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

In re	)	
	)	
TEXACO, INC.	)	DOCKET NO. CAA(211)-51
	)	
Respondent	)	

Respondent found to be liable for violation of the governing statute and regulations as alleged in the complaint. The penalty proposed by Complainant found proper. Order entered assessing such penalty.

APPEARANCES:

George E. Mittelholzer for Respondent.

Joseph P. Boland and Peter Murtha for Complainant.

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

I. Introduction

This matter arises from a complaint issued by the United States Environmental Protection Agency, Office of Enforcement (EPA) on March 26, 1980. The complaint alleges that Respondent Texaco, Inc. (Texaco) is liable for the violation of the EPA Regulations of Fuel and Fuel Additives (40 CFR Part 80) promulgated under Section 211 of the Clean Air Act, in that Texaco's branded fuel, represented as unleaded, but in fact containing in excess of 0.05 grams of lead per gallon, was offered for sale on September 11, 1979, at Dadswell's Service Station, Williamsville, New York, for use in motor vehicles, in violation of 40 CFR §80.22(a).

Pursuant to 40 CFR 80.23(a)(1), Texaco is deemed to be liable for the violation, unless it presents a proper defense under the provisions of 40 CFR 80.23(b)(2). The hearing in the proceeding was held on June 2, 1981, in Buffalo, New York. Both EPA and Texaco have timely filed initial briefs, and EPA has also submitted a reply brief.

II. Stipulations

At the hearing, the parties agreed to stipulate that Kenneth Dadswell, the owner of Dadswell Service Station, was ill and unavailable to testify at the hearing; and that, had he been able to testify, Mr. Dadswell would have in effect testified as follows:

1. That Dadswell advised the Texaco Sales Representative, Cyrus Hingston, that he would convert his high test gasoline pumps and tank from leaded to unleaded gasoline, as soon as they were empty; and that he had formed the intent to do so sometime before August 22, 1979.

2. That it was Dadswell's understanding that it was the responsibility of Texaco to purge the tanks before unleaded gasoline could be placed in those high test tanks.

3. That Dadswell was not present on August 22, 1979, during the last gasoline delivery to his station by Texaco prior to the EPA sampling of his unleaded gasoline on September 11, 1979.

4. That there is presently pending a proceeding against Dadswell dealing with the same alleged contamination involved here;

and that the parties have reached there a tentative agreement to settle the case, under which Dadswell has neither admitted nor denied liability, but has agreed to pay a civil penalty of $300.

III. The Basic Facts

Texaco is a refiner of petroleum products. Dadswell is a retail outlet displaying the Texaco brand name and selling or offering for sale Texaco gasoline and other products for use in motor vehicles. While in the past Texaco had supplied gasoline to Dadswell pursuant to a contractual agreement, that agreement was terminated on June 13, 1979, as a result of Texaco's decision to withdraw from the Buffalo market area in western New York, where Williamsport is located. However, pursuant to regulations promulgated by the Federal Energy Administration, now the Department of Energy (DOE), Texaco continued to supply Dadswell with gasoline after June 13, 1979, including a delivery on August 22, 1979, the last one immediately prior to the EPA's sampling leading to this complaint proceeding, in accordance with Respondent's normal business practices. The cancelled contract contained the following provisions:

> Product Quality Maintenance - Purchaser shall not mix Texaco brand products one with another or mix or adulterate Texaco brand products with petroleum products of others or into any chemical or material whatsoever.
>
> * * * * * * * * * *
>
> Purchaser represents that it has received and read a copy of Seller's "Guidelines for the Handling of Lead-free Texaco Gasoline - Retailers and Consumer Accounts", dated July 15, 1975, 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 will cooperate with Seller in any investigation of any alleged violations of such obligations.

On September 11, 1979, agents of the Weights and Measures Bureau of Erie County, New York, inspected Dadswell's gasoline station on behalf of EPA. The station was open for business on that date. The inspectors took a sample of gasoline from pump number 15-EG-593, which gasoline was represented to be unleaded, but which had, in fact, a lead content in excess of 0.05 grams per gasllon, in violation of 40 CFR §80.22(a). The atomic absoption test of the sample revealed the presence of 0.79 grams of lead per gallon. The immediate cause of the contamination was the introduction of unleaded gasoline into a tank previously used for storing leaded gasoline, but without proper purging of that tank, to flush out all leaded gasoline, before its actual conversion for the use of unleaded gasoline.

Generally, Texaco takes precautions to prevent commingling of leaded and unleaded gasoline in its operations at its own plant facilities and during delivery to retailers. The driver visually inspects each compartment of the delivery truck to make

sure that it is empty before loading gasoline. Each type of gasoline sold by Texaco -- regular leaded, premium leaded and unleaded gasoline -- is dispensed from a color-coded spout which is also labeled with the particular product's designation. The fill caps of the tanks located at the individual stations are also color-coded to correspond to the various types of gasoline. In addition, Texaco supplies each driver with a card which depicts a schematic design or diagram of each station served, indicating specifically the location and capacity of the tanks holdings the three indicated types of gasoline. At monthly safety meetings, Texaco has been instructing its employees in the handling of leaded and unleaded gasoline. At times it sends a safety inspector along with its drivers to observe how the deliveries are made. If a problem arises with respect to any delivery to an individual service station, it has been Texaco's normal practice to require the driver to call the plant where the gasoline originated and talk to, and obtain instructions from, a supervisor.

Texaco requires its field maintenace supervisors to randomly sample unleaded gasoline at service stations outlets. Respondent's field maintenance supervisor for the involved territory indicated that in 1979 his normal method of determining random sampling was totake gasoline samples at stations which he visited for other business purposes. During the period from May 1979, when he actually began to take samples for Texcao, until September 1979, he sampled gasoline at only 11 customers out of approximately 200. He did not have any occasion to visit the Daswell station and, therefore, had never sampled any unleaded gasoline sold there.

In 1979, due to the increased demand for unleaded gasoline, a number of service stations sought to enlarge their unleaded gasoline handling capacity by converting their storage tanks from leaded to unleaded gasoline. According to Texaco, changing a storage tank from leaded to unleaded gasoline involves an exacting procedure, requiring thorough flushing and then testing to make sure that the tank was purged of leaded gasoline. Ordinarily, properly to accomplish such a change, a retailer would need the assistance of either Texaco or a contractor. The final step in the conversion, once the gasoline storage tank has been determined to be sufficiently free of lead, is to repaint the fill caps to correspond to the color-code applicable to unleaded gasoline.

Approximately two or three months before the contamination involved here was discovered, Dadswell had discussed with Texaco's division marketing representative the possibility of converting his premium leaded gasoline tank to the storage of unleaded gasoline. Texaco's representative had outlined to Mr. Dadswell the procedure that should be followed in such conversion and advised him to call the Texaco's operations center for assistance in accomplishing the switch. However, Mr. Dadswell neither called the operations center, nor discussed the matter further with Respondent's marketing representative. Texaco was never informed whether the intended conversion had actually taken place. It is Texaco's common practice to change the diagram of the station involved and the color of the filler cap whenever such a conversion occurs.

On August 22, 1979, Mr. Kenneth Arnold, a truck operator of Texaco, was instructed to make a delivery to Dadswell's station. Specifically, he was told to delivery 6,200 gallons of unleaded gasoline and 1,300 gallons of regular leaded gasoline to Dadswell. Mr. Arnold was puzzled because Dadswell's diagram showed a maximum storage capacity of 4,000 gallons for unleaded gasoline. When he pointed out this discrepancy to his supervisor, the latter told him that Dadswell had probably converted one of his leaded tanks to the storage of unleaded gasoline. Mr. Arnold, in deliverying the gasoline to Dadswell, claimed that he followed normal procedures to prevent the contamination of unleaded gasoline while unloading. However, drawing again attention to the unusually large amount of unleaded gasoline, he was informed at the station that the premium leaded tank had been converted to the use of unleaded gasoline. But, as noted, Texaco's schematic diagram given to Mr. Arnold continued to show that tank as designated for the storage of premium leaded gasoline, and its fill cap was still color-coded for that particular type of gasoline as well. Nevertheless, Mr. Arnold followed instructions and unloaded the unleaded gasoline into that tank. Respondent was notified of the contamination on or about September 19, 1979. Texaco's marketing representative contacted Dadswell and advised him to discontinue immediately the sale of unleaded gasoline. On September 26, 1979, Texaco pumpted out the contaminated tank, flushed and purged it and made it suitable for the storage of unleaded gasoline.

IV. Positions and Contentions of the Parties

There is no dispute that the gasoline sample taken from Dadswell's station showed lead content far in excess of 0.05 grams per gallon permitted by the regulations. Although Respondent claims that EPA has failed to establish that the sample was taken from a pump which was represented to the public as containing unleaded gasoline, the principal issue presented here is whether Texaco has established an affirmative defense under 40 CFR §80.23(b)(2). Insofar as pertinent, the latter section provides as follows:

> (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
>
> (ii) That the violation was caused by an act in violation of law (other than the Act or this part), or an act of sabotage, vandalism, or deliberate commingling of leaded and unleaded gasoline, whether or not such acts are violations of law in the jurisdiction where the violation of the requirements of this part occurred, or
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> * * * * * * * * * * *
>
> (iv) That the violation was caused by the action of a retailer who is supplied directly by the refiner (and not by a reseller), in violation of a contractual undertaking imposed by the refiner on such retailer designed to prevent such action, and despite reasonable efforts by the refiner (such as periodic sampling) to insure compliance with such contractual obligation.

EPA asserts that it has met its burden of establishing a prima facie case; and that Texaco's contention that Complainant has not shown that the gasoline sample was represented to be unleaded is erroneous. EPA maintains that Texaco is responsible for the contamination. It points out that Respondent's driver unloaded the unleaded gasoline into the improperly purged tank despite the warning signs, i.e., that the color-coding on the fill cap and the schematic diagram, showing that the tank might still have contained leaded gasoline. EPA also contends that the defense of 40 CFR §80.23(b)(2)(iv) is not available to Texaco, inasmuch as Respondent terminated its contract with Dadswell over two months prior to the gasoline delivery giving rise to the contamination. Finally, EPA criticizes Texaco's compliance monitoring system, alleging that it was inadequate. EPA argues that Texaco's periodic sampling program was insufficient to uncover violations; and that Respondent failed to train adequately its employees to avoid contaminating unleaded gasoline when confronted with a situation such as the one presented herein.

On the other hand, Respondent states that it has proven that the violation, if any, was caused by persons other than Texaco, its agents or employees. More specifically, it avers that Dadswell intentionally commingled the gasoline. Texaco further argues that the "contractual undertaking" of the provisions of 40 CFR §80.23(b)(2)(iv) has been met by the requirement that the refiner maintain its historical, usual business practices

with retailers receiving products under DOE regulations, citing and quoting 10 CFR §210.62(a), as follows:

> (a) Suppliers will deal with purchasers of an allocated product according to normal business practices in effect during the base period specified in Part 211 for that allocated product, and no supplier may modify any normal business practice so as to result in the circumvention of any provision of this chapter. "Summer fill" programs and other "dating" or seasonal credit programs are among the normal business practices which must be maintained by a supplier under this paragraph, if that supplier had such programs in effect during the base period.

Texaco also maintains that it has exerted "reasonable efforts" through a periodic sampling program which was in effect at all times material to this proceeding, as required by the provisions of EPA's regulations. Respondent requests that the complaint be dismissed.

V. Discussion

As noted, the principal dispositive issue here is whether Texaco has established a defense absolving it from liability for the violation of the regulations, as provided in §80.23(b)(2). The question raised by Texaco as to whether EPA has proven a prima facie case by showing that the gasoline sampled was represented as unleaded does not merit extended discussion. EPA's witness, Kenneth Thompson, testified positively and unqualifiedly that the gasoline sample he took at the Dadswell station came "from one of the unleaded pumps". (Tr. 24). This

oral testimony has been amply corroborated by EPA's Exhibit No. 1, admitted into evidence without any objections by Texaco. That document, entitled "Inspection of Retail Gasoline Outlet", is a report ordinarily prepared in the course of all unleaded fuel inspections. It was filled by EPA's very same witness and clearly shows, under the brand of gasoline, "TEXACO-UNLEADED" and the pump number from which the sample was taken. Although Counsel for Texaco cross-examined Mr. Thompson in some detail, the former never asked the latter any questions concerning the subject.*/ Nor did Respondent introduct any evidence even remotely casting any doubts on the veracity or credibility of the witness or controverting in any way his testimony. On the basis of the record, therefore, Texaco's position is untenable and EPA is found to have sustained its burden of proof by presenting here a prima facie case of a violation of 40 CFR §80.22(a). Since there does not appear to be any dispute that the sampled gasoline contained lead in excess of 0.05 grams per gallon, we turn to consider the principal issue of whether Texaco has established a defense absolving it from liability for the violation.

A. Was the Violation Caused by Texaco, Its Employee or Its Agent?

The record shows that the violation was caused by the introduction of the unleaded gasoline into an improperly purged tank previously used to hold leaded gasoline. The actual introduction was performed by a Texaco employee, Kenneth Arnold, the driver of the delivery truck. He unloaded the unleaded gasoline

*/ On brief, Respondent stresses form over substance beyond any credibility, pointing out that Texaco has labeled its product "lead-free", whereas the witness has used the term "unleaded".

into a tank at Dadswell's station even though, by all the clear and concrete indications he had -- the diagram and the color of the filler cap -- that tank was still designated for the storage of leaded gasoline. There were compelling reasons here for extreme caution by both driver and his superior. Though it was Texaco's general practice to have its driver telephone a supervisor, if there was any question or problem with the appropriateness of a delivery, Mr. Arnold did not do so. Apparently, he disregarded the practice on the strength of his supervisor's previous bare, but baseless, statement that probably the tank had been converted to the use of unleaded gasoline. Texaco contends that it cannot be found responsible for the violation, allegedly because Mr. Dadswell directed that the unleaded gasoline be unloaded into the leaded tank. Assuming that the latter statement were correct, though it seems quite inconsistent with stipulation 3, the fact remains unchanged that Texaco's driver was the person who unloaded the gasoline and caused the contamination, despite his strong suspicion and the obvious signals that the storage tank was most likely an inappropriate one for unleaded gasoline. While the driver may not be entirely blamed for having been lulled -- including especially by the initial reaction of his own supervisor at the originating terminal -- into proceeding with the unloading, nevertheless Texaco through its employees was, or should have been, aware that the potential for contamination clearly existed here and that contamination may, in fact, take place as a direct result of the action or inaction of its

employees. Respondent had the duty to avoid contamination, but failed to use reasonable care to prevent it. That Dadswell might also be found liable for the same violation, or that he has been willing to settle the complaint brought against him, does not in any way alter the conclusion that Texaco was the actual and proximate cause of the contamination.

B. Has Texaco Established Any Valid Defense?

It has already been determined above that the violation was caused by Texaco or its employees and, therefore, it is here irrelevant whether Respondent can meet the standards of either 40 CFR §80.23(b)(2)(ii) or (iv). However, assuming, arguendo, that Texaco or its employees did not cause the violation, Respondent still does not escape liability since the record will not support any findings that a valid defense has been established under either of these provisions.

Texaco argues that Dadswell's request or, rather, direction to the driver to unload the unleaded gasoline into the unpurged tank amounted to deliberate commingling. However, aside from being contrary to stipulation 3, Texaco's position is also inconsistent with stipulation 2. Not only did Dadswell's stipulated testimony deny his presence at the station on August 22, 1979, during the delivery of the subject gasoline, it also indicated that it was his understanding that it was Texaco's responsibility to purge the leaded tank before any unleaded gasoline could be placed in it. It would be far-fetched and improper to infer or find -- despite this understanding and despite the testimony presented by Texaco itself that the matter had been discussed by its representative and Dadswell, the

former describing to the latter the usual procedure to be followed, but that Respondent had never been requested to have the use of any of the involved tanks changed or converted from leaded to unleaded gasoline storage -- that it was Dadswell who intentionally and deliberately caused the contamination. No reasonable grounds for such a conclusion exists on this record. Rather, if anything, such a conclusion would be contrary to the preponderance of the evidence. Accordingly, Texaco's defense under sub-paragraph (ii) is rejected.

Nor can Texaco avail itself of the contractual defense set forth in sub-paragraph (iv). As EPA correctly notes, Texaco went to some pains at the hearing to prove that its contract with Dadswell was cancelled on June 13, 1979, and was no longer in effect on August 22, 1979. (Tr. 74-76). Texaco argues that the DOE regulations which regulated the continued supply of gasoline to Dadswell in effect revived the prior contractual obligations relating to unleaded gasoline. But a careful reading of the quoted DOE regulations reveals no reference whatever to unleaded gasoline, but rather shows that the provisions are concerned mainly with allocations. Moreover, sub-paragraph (iv) requires "a contractual undertaking imposed by the refiner" on the retailer, whereas the DOE regulations are plainly addressed to, and governed and control the conduct of, suppliers. There is no warrant here for finding any implied, let alone any explicit, contractual obligation imposed by Texaco upon Dadswell. Even if we were to assume the existence of valid contractual obligations, Texaco's attempt to ensure compliance

must be deemed inadequate. Respondent's periodic sampling procedure was scanty at best. Sampling appears to have been but one minor responsibility of the field maintenance supervisor, who took samples at stations he happened to visit on other business. There was no demonstrated means, methods or procedures of assuring oversight over all or even most of the retail outlets Texaco supplied, on a reasonably regular basis. It also appears that Texaco's program for instructing employees concerning the commingling of leaded and unleaded gasoline is substantially deficient. The ineffectiveness of that program has been clearly demonstrated here by the fact that a highly regarded and long-time driver, as well as his supervisor, have failed to heed obvious warning signs indicating the need for caution and further investigation in order to prevent the probability of contamination.

Upon the facts and circumstances presented, the Presiding Officer finds that Texaco has not established any valid defense absolving it from liability for the violation which has been shown to have occurred here.

C. Amount of Penalty.

The maximum statutory penalty per day for each violation of the regulation is $10,000. EPA, however, proposes that a penalty of $7,000 be imposed on Texaco. The five factors to be considered in determining the size of a penalty are found in §80.330(b)(1) of the Rules of Practice (40 CFR §80.330(b)(1)). They are: (1) the gravity of the violation, (2) the size of the Respondent's business, (3) the Respondent's history of compliance with the Act, (4) the action taken by Respondent to remedy the

specific violation, and (5) the effect of the proposed penalty on Respondent's ability to continue in business.

Texaco's brief did not address the appropriateness of the penalty to be imposed in the event Texaco were found to be liable for the violation. It is noted that the amount of lead found in the sample was 0.79 grams per gallon, far in excess of, or more than 15 times, the maximum of 0.05 grams per gallon permitted in unleaded gasoline, and thus rendering the violation a serious one. Furthermore, Texaco's business (Category IV) is large enough to place a $7,000 penalty within the range appropriate for Respondent, with no previous violations in the Region. There is no evidence or any allegation that a penalty of this size will adversely affect Texaco's ability to continue in business. There is nothing shown here which would justify any reduction in the proposed civil penalty against Respondent. Although it learned of the contamination on September 19, 1979, Texaco did not purge Dadswell's tank and render it suitable for the storage of unleaded gasoline until September 26, 1979. Based upon the Guidelines for the Assessment of Civil Penalties Under Section 211(d) of the Clean Air Act (40 Fed. Reg. 339973, August 29, 1975) and the particular facts and circumstances presented, it is found that the proposed $7,000 penalty is appropriate here.

ULTIMATE CONCLUSIONS AND ORDER

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

(1) Respondent Texaco, Inc., as the involved refiner, is liable, pursuant to 40 CFR §80.23(a)(1), for violation of

40 CFR §80.22(a) and, as a result, for violation of Section 211 of the Clean Air Act.

(2) Respondent Texaco, Inc. has failed to establish any adequate defense under 40 CFT §80.23(b)(2) to be absolved from liability for the indicated violation.

(3) Respondent Texaco, Inc. should, accordingly, be assessed a civil penalty in the amount of $7,000, and that such penalty is just, reasonable and warranted in the circumstances presented herein.

WHEREFORE, IT IS ORDERED, subject to review by the Administrator on appeal, or sua sponte, as provided by §80.329 of the Rules of Practice (40 CFR §80.329), that:

(A) A civil penlaty in the amount of seven thousand dollars ($7,000) be, and it is hereby, assessed against respondent Texaco, Inc.

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

Jair S. Kaplan

By the Presiding Officer
October 22, 1981

Jair S. Kaplan
Administrative Law Judge (Ret.)

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing document was filed, and mailed by certified mail to Respondent, and by regular Mail to Complainant to the addresses that follow:

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Dated: October 23, 1981