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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER DENYING MOTION TO DISMISS

The complaint initiating this proceeding under section 205(c) of the Clean Air Act, 42 U.S.C. § 7524(c), filed on June 3, 1993, charged Respondent with violating section 211 of the Act, 42 U.S.C. § 7545, and regulations promulgated thereunder, 40 CFR Part 80. Respondent is alleged to have violated 40 CFR § 80.27, by transporting eleven truckloads of gasoline, which had a Reid Vapor Pressure (RVP) exceeding 7.8 pounds per square inch (psi), in a non-attainment area during the high ozone season.[1/]

1/ The regulation, 40 CFR § 80.27, was promulgated in order to reduce volatile organic compound (VOC) emissions from evaporating gasoline, which are considered a significant contributor to the nation's tropospheric ozone problem. That section sets standards of RVP according to the month of the year and the area of the country, as some areas have not attained the current National Ambient Air Quality Standard for ozone. Section 80.27 prohibits the sale, offering for sale, dispensation, offering to supply, or transport of gasoline whose RVP exceeds the applicable standard between June 1 and September 15, which is the high ozone season. Since 1992, the RVP standard during that season in non-attainment areas is 7.8 psi, and in other areas of the United States, the standard is 9.0 psi. The area of St. Louis, Missouri is a non-attainment area.

Section 80.27 provides in pertinent part:

> (b) Determination of compliance. Compliance with the standards listed in paragraph (a) of this section shall be determined by use of one of the sampling methodologies as specified in appendix D of this part and the testing methodology specified in appendix E of this part.
>
> (c) Liability. Liability for violations of paragraph (a) of this section shall be determined according to the provisions of § 80.28. . . .

The complaint alleged that Respondent, located in St. Louis, Missouri, and St. Louis W 70, a branded Unocal retail outlet located at 3265 North Service Road East, Foristell, Missouri, were inspected by EPA on September 4, 1992. Based upon the inspections, EPA determined that the retail outlet was selling premium and regular unleaded gasoline with an RVP exceeding 7.8 psi, and that Respondent transported the gasoline to that facility. According to the complaint, EPA also determined, based upon nine identified bills of lading, that Respondent transported to the same facility nine truckloads of premium and regular unleaded gasoline, with RVP ranging from 8.2 psi to 8.4 psi, during the period between June 5 through August 31, 1992. A civil penalty of $81,000 was proposed for the eleven alleged violations.

On June 18, 1993, Respondent filed an answer, denying the violations, and moved to dismiss the complaint for failure to state a claim. Respondent argued that, in accordance with 40 CFR § 80.28(f)(3), causation of the violation is an element of Complainant's case. Under that provision, where a violation of a standard in section 80.27 is detected at a retail outlet, a carrier

shall be deemed in violation "if the carrier caused the gasoline to violate the applicable standard."[2] Respondent argued that, because the complaint failed to allege that Respondent caused the violation in question and causation could not be reasonably inferred from the facts alleged, the complaint should be dismissed.

Complainant opposed the motion for the reason that the complaint alleged sufficient facts to provide notice to Respondent of the basis for the claimed violations. Complainant disagreed that it must allege that Respondent caused the violation.

The motion to dismiss was granted by an order, dated September 23, 1993. It was concluded that, where a violation is detected at a branded retail outlet, a cause of action against a carrier under 40 CFR § 80.28(e) must allege more than simply the transport of noncomplying gasoline. It was noted that Complainant did not allege that it had detected the violation at Respondent's facility.

Complainant appealed that decision to the Environmental Appeals Board. Firstly, EPA contended that it alleged causation in the complaint by the statement that liability was based on 40 CFR § 80.28(e), which provides that a carrier is only deemed liable if it caused the violation. Respondent assertedly caused the violation at the retail outlet by transporting the noncomplying

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[2] The complaint states that the violation is based on 40 CFR § 80.28(e), which is identical to § 80.28(f) with regard to carriers. Both deem a carrier liable "if the carrier caused the gasoline to violate the applicable standard." The difference is that § 80.28(e) refers to branded retail outlets and § 80.28(f) refers to unbranded retail outlets.

gasoline. Secondly, Complainant asserted that the complaint alleged sufficient facts to put Respondent on notice of nine alleged violations in accordance with 40 CFR § 80.28(b). Under that provision, carriers are presumptively liable for violations detected at the carrier's facilities and no showing of causation is necessary. Respondent's truck is a carrier facility, and the complaint alleged that Respondent transported nine truckloads of gasoline exceeding the 7.8 psi standard to the Unocal retail outlet. The bills of lading for the shipments allegedly indicated that the fuel was not for delivery to a 7.8 psi area. Finally, Complainant argued that a dismissal of a complaint for failure to state a claim should not be with prejudice, but should allow leave to amend the complaint.

The Board, citing the rule that dismissals with prejudice are not favored, remanded the matter to allow the filing of an amended complaint, notwithstanding the fact that Complainant had not moved for leave to amend. In re Commercial Cartage Company, Inc., CAA Appeal No. 93-2 (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. Because the complaint did not allege which, if any, violations were found during the inspection at Respondent's facility, which is an essential element of a claim under 40 CFR § 80.28(b), the complaint

did not state a cause of action under that provision. The Board noted, however, that, based on the pleadings before it, Complainant appeared to have evidence, i.e., records obtained at an inspection of Respondent's facility and bills of lading, which may support a claim under § 80.28(b) and § 80.28(e).

An amended complaint was filed on March 21, 1994, asserting three claims for relief.[3] The first claim charged Respondent with nine violations of 40 CFR § 80.27(a) pursuant to 40 CFR § 80.28(b), for delivering nine truckloads of gasoline which did not comply with the RVP standard of 7.8 psi. This claim was based upon inspections of Respondent's facility and that of the Hartford Wood River Terminal (HWRT) in Hartford, Illinois. EPA determined that the nine truckloads of gasoline which had been sampled and tested by HWRT, had an RVP over 7.8 psi, and were designated on the bills of lading as "gasoline not marketable in 7.8 RVP control areas." The complaint alleged that Respondent's conduct in transporting the noncomplying gasoline was either intentional or negligent.

The second claim charged Respondent with two violations of 40 CFR § 80.27(a) pursuant to 40 CFR § 80.28(e). By transporting to Union W 70, a branded retail outlet, gasoline exceeding the 7.8 psi standard, which gasoline was specifically designated by HWRT as not marketable in 7.8 psi areas, Respondent allegedly caused the gasoline at that retail outlet to be in

[3] The amended complaint referred to the branded Unocal retail outlet as "Union W 70."

violation of the RVP standard. This claim was based on an inspection of the retail outlet, including sampling and testing of gasoline taken from pumps at that facility, and the alleged fact that Respondent was the sole carrier of gasoline to the retail outlet.

The third claim for relief alleged liability for nine violations of 40 CFR § 80.27(a) pursuant to 40 CFR § 80.28(e). The nine deliveries described in the first claim for relief allegedly resulted in violations at the retail outlet. These violations were alleged to have been caused by Respondent's delivery of high RVP gasoline, either intentionally or negligently, to the retail outlet.

Respondent answered the amended complaint on April 4,1994, denying the violations. Under date of April 15, 1994, Respondent moved to dismiss the amended complaint, asserting that, even if the facts alleged by Complainant are taken as true, they cannot support a prima facie case against Respondent. On May 10, 1994, Complainant filed an opposition to the motion to dismiss.

D I S C U S S I O N

I. Whether Complainant has stated a claim based upon 40 CFR § 80.28(b)

The complaint charges Respondent with violating 40 CFR § 80.27(a)(2), which provides, in pertinent part:

> During the 1992 and later high ozone seasons, no person, including without limitation, no retailer or wholesale purchaser-consumer, and during the 1992 and later regulatory control periods, no refiner, importer, distributor, reseller, or carrier shall sell, offer for sale, dispense, supply, offer for supply, transport or introduce into commerce gasoline whose Reid vapor pressure exceeds the applicable standard. As used in this section and § 80.28, "applicable standard" means:
> (i) 9.0 psi for all designated volatility attainment areas; and
> (ii) The standard listed in this paragraph for the state and time period in which the gasoline is intended to be dispensed to motor vehicles for any designated volatility nonattainment area within such State [7.8 psi in Missouri from June through September 15] . . . .

The following essential allegations, in summary, are the basis for alleging the violation in count I: (1) on September 3, 1992, EPA inspected the facility of HWRT, reviewed and copied bills of lading and test data, and interviewed HWRT personnel; (2) HWRT conducts sampling and testing, in accordance with methodologies specified at 40 CFR § 80.27(b), of all incoming shipments of petroleum products to verify compliance with RVP specifications; (3) on September 4, 1992, EPA conducted an inspection at Respondent's facility, reviewed and copied bills of lading and interviewed personnel; (4) EPA determined that during June 1992 through August 1992, Respondent picked up and transported from HWRT nine loads of gasoline which had been sampled and tested by HWRT as having an RVP exceeding 7.8 psi, and were designated on bills of lading as "Gasoline Not Marketable in 7.8 RVP Control Areas;" (5) Respondent transported the gasoline to the retail outlet which is in a 7.8 RVP control area, and (6) each of the nine deliveries

constitutes a violation of 40 CFR § 80.27(a)(2) pursuant to 40 CFR § 80.28(b).

The question is whether these alleged facts support the claim that violations were "detected" at Respondent's facility, within the meaning of 40 CFR § 80.28(b), which provides:

> 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 . . . .

A. <u>Whether the violation may be "detected" by means other than sampling and testing gasoline from the carrier's truck</u>

Respondent's position is that, for violations such as the transportation of noncomplying gasoline, "detected at a carrier's facility" as used in section 80.28(b) plainly means actual sampling and testing by EPA of gasoline in the carrier's truck. According to Respondent, liability cannot be based upon speculation that non-compliant gasoline may have been present in a carrier's facility at some time.[4] As support, Respondent cites preamble discussions in notices of proposed and final rulemaking for the fuel volatility regulation, wherein EPA chose in-field sampling and testing as "the most effective means to detect violations" over other options of

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[4] The failure of EPA to have sampled and tested gasoline from Respondent's trucks is apparently the basis for its denial that "representatives of EPA inspected its facilities (Answer ¶ 22).

either self-reporting by refiners and importers or a combination of self-reporting and in-field sampling and testing. 52 Fed. Reg. 31274 (August 19, 1987); 54 Fed. Reg. 11868, 11870 (March 22, 1989). Respondent also quoted the following language in the preamble to the final rule:

> Common carriers would be presumed liable only for violations detected at their facilities. Where the violation is detected at a facility downstream from the carrier, the carrier would be liable only where it actually caused the violation. . . .
> Carriers would be liable for violations found at retail outlets only where they actually caused the violation (54 Fed. Reg. 11872).

However, that language, and that of section 80.28(b) as a whole, does not preclude detecting a violation of section 80.27 from evidence other than sampling and volatility testing by EPA of gasoline from a carrier's facility. Detection 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.[5]

Such a conclusion is based in part on the broad meaning of the words "facility" and "detect." As to the meaning of "facility," the language of section 80.28(b), "detected at a carrier's facility, whether in a transport vehicle, in a storage facility, or elsewhere at the facility," that is, a singular facility, must refer to a place which includes the premises,

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[5] The sufficiency of such evidence is a question to be addressed at later point in the proceeding, upon examination of all of the evidence.

offices and property, such as tank trucks, owned or operated by Respondent.[6]

Because there is no definition of "detect" in the regulations, it is presumed the ordinary meaning of the word was intended. The dictionary defines "detect" thusly: "to discover the true character of . . . to discover or determine the existence, presence or fact of." Webster's Third New International Dictionary, 616 (1986).

In the preamble to the final rule, EPA stated that "an in-field sampling and testing program is the most effective means to detect violations . . . ." 54 Fed. Reg. 11868, 11870 (March 22, 1989). This language, however, does not preclude detecting violations by reviewing documentary evidence such as reports of sampling and testing by others. See, e.g., the 1992 Volatility Question And Answer Document at 5 which provides in pertinent part:

> If a violation is found downstream and a refiner or terminal is presumed liable for the violation, as part of its defense, the party may provide (along with evidence of any other methods the party employs to ensure delivery to the proper area) documentation showing that the gasoline was shipped to the proper area and that the shipping documents accompanying the gasoline clearly indicated that the gasoline was 9.0 psi and not intended for an area having a 7.8 psi standard. If, during a follow-up inspection of a distributor facility, EPA determines that the distributor delivered 9.0 psi gasoline to a 7.8 psi area, the distributor may be deemed liable for the violation.

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[6] This interpretation is consistent with the use of the term "facility" in 40 CFR § 80.79(a), which imposes liability against various parties for gasoline contained in a storage tank at a "facility" owned, leased, operated, controlled or supervised by a carrier (among other parties in the distribution chain).

Inasmuch as it is unlikely that the gasoline delivered by the carrier or distributor would still be available for sampling and testing, the foregoing, which is very similar to the situation here, must envisage that the violation by the carrier or distributor may be determined by other evidence such as records of sampling and testing by others and shipping documents. While EPA did not specifically state that it intended to rely on such documentary evidence, if it had intended to exclude that possibility, it would have used different language. For example, the provision could have been phrased, "Where gasoline exceeding the applicable RVP standard set forth in 40 CFR § 80.27 is found at a carrier's facility . . . ." EPA used such phrasing in an analogous regulation, controlling reformulated gasoline, 40 CFR § 80.79, as follows:

> Where the gasoline contained in any storage tank at any facility owned, . . . or supervised by any refiner, importer, oxygenate blender, carrier, distributor, reseller, retailer, or wholesale purchaser-consumer is found in violation of the prohibitions described in § 80.78(a), the following persons shall be deemed in violation:
> (1) Each refiner . . . who owns . . . or supervises the facility where the violation is found; . . . .

In proposing the in-field testing and sampling option of the three enforcement mechanisms considered to monitor compliance with RVP control requirements, EPA anticipated that "[i]nspectors (EPA, contractor, state, or a combination) would take samples at one or more types of fuel distribution facilities" and that regulated parties might be required to maintain records to

facilitate the tracing of violating samples [gasoline] through the distribution network. 52 Fed. Reg. 31274, 31295-6 (August 19, 1987). With regard to parties upon whom to impose liability, EPA considered tracing the source of the violating product to the party which actually caused the violation, but instead proposed the liability scheme based upon presumption of liability and/or vicarious liability.[7] Reasons for that choice were that the "tracing back" scheme would be very resource intensive, the paper trail would be difficult to trace and often scarce or nonexistent, and would require recordkeeping regulations to be promulgated.

Nevertheless, EPA in this case traced the gasoline at issue from the HWRT to Respondent as the carrier and to the retail outlet. The regulations as promulgated do not preclude use of that method to "detect" violations. It is also permissible for EPA to detect the violation at another facility in the distribution chain, even if sampling and testing of the gasoline are not performed by EPA at that facility.

The next point to address is whether the allegations in the complaint, accepted as true for the purposes of the motion, establish a prima facie case that the alleged violations were detected at Respondent's facility.

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[7] 52 Fed. Reg. 31302. Vicarious liability was apparently not contemplated for carriers, because they do not normally control other persons in the distribution chain.

B. <u>Whether the facts alleged in the complaint constitute detection of the alleged violation at Respondent's facility</u>

EPA's assertion that it detected the violation of section 80.27 at Respondent's facility is based on documents obtained and interviews of personnel conducted during inspections of HWRT'S facility and of Respondent's facility. This includes the RVP test results obtained by HWRT, and does not include any sampling and testing performed by EPA at Respondent's facility.

HWRT was inspected on September 3, 1992, while Respondent and Union W 70, the retail outlet, were inspected on September 4,1992. It therefore appears that the violations were initially detected or suspected from the inspection of HWRT and that additional evidence of the violations was obtained from the subsequent inspections of Respondent and the retail outlet. There is no requirement that the violation be detected solely at the carrier's facility and evidence gathered at the carrier's facility, which confirms a violation suspected from evidence obtained from other points in the distribution chain, may be regarded as compliance with the provision that the violation be "detected at a carrier's facility." Pre-hearing exchanges have yet to be submitted and the question of the sufficiency of the evidence to establish that the alleged violations were "detected" at Respondent's facility within the meaning of § 80.28(b) cannot and need not be addressed at this stage of the proceeding. Suffice it to say that Complainant has alleged facts which, if proved, are sufficient to

establish a prima facie case and the motion to dismiss will be denied.

II. Whether Respondent has stated a claim based upon 40 CFR § 80.28(e)

Section 80.28(e) provides in pertinent part: "Where a violation of the applicable standard set forth in § 80.27 is detected at a retail outlet. . . , the following parties shall be deemed in violation: . . .(3) The carrier (if any) if the carrier caused the gasoline to violate the applicable standard; . . . ."

Respondent asserts that the documents attached to the complaint, without admitting their authenticity or admissibility, establish that Commercial Cartage contracted with the owner of the gasoline to pick up specified gasoline at HWRT and deliver it to Unocal's retail outlet located at St. Louis W 70 (Memorandum In Support Of Motion To Dismiss at 6). Respondent quotes language on the bills of lading stating "(g)asoline not marketable in 7.8 RVP control areas. . ." and points out that the bills of lading also state "(g)asoline meets all Federal RVP Standards." Respondent argues that it did exactly as it contracted to do, i.e., it carried the gasoline it was hired to carry and delivered the gasoline to the place to which it had contracted to make the delivery. Respondent asserts that performance of a contract for common carriage cannot "cause" gasoline to violate the standards for fuel volatility. By analogy, Respondent says that the Postal Service cannot cause a violation of obscenity laws by delivering material

which violates community standards to the address intended by the sender. According to Respondent, the owner of the gasoline caused the gasoline to violate the applicable standard by directing that it be delivered to a retail outlet in a non-attainment area (Memorandum at 8).

The preamble to the final rule, 54 Fed. Reg. 11868 (March 22, 1989) at 11874, 11875, reveals that the matter of carrier liability was fully considered. For example, the following appears 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 in storage tanks at a pipeline facility. Also, product that was intended to be delivered in one RVP area (e.g., an area with a Class C standard) may be intentionally or negligently re-routed by the carrier to another RVP area (e.g., an area with a Class B standard). This rerouting of the gasoline could result in the gasoline not complying with the applicable standard for that area.

Respondent quotes the above language from the preamble and argues that, because no re-routing or mis-routing of the gasoline is alleged or shown, it did not cause the gasoline to exceed the applicable standard and claims based upon § 80.28(e) must be dismissed.

Prompted by dictum in the EAB decision, <u>Commercial Cartage</u>, supra (slip opinion at 7), the complaint alleges that Respondent either intentionally or negligently transported

noncomplying gasoline to Union W 70, the branded Unocal retail outlet. Respondent argues, however, that the regulations impose liablility on the carrier only if it caused the gasoline to exceed the applicable standard and that its actual or constructive knowledge of the characteristics of the fuel delivered is immaterial to the question of causation (Memorandum at 7). The preamble language quoted by Respondent indicates that negligently or intentionally commingling or mis-routing can "cause the gasoline to violate the applicable standard" within the meaning of § 80.28(e)(3), and it would be anomalous indeed if intentionally or negligently delivering noncomplying gasoline to a branded retail outlet in an RVP control area would not be deemed to have the same effect.[8/] Moreover, Respondent has misquoted the language of §80.28(e)(3) in that it does not state that the carrier shall be deemed in violation if it caused the gasoline to "exceed the applicable standard", but provides that the carrier shall be deemed in violation if it caused the gasoline to "violate the applicable standard." The latter is clearly a more expansive term.

[8/] This situation was envisaged by the Volatility Question and Answer Document which provides at 17 that ". . .carriers can and should negotiate contracts which are drafted in such a way that the carrier is not obligated to transport or store product in violation of the regulations."

ORDER

The motion to dismiss is DENIED.

Dated this 11th day of October 1995.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Order Denying Motion To Dismiss was filed in re Commercial Cartage Company, Inc.; Docket No. CAA-93-H-002 and exact copies of the same were mailed to the following:

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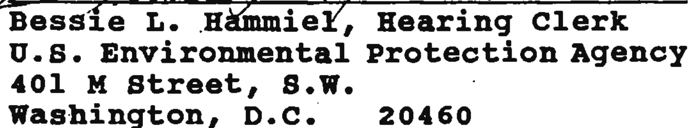

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Dated: Oct. 11, 1995