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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:) DOCKET NO. 080067
) -----
) Marvin E. Jones
B&H 66) Administrative Law Judge
Liberty Gas & Oil Co, Inc.) 1735 Baltimore
Phillips Petroleum Company) Kansas City, Missouri 64108

INITIAL DECISION

By Complaint issued August 11, 1977, Respondent Phillips Petroleum Company (hereinafter Phillips) was charged with violation of 40 CFR 80.22(a), promulgated pursuant to Section 211(c)* of the Clean Air Act, as Amended (the "Act") in that on or about July 28, 1977, the retail outlet B&H 66 (a Phillips branded retail outlet) offered for sale unleaded gasoline containing in excess of 0.05 grams per gallon lead content, said gasoline having been delivered (to B&H) by Liberty Gas and Oil Company, a Phillips reseller.

Complaints arising from the subject alleged violation were also filed against Walter R. Jones, d/b/a B&H 66 (B&H), a retailer as defined in 40 CFR 80.2(k), operating a "retail outlet" (80.2(j)); and against Liberty Gas and Oil Company, Inc. (Liberty), a "distributor" and "reseller" (40 CFR 80.2(l) and 80.2(n), respectively). The Complaint against B&H was resolved by the payment by it of \$500.00 under a Consent Agreement executed on October 28, 1977. The Complaint against Liberty was by the Complainant withdrawn. The decision herein concerns only the remaining Complaint against Respondent Phillips.

* Loc. cit. 40 U.S.C. 1857f-6c(c).

An Adjudicatory Hearing in this cause was convened on November 3, 1977, at 10:00 a.m. at 1735 Baltimore, Kansas City, Missouri, at which time Joint Exhibit 1 was offered and received which contains Stipulated Facts wherein the parties, among other things, stipulated that B&H offered for sale to the public, as unleaded, Phillips branded gasoline containing lead in excess of 0.05 grams lead per gallon; and that unleaded gasoline supplied by Phillips to Liberty did not contain excess lead.

Complainant rested its case stating that the facts stipulated established for it a prima facie case. Phillips elicited evidence on the record from three witnesses apparently to show that it has promulgated a commendable program for the handling of unleaded gasoline and that it oversees effectively the handling of such product by its distributors and retailers.

In alleging the complaint that Phillips violated said Section 80.22(a), Complainant is in effect alleging that Respondent is a "retailer" under Section 80.2(k). [40 CFR 80.22(a) and 80.2(k)].

Said Sections provide as follows:

80.22 "Controls applicable to gasoline retailers and wholesale purchaser-consumers.

"(a) After July 1, 1974 no retailer or his employee or agent and after January 31, 1975 no wholesale purchaser-consumer or his employee or agent shall sell, dispense, or offer for sale gasoline represented to be unleaded unless such gasoline meets the defined requirements for unleaded gasoline in Section

80.2(g); nor shall he introduce or cause or allow the introduction of leaded gasoline into any motor vehicle which is labeled "unleaded gasoline only," or which is equipped with gasoline tank filler inlet which is designed for the introduction of unleaded gasoline."

"80.2(k) 'Retailer' means any person who owns, leases, operates, controls or supervises a retail outlet."

Complainant does not, in its proposed Findings of Fact contend that Phillips is a "retailer" nor do the parties so stipulate. It is agreed that Phillips is a refiner as defined in Section 80.2(i). In Phillips Brief in Support of proposed Findings of Fact, its statement, page 2, hereinafter quoted, is unchallenged:

"All of the testimony at the hearing came from Phillips' three witnesses. The undisputed testimony at the hearing established that Phillips did not own or lease the service station or station site of B&H on the date in question and that Phillips had no contractual relationship with B&H 66."

Its proposed Finding of Fact No. 4, page 2, states:

"Phillips did not directly supply and deliver any leaded or unleaded gasoline to B&H nor did Phillips own, lease, operate, control or supervise such service station."

Phillips devotes most of its brief and argument to its contention that it provides reasonable "oversight" relative to its contract (Phillips Exhibit 2) with Liberty.

It is apparent that since Phillips is not a retailer, as contemplated by said Section 80.22(a), said Section is not here applicable. Further, Section 80.23, as demonstrated

below, is likewise not applicable [In the matter of Amoco Oil Co., Docket No. A677-0031, Region VI, September 27, 1977.].

"80.23 "Liability for Violations."
Liability for violations of paragraph
(a) of Section 80.22 shall be determined
as follows: ..."

The foregoing comprises my Findings of Fact herein.

After consideration of the facts found, the stipulated facts contained in Joint Exhibit 1 (attachment 1 hereto), my examination of the transcript, and the proposed findings and conclusions of the parties accompanied by their respective briefs and arguments, I arrive at the following

CONCLUSIONS OF LAW

1. Respondent Phillips, though a refiner, is not a retailer as defined in applicable provisions of the subject regulations and thus is not within the purview of the provisions of 40 CFR 80.22(a).

2. Phillips is not legally chargeable with, nor responsible for, the violation alleged in subject Complaint.

DISCUSSION

In conformity with my decision in Amoco Oil Co, supra, I here find that Phillips is not liable for the subject violation because it "does not come within the purview of either Section 80.22(a) or Section 80.23, the latter being complementary of the first." Where Complainant seeks to hold a refiner accountable for a violation it is necessary that it prove that said refiner is a retailer as defined and contemplated by applicable Regulations. The contrary appears from

the record. Since it must be concluded that Phillips is not a retailer and that the Sections, under which Respondent is charged in subject complaint, are not here applicable, we do not reach the further issues argued by the parties.

In this, and in every case, the burden rests with the Complainant to prove that Respondent is, by rule, subject to the regulatory sanctions proposed by it to be invoked (Section 80.324). In numerous cases, previously here decided the issue of whether the Respondent is a retailer under the definition [Section 80.2(k)] was not raised. Those cases were submitted on the agreed premise that the only issue outstanding is whether Respondent had proven a defense under Section 80.23(b)(2). In such case, it is rightfully assumed that the Respondent is a retailer subject to the sanctions of Section 80.22(a) which liability thereunder is then determined after consideration of any defense contended for by Respondent under the provisions of said Section 80.23.

In contrast where, as here, the fact of whether Respondent is a retailer is not proven by Complainant and, in addition, is controverted, such issue must be resolved and determined as by applicable regulations provided.

The Stipulation of Facts (Joint Exhibit 1) and the transcript of evidence elicited at the Hearing are silent on said issue. Complainant has not sustained its burden of proving a fact essential to its case. When Respondent raised the issue in its Proposed Findings of Fact (Finding No. 4) and in its Brief and Argument (or either) it is incumbent on Complainant to at least reply if it would challenge the contention there made. In the absence of comment on

Respondent's said statement, and proposed finding, that it does not own, lease, operate, control or supervise the service station or station site, and in the absence of any evidence in the record, it must be here concluded that Phillips, on this record, is not a retailer and thus does not come within the purview of said Section 80.22(a). The fact that Respondent argued also that a defense existed under said Section 80.23, I interpret as its alternative argument in its brief.

It should be further observed that any other construction of said regulations will present a patent ambiguity which must appropriately be resolved in Respondent's favor.

By reason of the foregoing, I find that Respondent Phillips is not answerable for the violation charged, and that no penalty should be assessed.

PROPOSED FINAL ORDER

This Initial Decision and the following proposed Final Order shall become the Final Order of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided in 40 CFR 80.327(c):

"Final Order

It being hereby determined that Respondent Phillips Petroleum Company is not answerable for the violation charged in the subject Complaint, no penalty is assessed against it."

This Initial Decision is signed and filed this 6th day of January 1978, at Kansas City, Missouri.



ALJ

Attachment.

Joint Ex. #1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
1735 BALTIMORE
KANSAS CITY, MISSOURI 64108

IN THE MATTER OF) DOCKET NO. 080067
)
)
PHILLIPS PETROLEUM COMPANY)
)
Respondent.)

STIPULATION OF FACTS

The United States Environmental Protection Agency, Complainant herein (hereafter EPA), and Respondent, Phillips Petroleum Company (hereafter Phillips), by their attorneys of record do hereby stipulate and agree that each of the following statements of fact is true and may be received in evidence in this matter without objection:

1. Phillips is and has been at all times pertinent to this matter a "Refiner" as defined in 40 CFR 80.2(i).
2. Liberty Gas & Oil Company, Inc., is and at all times pertinent to this matter a "distributor" as defined in 40 CFR 80.2(l), and a "reseller" as defined in 40 CFR 80.2(n).
3. Walter R. Jones, d/b/a B & H 66, Omaha, Nebraska, is and at all times pertinent to this matter has been a "retailer" as defined in 40 CFR 80.2(k).
4. B & H 66 is a "retail outlet" within the meaning of 40 CFR 80.2(j).
5. At all times pertinent to this matter, the brand name "Phillips" was displayed at the retail outlet, B & H 66.
6. B & H 66 sells unleaded gasoline.
7. Said unleaded gasoline is supplied by Liberty.
8. Said unleaded gasoline is supplied to Liberty by Phillips.
9. On or about July 28, 1977, Richard Barnes, Nebraska Weights and Measures Inspector, inspected B & H 66, sampled said unleaded gasoline, and forwarded the sample, identified by I.D. No. 080067 to the EPA laboratory, Kansas City, Kansas.

10. David Stitt, EPA Fuels Inspector, received sample number 080067 at the EPA laboratory.

11. Fred Westermeir, EPA Laboratory Technician, tested sample number 080067 at the atomic absorption spectrophotometer in accordance with Appendix B as set out in the July 8, 1974, Federal Register.

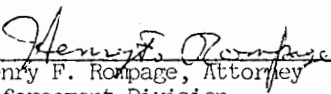
12. Said test revealed the unleaded gasoline in sample number 080067 contained .064 grams per gallon lead content.

13. B & H 66 has entered into a Consent Agreement and Final Order with Complainant and has paid a civil penalty.

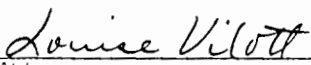
14. The Complaint against Liberty has been withdrawn by Complainant.

15. The unleaded gasoline referred to in Stipulation of Fact No. 8 supplied by Phillips to Liberty was in conformity with 40 CFR 80.2(g).

Date 11-3-77


Henry F. Rompage, Attorney
Enforcement Division
Environmental Protection Agency
Region VII

Date 11-3-77


Attorney
Phillips Petroleum Company