UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR

79 MAY 22 P12:52

In the Matter of	)
	)
Texaco Inc.,	) Docket No. I UNG-421C
	)
Respondent.	)

INITIAL DECISION

This is a proceeding for the assessment of a civil penalty for violation of the Clean Air Act, Section 211, 42 U.S.C.A. 7545 (1978 Supp), and the regulations issued thereunder, 40 CFR Part 80. The civil penalty is assessed pursuant to Section 211(d) of the Act. The violation charged is that unleaded gasoline offered for sale at a Texaco-branded service station exceeded the lead content for such gasoline specified in 40 CFR 80.2(g) of the regulations. The sole issue is whether Texaco Inc. is liable for the violation under 40 CFR 80.23 of the regulations. A penalty of $6,500 is requested.

The case has been submitted on a stipulation of facts and the parties have agreed to dispense with an oral hearing. The stipulation provides that the case is submitted "on such briefing, etc., as the presiding officer may order, pursuant to 40 CFR 80.326." Since the facts in this case are similar to those in the consolidated proceeding Docket Nos. I UNG-355C & 356C, which I decided in an Initial Decision issued on February 13, 1979, I inquired by letter to the parties dated April 3, 1979, whether there was any need to submit briefs if the parties were going to rely on the same legal arguments. Complainant replied that it considered further briefing unnecessary and would waive its right to brief the case provided Texaco did the same.

Texaco did not respond to my inquiry. Accordingly, I sent the following letter to Texaco's counsel on April 20, 1970:

Jerome L. Francis, Esq.
Texaco Inc.
1040 Kings Highway
Cherry Hill, New Jersey 08034

Subject: Texaco Inc., Docket No. I UNG-421C

Dear Mr. Francis:

I have not received an answer to my letter of April 3, 1979, regarding the need to file briefs in this matter.

Unless I hear from you to the contrary by April 30, 1979, I will assume that respondent is relying on the same legal and factual arguments as were made in respondent's brief in Docket Nos. I UNG-355C and 356C, and I will go ahead and render an initial decision in favor of complainant, as I advised I would do in my letter of April 3, 1979.

The return receipt shows that this letter was received on April 24, 1979. No answer has been received from Texaco's counsel, and, accordingly, I am assuming that Texaco is relying on the same legal and factual arguments as were made in Docket Nos. I UNG-355C and 356C.

The stipulation of facts between the EPA and Texaco Inc., and the exhibits submitted with it, marked Texaco, Exhibits 1 through 3, are admitted into evidence. On consideration of the stipulation of facts, and taking cognizance of the fact that the parties are relying on the same legal and factual arguments which they made in the consolidated proceeding, Docket Nos. I UNG-355C and 356C, decided by my initial decision issued on February 13, 1979, it is found that Texaco Inc. is liable for the violation found herein. A civil penalty of $6,500 is assessed.

Findings of Fact

1. Respondent Texaco Inc., ("Texaco") is a "refiner" of gasoline within the meaning of 40 CFR 80.2(i), whose gross income exceeds $5 million annually.

2. Ray's Texaco Service Station, located at 182 Main Street, Claremont, New Hampshire, offers gasoline for sale at retail and is a "retail outlet" within the meaning of 40 CFR 80.2(j).

3. On August 8, 1978, an Environmental Protection Agency fuels inspector collected a sample of gasoline offered for sale by Ray's Texaco through a pump bearing the label "Unleaded Gasoline", and Texaco's corporate, trade or brand name.

4. The lead content of the sample of gasoline collected at Ray's Texaco service station was equivalent to 0.178 gram of lead per gallon, and exceeded the defined requirement for unleaded gasoline in 40 CFR 80.2(g), that unleaded gasoline contain not more than 0.05 gram of lead per gallon.

5. The gasoline labelled as "unleaded gasoline" from which the sample was taken was purchased by Ray's Texaco from O.H. Lewis Company, Inc., who is a reseller of gasoline as the term "reseller" is defined in 40 CFR 80.2(n).

6. O.H. Lewis Company, Inc., in turn, had purchased said gasoline from respondent Texaco, at a terminal owned and operated by Texaco in Chelsea, Massachusetts.

7. Texaco has sold said gasoline to O.H. Lewis Company, Inc., since April 27, 1976, pursuant to a contract which contains the following provisions dealing with gasoline sold by Texaco as unleaded gasoline:

Unleaded Gasoline

Purchaser warrants and agrees that Purchaser will not (1) mix or allow Lead-Free Texaco gasoline to be mixed with any gasoline containing lead anti-knock agents and then sell it as Texaco gasoline; and (2) will not store, transport or deliver Lead-Free Texaco Gasoline in or through any container, tank, pump, pipe, or other element of its gasoline storage or distribution system unless such facilities comply with all Federal, State and local government requirements for dispensing unleaded gasoline.

Purchaser further warrants and agrees that Purchaser, its employees or agents, will not introduce, cause or allow the introduction of leaded gasoline into any motor vehicle which is labeled "UNLEADED GASOLINE ONLY" or which is equipped with a gasoline tank filler inlet which is designed for the introduction of unleaded gasoline only.

Purchaser represents that it has received and read a copy of Texaco's "Guidelines for the Handling of Lead-Free Texaco Gasoline -- Wholesaler and Consignees," which has been provided for Purchaser's information in order to make Purchaser aware of the proper handling procedures which would assist it in complying with the warranties of the preceding paragraphs and the relevant Federal Environmental Protection Agency Regulations pertaining to unleaded gasoline.

Purchaser will allow Seller, its employees or agents, to enter Purchaser's place or places of business at any time to obtain such samples or conduct such tests as may, in Seller's judgment, be reasonably required to confirm that Purchaser is complying with the aforesaid obligations, and Purchaser will cooperate with Texaco in any investigation of any alleged violations of such obligations.

Purchaser agrees that it will defend, indemnify and hold Seller harmless from and against all present and future claims, demands, suits, actions, proceedings and litigation arising out of any alleged liability for Purchaser's storage, transportation or delivery of Lead-Free Texaco Gasoline in or through any container, tank, pump, pipe or other element of its gasoline storage or distribution system or the introduction of leaded gasoline into any motor vehicle which is labeled "UNLEADED GASOLINE ONLY." Purchaser further agrees that it will, on Seller's demand, promptly pay all losses, costs, damages, obligations, judgments, fines, penalties, expenses and fees

suffered or incurred by Texaco by reason of any such claims, demands, suits, actions, proceedings, or litigation, except those which are caused by the sole negligence of Seller or its employees.

Seller warrants that Lead-Free Texaco Gasoline purchased from Seller shall conform to Seller's specifications for same at the time of delivery. Purchaser shall notify seller immediately of any claim for variance in quality, and Seller shall have an opportunity to inspect and investigate at any time thereafter. Failure of Purchaser to so notify Seller or cooperate in any investigation shall operate as a waiver of any and all claims by the Purchaser hereunder.

In the event that Purchaser sells Lead-Free Texaco Gasoline to any other person, firm or company for resale under Seller's corporate, trade or brand name, Purchaser shall obtain from every such buyer for Seller's benefit in writing the warranty and agreements stated in this Clause 9 and shall hold Seller harmless and indemnify Seller from any penalty, cost, judgment, loss, fine or expense, including, but not limited to, attorneys' fees and court costs which Texaco may incur as the result of the breach, actual or alleged, of the obligations of the Purchaser or any person, firm or company buying Seller's gasoline for resale from Purchaser.

8. The Guidelines for the Handling of Lead-Free Texaco Gasoline referred to in the contract provide in pertinent part as follows:

Service Station Tankage - (Previously containing leaded product)

All leaded product should be removed from the tank, lines and dispensers. The tank should then be flushed three times with approximately 25-50 gallons of Lead-free product, depending on size of tanks. It has been found that repeated flushing with small quantities of unleaded product is satisfactory. Upon completion of flushing, add minimal amount of product to a tank that can be dispensed. Then flush lines and dispenser thoroughly, normally twice the volume of line.

The product should then be tested for lead content to determine product is on test. If not, additional flushing of tank is required, repeating the above sequence. Experience has been that three flushings are generally satisfactory. Experience may indicate two flushings will give satisfactory results.

* * *

Tank Truck

Dedicated compartments are not necessary, however, each compartment should have separate unloading lines with no manifolding. Strong control is necessary to be sure that all residual product, if any, is drained from the compartment prior to the loading of unleaded Texaco gasoline.

Split loads of unleaded Texaco gasoline with kerosene, Diesel fuel, furnace oil or other gasolines should not be permitted in units which do not have separate outlets from the compartments and products are separated by double walls or an empty compartment.

If a meter is utilized on the truck, then the meter should be flushed with unleaded Texaco or in these instances, dedication of compartment or trucks may be warranted depending on local conditions.

Tank cars are to be inspected to ascertain that tank car is free from any previous product and condition of car is acceptable for loading.

Delivery of Unleaded Texaco Products to the Service Station or Consumer

Extreme care is to be taken to be sure that all products are dropped to the appropriate tank. Tank identification by product is most important.

Where delivery is made through metered lines, then flushing is required.

9. Gasoline identified and sold by Texaco as "lead free" to O.H. Lewis Company during the time the violation occurred, complied with the unleaded gas regulations at the time such gasoline was delivered to O.H. Lewis Company at Texaco's Chelsea terminal.

10. Under the procedures followed by Texaco, which procedures were in effect at the time the violation occurred, O.H. Lewis Company's employee operates the loading rack arm at the Chelsea Terminal, loading gasoline designated as "lead-free" into O.H. Lewis Company's truck. Texaco asserts no control over O.H. Lewis Company's employee during said loading operation.

11. Under the procedures followed by Texaco, which procedures were in effect at the time the violation occurred, after Texaco's "lead free" product is loaded on O.H. Lewis Company's truck at Texaco's Chelsea Terminal, O.H. Lewis Company's employee receives from Texaco's employee a truck bill of lading and manifest form. Texaco has no knowledge of O.H. Lewis Company's subsequent handling of said "lead free" product.

12. Under the procedures followed by Texaco, which procedures were in effect at the time the violation occurred, Texaco furnishes O.H. Lewis Company with a copy of the Guidelines but makes no effort to insure that O.H. Lewis Company does, in fact, comply with its contractual obligations or with Texaco's Guidelines in handling Texaco's "lead free" gasoline after receiving the product from Texaco.

Discussion, Conclusion and Proposed Penalty

The stipulated facts in this case establish that a retail station offered Texaco-branded gasoline for sale from a pump bearing the label "Unleaded Gasoline", which gasoline was found to contain lead substantially in excess of 0.05 gram of lead per gallon, the limit prescribed for unleaded gasoline by the regulations, 40 CFR 80.2(g).

What is at issue is Texaco's liability under 40 CFR 80.23 of the regulations. Paragraph 80.23 (a)(1) of the regulation provides that the refiner, reseller and retailer are all presumed to be liable when unleaded gasoline containing excessive amounts of lead is offered for sale or sold by the retailer under the refiner's corporate, trade, or brand name. Paragraph 80.23 (b)(2) sets out the grounds on which the refiner may rebut this presumption. The provisions which are pertinent to this proceeding are as follows:

> (b)(2) In any case in which a retailer or wholesale purchaser-consumer, a reseller (if any), and any gasoline refiner would be in violation under paragraph (a)(1) of this section, the refiner shall not be deemed in violation if he can demonstrate:
>
> (i) That the violation was not caused by him or his employee or agent; and
>
> * * *
>
> (iii) That the violation was caused by the action of a reseller or a retailer supplied by such reseller, in violation of a contractual undertaking imposed by the refiner on such reseller designed to prevent such action, and despite reasonable efforts by the refiner (such as periodical sampling) to ensure compliance with such contractual obligation....

In this case, Texaco has satisfied its obligation under Section 80.23 (b)(2)(i) of showing that the violation was not caused by it. The gasoline, consequently, must have become contaminated through negligent handling either by the reseller or the retailer.

Texaco in its contract with O.H. Lewis Company has imposed a contractual undertaking on O.H. Lewis Company, Inc., obligating it to comply with Federal, State, and local unleaded gas requirements and to obtain from its purchasers for Texaco's benefit a similar commitment (Texaco Exhibit 2, Par. 9). In addition, the contract also contains the following provision which while perhaps not directly relating to the sale of contaminated unleaded gasoline is evidence that Texaco does possess some control over resellers of its branded gasoline and their customers. (Texaco, Exhibit 2, p. 6):

> Product Quality Maintenance. - Purchaser will not allow or permit any Texaco branded products to be sold as Texaco branded products by purchaser or the service stations and outlets selling Texaco products which he operates or serves which are mislabeled, misbranded, or contaminated and without limiting the generality of the foregoing, specifically Purchaser will not sell or allow to be sold Sky Chief Gasoline as Sky Chief Gasoline which has been commingled with other grades of Texaco branded gasoline or any non-Texaco gasoline; nor will Purchaser allow or permit the commingling of leaded with unleaded gasoline; nor will Purchaser allow or permit the sale, under a Texaco label or designation, of gasoline or any other product which is in fact a non-Texaco product or is a grade of Texaco product other than described by the label or designation. Purchaser hereby authorizes Seller to inspect and sample at Purchaser's facilities or equipment or service stations and outlets he serves, the product at any time and conduct such tests of the product as seller may deem necessary. (Emphasis supplied.)

Texaco's only effort to insure that O.H. Lewis Company and its customers, which includes Ray's Texaco, do not sell or offer for sale Texaco-branded unleaded gasoline that contains excessive amounts of lead is to furnish O.H. Lewis Company with a copy of its guidelines.

Texaco's contract with the reseller here is identical to the one considered in the consolidated proceeding Docket Nos. I UNG-355C and 356C. In that proceeding, I rejected the contention that Texaco by furnishing guidelines to the reseller and making no other effort to prevent violations by the reseller or its customers had sustained its burden under the regulation of showing that it had made reasonable efforts to insure that the reseller had complied with its contractual obligation to prevent violations of the unleaded gasoline requirements by it or its customers. Texaco has not come forward with any reason why a different result should follow in this proceeding, but instead, as already noted, relies on the same legal and factual arguments. Accordingly, for the reasons given in my initial decision in Docket Nos. I UNG-355C and 356C, I conclude that Texaco has violated Section 211 of the Clean Air Act, as amended, 42 U.S.C.A. 7545, and the regulations issued thereunder, 40 CFR Part 80, as alleged in the complaint issued against Texaco Inc. on November 6, 1978.

The Penalty

In evaluating the appropriate penalty, I am to consider the gravity of the violation, the size of Texaco's business, Texaco's history of compliance with the Act, the action taken by Texaco to remedy the specific violation, and the effect of the proposed penalty on Texaco's ability to continue in business. 40 CFR 80.327 (b), 80.330 (b). I may also consult and rely on the Guidelines for the Assessment of Civil

Penalties under the Clean Air Act, Section 211(d), 42 U.S.C.A. 7545 (1978 Supp.), which Guidelines are published in 40 Fed. Reg. 39974 (Aug. 29, 1975), but am not required to follow them. The Guidelines reflect the EPA's judgment of what are suitable penalties for effectively enforcing the Act, and their purpose is to ensure uniformity of penalties for similar violations. They will, accordingly, be followed here.

The civil penalty assessment schedule fixes a tentative penalty based on the gravity of the violation, the size of Texaco's business and Texaco's history of compliance with the Act. The penalty proposed for each violation found herein for a company of Texaco's size is between $6,000 and $7,000, 40 CFR 39976. The exact amount depends upon how much the lead content of the gasoline exceeded the maximum federal standard of 0.05 gram of lead per gallon, 40 CFR 39975. The violation found here of 0.178 gram of lead is substantially in excess of the allowable maximum, and $6,500, which is in the middle of the range, seems reasonable.

This tentative penalty may be reduced if a respondent shows that it promptly acted to remedy the violation and the conditions which gave rise to it, or that payment of such amount will adversely affect respondent's ability to continue in business, or that there are special circumstances which justify a reduction in penalty. 40 CFR 39975.

Texaco has come forward with no mitigating facts which justify reducing the penalty. It does not contend that the penalty will cause any disruption of its business, and there is no evidence that Texaco

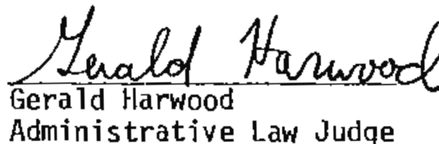
has investigated the violation and has taken measures to keep it from occurring again. Finally, Texaco has not shown any special mitigating circumstances present which should be considered.

I conclude, accordingly, that $6,500 is an appropriate penalty for the violation found.

FINAL ORDER[1/]

1. Pursuant to Section 211(d) of the Clean Air Act, as amended, 42 U.S.C.A. 7545 (1978 Supp.), and the regulations issued thereunder, 40 CFR 80.301, et seq., a civil penalty of $6,500 is assessed against Texaco Inc. for the violation of said Act found herein.

2. Payment of the full amount of the penalty assessed shall be made within 60 days of service upon Texaco Inc., by forwarding to the Regional Hearing Clerk, a cashier's check or certified check in the amount of the penalty payable to the United States of America.



Gerald Harwood
Administrative Law Judge

May 23, 1979

1/ This initial decision shall become the final order of the Regional Administrator unless appealed or reviewed by him in accordance with 40 CFR 80.327(c).