oversight program conducted by the carrier, such as periodic sampling and testing of incoming gasoline. CCC did not claim, and the evidence does not show, that it met these criteria for a defense to liability. It is unrealistic, if not totally unreasonable, to expect that a carrier not having storage facilities, in possession of the gasoline for a few hours at most, and operating on the margins shown by this record could or would engage in periodic sampling and testing.[(12)]

Therefore, the issue as to Complainant's first claim is whether "a violation of the applicable standard set forth in § 80.27 [was] detected at a carrier's facility." The inspectors did not take samples of gasoline from CCC's tank trucks. Complainant relies on documentary evidence found by the inspectors at the HWRT and CCC facilities and interviews with personnel during the inspection of those facilities to support its contention that a violation was detected at a CCC's facility. The ALJ previously ruled that "(d)etection may be based upon evidence such as documents found at the carrier's facility and volatility test results from samples taken by persons other than EPA inspectors." Order Denying Motion to Dismiss, dated October 11, 1995, at 9. Upon further review, it is concluded, however, that the regulation contemplated that "detection at the carrier's facility" would be by sampling and testing from the carrier's tanks.

As CCC pointed out, the Agency in the preamble to the proposed rules adopted "in-field sampling and testing" as the most effective means of detecting violations and to assure that emission reduction benefits from RVP controls are actually achieved. 52 Fed. Reg. 31295-296 (August 19, 1987). This is a strong indication that sampling and testing was the preferred, if not necessarily the only, method of detecting violations.

Evidence that "detected at the carrier's facility" meant in the carrier's truck, pipeline, or storage tanks rather than its offices, where documents would presumably be stored, is contained in subsequent pages of the preamble: Id. 31306 "ii. Carrier Facility. When a violation is detected at a carrier facility, either in the actual carrier (pipeline, truck, etc.) or in the carrier's storage facilities, EPA proposes to hold the carrier presumptively liable because either (1) the carrier physically caused the violation through its affirmative act or omission, or (2) the carrier transported product which was in violation." "Detected at a carrier's facility" thus contemplated that violations would be detected by sampling and testing from the carrier's tank or tanks.[(13)]

EPA finalized the RVP regulations largely as proposed (54 Fed. Reg. 11868-11890, March 22, 1989). The RVP standard applied at all points in the distribution chain, in-field sampling and testing was maintained as the RVP enforcement mechanism, and "detected at the carrier's facility" meant sampling and testing.[(14)] Responding to comments that a distributor should be able to rely on documents showing that the product was in compliance when received, rather than conducting periodic sampling and testing, the Agency stated: "The reliability of documents alone, without test results to support them, is questionable." 54 Fed. Reg. 11873. If the Agency is unwilling to rely on documents as assurance that product in the hands of a distributor or carrier is in compliance, by the same token it may not rely on documents, other than those showing concurrent sampling and test results, to show a violation.

Moreover, while the evidence indicates that the samples drawn and tested by HWRT were composites and thus representative of the RVP of the gasoline in the very large tanks on the dates the samples were drawn,[(15)] the HWRT tests do not establish the RVP of the gasoline on the dates and at the point it was drawn to fill CCC's tank trucks because of the possibility of evaporation, e.g., from the open hatch from which samples were drawn, and the likelihood of stratification (findings 10, 11). While it may be questionable whether any of the gasoline picked up by CCC at

HWRT and delivered to Union W 70 during the period June 1, 1992, through August 31, 1992, had an RVP of 7.8 psi or below (finding 12), there is no way of knowing this because gasoline from CCC's tank truck was not sampled and tested. As a practical matter then, EPA can "detect a violation at the carrier's facility" within the meaning of § 80.28(b) only by sampling and testing gasoline from the carrier's tank, in this instance, CCC's tank truck.

The ALJ's contrary conclusion in the order denying CCC's motion to dismiss was based in part on the 1992 Volatility Question And Answer Document, which indicates at 5, that a "distributor" may be deemed liable based upon an inspection subsequent to the discovery of a violation downstream from a refinery or terminal, showing delivery of 9.0 psi gasoline to a 7.8 psi area. Reliance on this quote from the Q and A Document failed to consider that, while all carriers are distributors as defined in the regulation, all distributors are not carriers, the distinction being that a carrier does not have any ownership interest in the gasoline or diesel fuel transported and does not alter either the quantity or the quality thereof. 40 C.F.R. §§ 80.2(l) and 80.2(t). It is logical to hold one who may own the product transported and who may alter either or both the quantity and quality of the product to a higher standard than one who simply transports product owned by another. 40 C.F.R. §§ 80.28(e)(2) and 80.28(g)(3). Moreover, in the cited example distributor liability may have been based on the theory that the distributor caused the violation and did not directly concern the method of detecting the downstream violation which may have been by sampling and testing.

Assuming, arguendo, that a violation of 40 C.F.R. § 80.27(b)(2) may be "detected at a carrier's facility" within the meaning of 40 C.F.R. § 80.28(b) by inspecting documents at the carrier's facility, Complainant has not demonstrated that documents inspected at CCC's facility showed the violations alleged in Complainant's first claim for relief. The record shows that CCC's facility was inspected on September 4, 1992, by EPA contract inspectors William Simpkins and Rodney Goreman (findings 17 and 18). Mr. Simpkins reviewed and copied delivery tickets generated by CCC, which showed the transport and delivery of fuel to Union W 70, Foristell, Missouri (findings 18 and 19). The delivery tickets included, inter alia, information as to destination, point of origin of the gasoline (HWRT), and the amount and types of gasoline transported. Although Mr. Simpkins was able to "match up" the delivery tickets with bills

of lading obtained from HWRT, the delivery tickets do not include any reference to the volatility or RVP of the gasoline.

The HWRT bills of lading, on the other hand, do include a reference to RVP. The fact that HWRT bills of lading and CCC delivery tickets were combined for copying purposes (finding 23) is some evidence that HWRT bills of lading may have been found during the inspection of CCC, rather than being brought from HWRT. Mr. Simpkins testified we found "..nine invoices of bills of lading indicating Commercial Cartage had made deliveries,..." (finding 19), indicating that he may have been referring to CCC invoices attached to the delivery tickets rather than HWRT bills of lading. There are no HWRT invoices in the record. In any event, his testimony in this regard is simply not clear. Moreover, it is noted that Complainant's counsel distinguished Exhibits 2 and 3, explaining that documents in CX 2 were HWRT bills of lading and that documents in CX 3 were CCC delivery tickets (Tr.I 24, 25). In accordance with this representation, Complainant has proposed a finding that CCC delivery tickets were found at CCC's facility during the inspection, but has not proposed a finding that HWRT bills of lading were found at CCC during the inspection (Complainant's Proposed Findings of Fact ¶¶ 16 & 17).

The record does not establish that the HWRT bills of lading were found by the inspectors at CCC's facility, and the CCC delivery tickets do not refer to RVP standards or to the RVP of the gasoline and do not on their face show a violation of such standards. Thus, the alleged violations of 40 C.F.R. § 80.27 were not "detected" at CCC's facility on the basis of documents found by the inspectors.[(16)] A broad holding that a violation may be "detected at a carrier's facility" within the meaning of § 80.28(b) merely on the basis of documents which contain no reference to RVP, but that appear to confirm the delivery of gasoline, which documents obtained at other points in the distribution chain indicate exceeded the 7.8 psi RVP standard, to an area subject to the standard, would obviate the distinction between carrier liability under § 80.28(b) and that under § 80.28(e)(3) and eliminate the Agency's need to show causation in order to establish carrier liability. Such a result is rejected, because it is contrary to the RVP regulation establishing presumptive liability for carriers. The first claim for relief (Count I) of the complaint will be dismissed.

II. Whether CCC caused the two violations of 40 C.F.R. § 80.27 which were detected at Union W 70 on September 4, 1992

Complainant's second claim for relief charges that CCC caused the two violations of 40 C.F.R. § 80.27(a)(2) which were detected at a branded retail outlet, Union W 70, on September 4, 1992. Liability is predicated on 40 C.F.R. § 80.28(e), which provides in pertinent part:

(e) Violations at branded retail outlets or wholesale purchaser-consumer facilities. Where a violation of the applicable standard set forth in § 80.27 is detected at a retail outlet or at a wholesale purchaser-consumer facility displaying the corporate, trade, or brand name of a gasoline refiner or any of its marketing subsidiaries, the following parties shall be deemed in violation:

. . .

(3) The carrier (if any) if the carrier caused the gasoline to violate the applicable standard . . . .

Complainant alleged that Respondent transported to Union W 70 premium and regular unleaded gasoline exceeding the 7.8 RVP standard, which gasoline was specifically designated by HWRT as "not marketable in 7.8 RVP control areas", thereby causing the gasoline to be in violation of the RVP standard when sampled on September 4, 1992.

There is no dispute that the regular unleaded gasoline sampled at Union W 70 on September 4, 1992, had an RVP of 8.82 psi, and that the premium unleaded gasoline sampled on that date had an RVP of 8.65 psi (finding 27). Mr. Mark Kaiser, president of St. Louis West 70 Truck Plaza, Inc., testified that CCC delivered gasoline to the Union W 70 station "between" the months of June and August of 1992 (finding 28). When asked whether anyone else delivered gasoline to the station, he replied, "[n]ot that I'm aware of." CCC points out that this is not surprising, because deliveries were arranged by Unocal and not by Union W 70 personnel (Brief at 34).

CCC has disputed Complainant's contention that the RVP of the gasoline sampled at Union W 70 on September 4, 1992, represented gasoline delivered by CCC. It points out that there is no record of deliveries by CCC to Union W 70 between July 24 and August 31, 1992. In view of the fact that Union W 70 is a large station, typically receiving deliveries of gasoline every five or six days,

CCC asserts that "[o]bviously, some carrier other than CCC delivered gasoline between July 24 and August 31." Brief at 34, 35. Responding to this argument, Complainant has attached to its reply brief, dated and filed March 27, 1997, documents purporting to be copies of HWRT bills of lading, CCC delivery tickets and invoices for transportation of gasoline to Union W 70 on dates in addition to those represented by documents in evidence. CCC has moved to strike Complainant's reply brief upon the ground that it was not filed on or before March 12, 1997, in accordance with the order granting extension of time, dated January 22, 1997 (Motion to Strike, dated April 4, 1997). CCC has also moved to strike the documents attached to Complainant's reply brief because the documents are new evidence not disclosed with the prehearing exchange, not introduced at the hearing, and not offered in accordance with the rule for reopening the hearing at 40 C.F.R. § 22.28.

Complainant opposes the motion to strike, explaining that its reply brief was filed in accordance with the ALJ's order at the hearing (Tr.I 11), which allowed each party 45 days from the receipt of the opposing parties' initial submission in which to file reply briefs (Response to Motion to Strike, dated April 14, 1997). Complainant asserts that the documents were being proferred not to make a prima facie case, but to prevent CCC from "misleading the court or making certain factual errors." Response to Motion to Strike at 4. Complainant points to Mr. Ackerman's testimony to the effect that he examined bills of lading, delivery tickets and invoices showing that CCC transported gasoline from HWRT to Union W 70 in the summer of 1992 in addition to those deliveries cited in the complaint (finding 42).

Complainant's reply brief will not be stricken as untimely, in view of the general principle favoring resolution of cases on their merits and because the delay apparently resulted from inadvertence rather than from any dilatory motive or attempt to obtain a tactical advantage. While the ALJ expects complainant as well as respondent to scrupulously adhere to orders requiring simultaneous filings and will not excuse breaches of such orders as a matter of course, CCC's reply brief was limited to penalty issues, which under the decision herein are not relevant, and CCC hasn't alleged or shown any prejudice.

A different conclusion is required as to the additional documents Complainant has proffered with its reply brief. The time for the presentation of evidence in this proceeding ended at the conclusion of the hearing (Tr.II 151) and, in the absence

of a properly supported motion to reopen the record such as the discovery of evidence which could not with due diligence have been proffered at the hearing, there is no basis for the admission or consideration of evidence submitted for the first time with a post-hearing brief. A motion to reopen the record prior to the issuance of an initial decision would be addressed to the ALJ's discretion under Rule 22.16 concerning motions rather than Rule 22.28 concerning motions to reopen the hearing after issuance of an initial decision. The documents attached to Complainant's reply brief are stricken from the record and will not be considered.

Complainant relies on the testimony of Richard Ackerman and Mark Kaiser to support its position that the gasoline sampled by the inspectors at Union W 70 was delivered by CCC. While Mr. Ackerman did refer to bills of lading, delivery tickets and invoices which purportedly show deliveries by CCC to Union W 70 other than those cited in the complaint (finding 42), he did not mention any specific dates for such deliveries. Because orders for gasoline were arranged by Unocal rather than Union W 70 (finding 29), Mr. Kaiser's testimony does not establish that CCC was the only carrier delivering gasoline to Union W 70 in the summer of 1992. He did not recall the frequency of gasoline deliveries to the station, and did not know the date of the most recent delivery prior to the EPA inspection on September 4, 1992. Moreover, it should be noted that the RVP of the samples of gasoline drawn by the inspectors on September 4, 1992, 8.82 psi for the regular and 8.65 for the premium (finding 27), is substantially in excess of the RVP of any of the composite samples drawn and tested by HWRT. This tends to support the notion that some other carrier may have delivered gasoline to Union W 70 between July 24, 1992, and August 31, 1992. Complainant has not established by a preponderance of the evidence that CCC was the exclusive carrier of gasoline to Union W 70 during the summer months of 1992. Consequently, Complainant hasn't shown that samples drawn by the inspectors at Union W 70 on September 4 were necessarily from gasoline transported by CCC.

The record suggests, however, that the delivery by CCC on August 31 was the last delivery of gasoline to Union W 70 prior to the EPA inspection. The Fuels Field Inspection report completed by Mr. Simpkins at the time of the inspection contains a handwritten note "Last delivery 8/31/92, Bill-of-Lading atch'd." (finding 26). While the bill of lading referred to was not attached to the report of the Fuels Field Inspection submitted into the record, it may be inferred that it is the HWRT bill of

lading reflecting the delivery by CCC of premium and regular gasoline to Union W 70 on August 31, 1992 (finding 26).

Assuming arguendo, that the gasoline samples taken at Union W 70 on September 4, 1992, were from gasoline delivered by CCC, violations of the 7.8 psi standard were clearly detected at a branded retail outlet within the meaning of 40 C.F.R. § 80.28(e). In accordance with § 80.28 (e)(3), CCC, as the carrier, is liable only if it is shown to have "caused the gasoline to violate the applicable standard." Although "caused" in this context is not otherwise defined, some indication of the intended meaning of the term is provided by the preamble to the final regulation, which provides in pertinent part at 54 Fed. Reg. 11875:

"Even assuming that a carrier who does not have title to the product has less incentive to alter the quality of the gasoline than the party who owns it, the carrier's handling of the product can nevertheless result in violations. For example, batches of gasoline with different RVP levels can be inadvertently or negligently commingled at a pipeline facility. Also, product that was intended to be delivered to one RVP area....may be intentionally or negligently re-routed by the carrier to another RVP area....."

The foregoing is a strong indication that a carrier may be held to have "caused the gasoline to violate the applicable standard" as provided in § 80.28(e)(3) only through some deliberate or negligent act other than, or in addition to, delivering the gasoline as directed by the shipper or owner. Some support for this view is found in the EAB's decision on Complainant's appeal from the order dismissing the initial complaint: "We agree with the Presiding Officer that transportation alone is not sufficient to state a claim [under 40 C.F.R. § 80.28(e)(3)], but that the complaint must allege that the carrier either intentionally or negligently brought gasoline above the RVP standard to an area subject to the standard." In re Commercial Cartage Company, Inc., supra, 5 E.A.D. at 118.

There is no evidence and no contention that CCC intentionally delivered gasoline which it knew exceeded the 7.8 psi standard to Union W 70.

Complainant's contention that the note on the HWRT bills of lading "Gasoline Not Marketable in 7.8 R.V.P. Control Areas" together with the Federal Register notice that St. Charles County, Missouri was in the St. Louis nonattainment area placed

CCC on notice that the gasoline exceeded the 7.8 psi standard and was destined for an area subject to the standard overlooks several facts.

Firstly, in the absence of sampling and testing, which CCC's driver lacked the means and capability of performing, CCC had no way of knowing the actual RVP of the gasoline in its tank truck.

Secondly, a bill of lading showing the quantity and destination of the gasoline is normally printed only after the tank truck is loaded (finding 36). While CCC apparently knew the destination of the gasoline prior to receiving a bill of lading, CCC cannot be charged with notice of the notation "Gasoline Not Marketable in 7.8 R.V.P. Control Areas" until a bill of lading was printed and received. The point, of course, being that any alleged duty of inquiry can only have arisen after the truck was loaded. At that point, CCC's obligation as a carrier was to deliver the product as specified in the bill of lading, absent knowledge that the cargo could not legally be delivered as specified.[(17)] In this regard, Mr. Simpkins testified that from the mentioned notation and the statement "Gasoline Meets Federal R.V.P. Regulations" on the bills of lading, he would presume that Foristell, Missouri was not in an 7.8 [psi] area unless he checked a map (finding 20). This is a strong indication that the bills of lading upon which Complainant relies were at least ambiguous and that it was not negligence for CCC to depend on the instructions of the shipper (Unocal) and thereby presume the legality of the shipment and to deliver the gasoline as specified in the bills of lading.

Other evidence which, according to Complainant, should have placed CCC on notice that the gasoline could not properly be delivered to Union W 70 as specified in the bills of lading was a sign in the "driver's room" at HWRT stating, "Gasoline not marketable in 7.8 R.V.P. Control Areas" and listing the control areas (finding 31). Assuming that the sign listed St. Charles County, Missouri as an RVP control area, this information was not meaningful as applied to the deliveries at issue here without the further knowledge that Union W 70 was in St. Charles County. There is no indication that a professional truck driver would normally know the county he was then in or the county of the destination of the gasoline he was to deliver (finding 36).

While it may be inferred that a driver visits the driver's room at HWRT after the truck is loaded to sign a bill of lading or other receipt for the gasoline (finding 31), there is no evidence and no basis for an inference that a driver visits the

driver's room and thus had an opportunity to observe the RVP sign prior to loading his truck.

It may be argued that 40 C.F.R. § 80.27(a)(2), prohibiting during the 1992 and later control periods any refiner, importer, distributor, reseller or carrier to, inter alia, sell, offer for sale, dispense, transport or introduce into commerce gasoline, whose RVP exceeds the applicable standard as defined in §§ 80.27(a)(2)(i) and (ii), creates an obligation and thus, a duty of the carrier to inquire or otherwise ascertain the RVP of any gasoline transported. While this argument might be sound based upon § 80.27 (a)(2) in isolation, liability for violation of § 80.27 is determined in accordance with § 80.28 (§ 80.27(c)) and under § 80.28(e), the carrier is presumptively liable only "if the carrier caused the gasoline to violate the applicable standard." We have already determined that "caused" in this context requires a showing that CCC either deliberately or negligently delivered gasoline exceeding the 7.8 psi standard to an area subject to the standard. The evidence does not show and no contention has been made that CCC delivered gasoline to Union W 70, which it knew exceeded 7.8 psi RVP. Additionally, CCC has not been shown to have been negligent in delivering the gasoline as directed by Unocal and thus, did not "cause the gasoline to violate the applicable standard." Accordingly, the fact that CCC may not meet the criteria for affirmative defenses under § 80.28(g)(1) is not relevant.

Mr. Ackerman testified that HWRT was not cited for the violations alleged in the complaint, because it had an oversight program and because it had taken reasonable steps through the posting of warnings to preclude violations (finding 42). The record shows, however, that the warnings were posted and notations included on the bills of lading "Gasoline Not Marketable In 7.8 R.V.P. Control Areas" notwithstanding that some of the gasoline complied with the 7.8 psi RVP standard (finding 31). Moreover, HWRT was bound to know that the destinations (stations) for some of the gasoline it distributed were in the St. Louis nonattainment area. Accordingly, allowing HWRT to escape responsibility based upon the posting of warnings which were not always accurate and, which it must have known were not heeded, while holding CCC as the carrier liable, is to place the onus for compliance on the person least able to control the RVP and destination of the gasoline.

It is concluded that on this record CCC may not be held to have caused the gasoline to violate the applicable standard by picking up gasoline at the point of origin and delivering

gasoline to the destination specified by Unocal, the shipper. Complainant's second claim for relief (Count II) will be dismissed.

III. Whether CCC caused nine violations of 40 C.F.R. 80.27 which were detected at Union W 70

The nine violations alleged in Complainant's third claim for relief (Count III) include the two violations based on the deliveries by CCC to Union W 70 on August 31, 1992, alleged in the second claim and seven other alleged violations based on CCC's deliveries of premium and unleaded gasoline to Union W 70 on June 5, 1992; deliveries of premium gasoline to Union W 70 on June 12, 17, and 23, 1992 and deliveries of regular unleaded gasoline to Union W 70 on July 20 and July 24, 1992. Complainant alleges that these violations were detected by the sampling and testing referred to in the second claim for relief and by an analysis of delivery records of Commercial Cartage (Complaint ¶ 35).

This claim need not long detain us. Firstly, "detected at a branded retail outlet" plainly means evidence of RVP violations found at the retail outlet, not evidence found at another facility. The delivery records from CCC's or HWRT's facilities were not shown to have been found at Union W 70.

Secondly, "detected at a branded retail outlet" within the meaning of § 80.28(e), no less than "detected at a carrier's facility" within the meaning of § 80.28(b), means by sampling and testing. Complainant may not rely on testing by HWRT of gasoline in its tanks nearest to the date CCC picked up gasoline at HWRT to show that RVP violations were detected at Union W 70.

Thirdly, while there is no reason to doubt that the tests were on samples which were representative of the RVP of the gasoline in the very large tanks on the dates the samples were drawn, Complainant hasn't shown that this sampling was representative of the gasoline actually transported by CCC. The record shows that the point from which gasoline is drawn to fill tank trucks at HWRT is approximately two feet from the bottom of the tanks and that there is a possibility or likelihood of stratification so that a composite sample representing the RVP of the gasoline in the tank would not necessarily be representative of the gasoline transported by CCC (findings 10 and 11). Moreover, it is possible that the RVP of the gasoline decreased through evaporation, e.g., through open hatches from which samples were drawn, between the time it was sampled by HWRT and the time it

was loaded into CCC's tank truck. It should be noted that if the HWRT sampling on August 31, 1992 (finding 12) was after the CCC pickup on that date, the most recent prior sampling of the premium tank was on June 24, 1992 (finding 18). While it may well be that the gasoline transported to Union W 70 by CCC exceeded 7.8 psi, there is no way of knowing or showing this unless the gasoline in CCC's tank truck is sampled and tested. As noted above, this is a compelling reason why a violation cannot be "detected at a carrier's facility" within the meaning of § 80.28(b) or "detected at a retail outlet" within the meaning of § 80.28(e), except by sampling and testing.

For the reasons set forth in connection with the discussion of Complainant's second claim for relief, CCC has not been shown to have "caused" the gasoline sampled at Union W 70 on September 4, 1992, "to violate the applicable standard". It follows that Complainant has not carried its burden of establishing the violations alleged in the third claim for relief and this claim will be dismissed.

ORDER

The complaint is dismissed.[(18)]

Dated this 19th day of August 1997.

Spencer T. Nissen

Administrative Law Judge

1. Designated Volatility Nonattainment Area is defined in 40 C.F.R. § 80.2(cc) as "any area designated as being in nonattainment with the National Ambient Air Quality Standard for ozone pursuant to rulemaking under section 107(d)(4)(A)(ii) of the Act." The St. Louis area has been so designated (40 C.F.R.§ 81.326).

2. The penalty claimed was reduced to $40,500 at the hearing (Tr.I 12, 184).

3. Proposed findings not adopted are either rejected or are considered to be unnecessary to this decision.

4. 40 C.F.R. §§ 80.27 and 81.314. CAA § 211(h)(1) provides that the Administrator shall promulgate regulations making it unlawful for any person during the high ozone season (as defined by the Administrator) to sell, offer for sale, dispense, supply,

offer for supply, transport, or introduce into commerce gasoline with a RVP in excess of 9.0 psi. Section 211(h)(4) provides that for gasoline blends containing 10 percent denatured anhydrous ethanol the RVP shall be one pound in excess of that established under paragraph (1).

5. Weber, Tr.I 130-31; Stack, Tr.I 148. The Agency has recognized the problem of obtaining representative samples of gasoline from large storage tanks and has stated that the possibility of stratification should be assumed even on tanks equipped with mixers. 1992 Volatility Question And Answer Document, Sampling Methods at 39. See also 40 C.F.R. Part 80, Appendix D.

6. Tr.II 13. This is well illustrated by bulk transporter documents or delivery tickets in this case which indicate that, in transporting approximately 8,300 gallons of gasoline from HWRT to Union W 70, CCC's vehicle traveled 110 miles of which 53 were with the tank truck loaded and for which it was paid just over or just under $142 (CX 3).

7. Tr.I 177. It is probable that Mr. Ackerman was referring to CCC bulk transporter documents or delivery tickets as confirming the pickups, rather than HWRT invoices because no HWRT invoices are in the record.

8. Tr.I 177. Responding to an inquiry from the ALJ as to the number of [alleged] violations, counsel for Complainant stated that it was the Agency's position that CCC's action in transporting [noncompliant gasoline] and causing the violation were separate violations (Tr.I 185). While this argument might have some merit, if the violations were attributable to commingling by the carrier, it is rejected here, because liability for the transport of noncomplying gasoline in violation of 40 C.F.R. § 80.27(a)(2) is determined in accordance with § 80.28 and, because there could be no delivery without the transport, separate elements of proof are not involved.

9. Tr.I 206-07, 209. While HWRT may be a common carrier under the usual definition of the term, it is a distributor under the regulation, because it owns some of the gasoline in its tanks (finding 7) and the feature distinguishing a carrier from a distributor is that the carrier does not have any ownership interest in and does not alter either the quality or quantity of the gasoline or diesel fuel transported. 40 C.F.R. §§ 80.2(1) and 80.2(t).

10. Because the tractor was not owned by CCC and the driver under the terms of the lease was not an employee or agent of CCC, CCC argues that it did not make the deliveries to Union W 70 at issue (Brief at 37, 38). It is concluded, however, that CCC may not hold itself out as a common carrier and shield itself from the resulting obligations by a lease with the owner of the equipment.

11. Under the lease with M & R Trucking, the owner provided and presumably paid the driver or drivers. It is, therefore, not clear that the letter referred to by Mr. Lewis would reach a driver making the deliveries of concern here.

12. It should be noted that, although the D.C. Circuit largely upheld the regulations at issue as against the contention they were arbitrary and capricious as applied to carriers, National Tank Truck Carriers, Inc. v. U.S.E.P.A., 907 F.2d 177, 185 (D.C. Cir. 1990), the carrier's challenge to the RVP testing requirements was held to be not ripe for review, the court observing that these and related questions were more appropriately committed to an enforcement proceeding. 907 F.2d at 184.

13. The D.C. Circuit in National Tank Truck Carriers, Inc. v. U.S. E.P.A., supra note 12, understood that "carrier's facility" as used in 40 C.F.R. § 80.28(b) meant the carrier's tank, observing that "[a] carrier is presumptively liable when EPA finds noncomplying gasoline in the carrier's tank." 907 F.2d at 179. It is at least an open question whether the regulations would have been upheld had the Agency advanced the position advocated here.

14. 54 Fed. Reg. 11870, 11871. The preamble to the final regulation provides in part at 54 Fed. Reg. 11871: "Another related issue is how EPA will determine the applicable RVP standard for gasoline it samples and tests upstream from service stations." (emphasis added). Responding to commenters who opposed downstream monitoring upon the ground that when violations are found downstream, it would be more difficult to dispose of product than when a violation is detected at a refiner/importer facility, the Agency stated: "EPA recognizes that remedying violations downstream will generally be more difficult than at a refinery or importer facility...The Agency anticipates that by applying the standards to upstream facilities, and conducting inspections upstream, there will be more quality control early in the distribution process, resulting in fewer violations at downstream facilities. For

those violations that are detected downstream, there do exist methods for remedying violations, which include pumping out the product and sending it back to a terminal where it can be further blended to comply with the applicable RVP standard, or re-routing the product to a geographic area with a different RVP standard in which the product would be in compliance...." (Id). This quote indicates that violations would only be detected by sampling and testing for two reasons: (1) it is unlikely that the Agency would contemplate, or that a regulated party would acquiesce to, pumping out a tank and returning product merely because documents indicated there might be a violation, and (2) as a practical matter, product at the facilities of a carrier or retail outlet (filling station) is unlikely to be available for return for any significant period of time.

15. Finding 12. Although CCC has asserted (Brief at 14-17) that the HWRT sampling and testing may not be relied upon, because Complainant has not demonstrated that: (1) the samples were taken by persons having the requisite "judgment, skill, and sampling experience" required by 40 C.F.R. Part 80, Appendix D, ¶ 12.1; and (2) that proper procedures in running the tests (Part 80, Appendix E) were followed, the evidence shows that Mr. Stack reasonably adhered to required sampling and testing procedures (findings 13, 15).

16. "Detect" means to "discover the true character of" or "to discover or determine the existence, presence, or fact of." Webster's Third New International Dictionary (1986).

17. See 13 Am.Jur. 2d Carriers § 235 and 49 U.S.C. § 14101, formerly 49 U.S.C. §§ 301 et seq. It is a general rule that a carrier's responsibility for the cargo attaches when the loading is completed and a bill of lading signed. Mattel, Inc v. Interstate Contract Carrier Corp., 722 F.2d 17 (2nd Cir. 1983).

18. Unless this decision is appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 (40 C.F.R. Part 22) or, unless the EAB elects to review the same sua sponte as therein provided, this decision will become the final order of the EAB and of the Agency in accordance with Rule 22.27(c).