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

In re	)	
	)	
LEONARD V. SYLVIA, d/b/a WHALING MUSEUM SHELL	)	DOCKET NO. CAA(211)-106
	)	
SHELL OIL COMPANY	)	DOCKET NO. CAA(211)-116
	)	
Respondents	)	

Complainant found to have failed to establish that a violation of the governing regulations occurred. Order entered dismissing complaint.

APPEARANCES:

Leonard V. Sylvia, pro se.
Joseph H. Fields for Respondent Shell Oil Company
Marc Hillson and Sylvia Hardy, for Complainant.

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

I. Introduction

This matter arises from two separate complaints, dated May 8, 1980. Complainant, the United States Environmental Protection Agency, Office of Enforcement, (EPA), alleges that on November 22, 1979, gasoline represented to be unleaded and offered for sale at Whaling Museum Shell in New Beford, Massachusetts, for use in motor vehicles, contained in excess of 0.05 grams of lead per gallon, in violation of 40 CFR §80.22(a) of the EPA's Regulations

of Fuel and Fuel Additives (the regulations), thereby also violating Section 211 of the Clean Air Act. Complainant further alleges that Mr. Leonard V. Sylvia (Sylvia), the proprietor of Whaling Museum Shell (a retailer under 40 CFR §80.2[k]), and Shell Oil Company (Shell) (a refiner under 40 CFR §80[i]) are each liable for the violation pursuant to 40 CFR §30.23(a)(1). EPA seeks the imposition of civil penalties of $7,100 against Shell and $1,100 against Sylvia. Upon Complainant's motion, the two proceedings were consolidated for hearing and decision by order entered November 12, 1980. Hearing was held on June 16, 1981, in Boston, Massachusetts. EPA and Shell have both filed initial and reply briefs. Respondent Sylvia appeared at hearing pro se, but filed no brief.

II. Summary of the Evidence

Sylvia, at all times pertinent to the complaints, operated a retail gasoline filling station at which Shell's brand name was displayed. The handling of Shell's products by Sylvia was governed by a "Dealer Agreement and Dealer Lease" and a "Dealer Unleaded Gasoline Compliance Agreement" (the Agreements), both dated January 10, 1979. These Agreements imposed certain storage and handling obligations on Sylvia, designed to prevent violations of the EPA regulations, 40 CFR Part 80.

On November 22, 1979, two EPA inspectors conducted an inspection at Sylvia's station to determine whether gasoline offered for sale there as unleaded had a lead content in excess

of 0.05 grams per gallon in violation of the regulations. There was a conflict in the evidence as to whether and when the inspection was performed. The EPA witness believed that the inspection was performed at approximately 11:00 a.m., while Respondent Sylvia testified that the station was not opened on November 22, 1979 (which was Thanksgiving Day) before 1:00 p.m. For reasons hereinafter discussed, these conflicts are resolved in EPA's favor.

Upon completion of the inspection, (including a tentative field colorimeter test performed by the second inspector who was not present as a witness to testify at the hearing), a gasoline sample was drawn from Sylvia's super unleaded tank and forwarded to Bionetics Laboratory, a firm which had contracted with EPA to perform atomic absorption spectrometry analyses on such samples, as required by 40 CFR §80.3. When received by Bionetics on September 29, 1979, the container holding the sample was found leaking, a situation considered abnormal. The container was not replaced, but was put, along with other containers, some also leaking, on a shelf to await the analysis. The atomic absorption test was performed a day later, on September 30, and indicated the presence of 0.105 grams of lead per gallon. However, the chemist who actually performed the test admitted that, because of the leakage, gasoline vapor which contains no lead could have evaporated and escaped from the container and, thus, the proportion of lead in the remainder of the sample might have been increased. Apparently, there is no uniformity as to the volume of gasoline

included in the samples sent to the Bionetics Laboratory. Thus, there appeared no reliable way to accurately gauge here the amount or degree of any change in the lead content of the gasoline sample which might have occurred through the leakage. The witness also admitted that there was a possibility of substances leaking into, as well as out of, the damaged container.

Shell presented extensive testimony to demonstrate that it did not cause and could not have caused the contamination. Specifically, Shell has established: (a) that the pipe system for unleaded gasoline in its bulk plant, from which the Sylvia station was served, is segregated from the pipe system for leaded gasoline; (b) that there are no common lines or manifolds or cross-connections in the bulk plant; (c) that all unleaded gasoline arriving and leaving the bulk plant, during the two months preceding the EPA inspection, were tested for lead content and were shown to be below the prescribed maximum of 0.05 grams per gallon; (d) that Shell's driver properly loaded the three compartments of his truck (one each for leaded regular, unleaded regular, and super unleaded gasoline) prior to leaving the bulk plant; and (e) that the driver delivered and properly unloaded the respective products at Sylvia's station without any mishap. The Shell driver, who regularly delivered gasoline to Sylvia's station, once, apparently during 1980, but at some other station, mistakenly commingled super unleaded and regular unleaded gasoline, which incident was verified and corrected the next morning. However,

he has never commingled or "cross dumped" leaded and unleaded products. Shell considers it a serious offense, subjecting its drivers to disciplinary action, including discharge, if they hide and do not report such known errors and thereby preclude prompt corrective action. On the other hand, Shell recognizes that mistakes do sometimes happen and it will excuse the occurrance of unintentional errors, as long as they are brought to its attention. Here, each type of gasoline was unloaded in its turn from Shell's truck at the Sylvia station, based on, and in accordance with, a system of color coded caps and corresponding tags on the truck. The unleaded gasoline, in conformity to Shell's practice and general policy, was unloaded first, before the leaded product which is generally unloaded last. The caps here were clearly marked and the driver knew which product belonged in which storage tank. The driver unqualifiedly testifed that the proper products (involving respectively 1500, 2000, and 5000 gallons of unleaded regular, unleaded super, and leaded regular gasoline) were emptied in their entirety into their corresponding storage tanks and that no mistakes or mishaps of any kind occurred at the Sylvia station on September 19, 1979, during that last delivery immediately prior to the subject EPA inspection.

Based on the respective levels of the lead content of both the leaded and super unleaded gasoline involved, approximately 130 gallons of leaded gasoline would have been necessary to raise the lead content in Sylvia's super unleaded

gasoline storage tank to the alleged level of contamination. However, comparisons of physical audits of Sylvia's storage tank inventories, during the month of November 1979, with the truck meter readings and invoices show no unexplained or unaccounted losses of either leaded or unleaded gasoline. Nor was there any indication of structural problems or of leakage from one compartment to another in Shell's delivery truck and from one storage tank to another at Sylvia's station.

As noted, Sylvia had agreed to take steps necessary to insure the integrity of unleaded gasoline at his station. As pertinent, the Agreements provided as follows:

> The Dealer shall establish and enforce a positive program of compliance to assure that Dealer, Dealer's employees or agents, or third parties (including the employees, agents or contractors of Shell) will not cause, allow or permit contamination of Dealer's unleaded gasoline by any other gasoline product or foreign substance at any time after delivery by or for Shell to Dealer and prior to introduction by Dealer into any motor vehicle, such program to include, if and as necessary, periodic sampling and testing by Dealer of Dealer's unleaded gasoline inventory, the securing of manhole cover, fill line caps and dispensers to avoid unauthorized entry or use and the supervision and instruction of employees and others having access to Dealer's unleaded gasoline or the introduction of leaded gasoline into vehicles designed only for unleaded gasoline.

Shell has periodically conducted sampling and testing of gasoline at the Sylvia station, to insure compliance with these provisions. Each such compliance test performed has indicated lead levels

within appropriate limits. Shell also maintains a policy of oversight, intended to prevent commingling of leaded and unleaded gasoline.

III. Contentions of the Parties

EPA contends that it has established a prima facie showing that a violation of 40 CFR §80.22(a) has occurred. Complainant asserts that the elements of such a showing are as follows: (1) that after July 1, 1974, (2) a retailer or his employee or his agent, (3) sold, dispensed or offered for sale, (4) gasoline represented to be unleaded, (5) with a lead content in excess of 0.05 grams per gallon. There is no dispute that the events here occurred after July 1, 1974, and involved a retailer who had available for sale gasoline represented to be unleaded. There is also no dispute that, if contamination were proven, Shell would be presumptively liable under 40 CFR §80.23(a)(1), because its corporate or trade or brand name was displayed at Sylvia's station; and that Sylvia would be presumptively liable under the same provision, because the contamination occurred at his station.

The two initial issues raised here are (a) whether super unleaded gasoline was actually sold, dispensed, or offered for sale on November 22, 1979; and (b) whether the lead level of that unleaded gasoline was higher than permitted by the regulations. Complainant states that the testimony of William Blizzard (one of the two EPA inspectors allegedly present at Sylvia's station) indicates that the station was open for

business on November 22, 1979; and that gasoline was being offered for sale from the super unleaded gasoline pump. As to the contamination of the gasoline, EPA maintains that the atomic absorption analysis performed by Bionetics shows a lead level of 0.105 grams per gallon, more than twice the allowable maximum, in the gasoline sample taken at Sylvia's station.

Shell disputes both of those contentions. As to whether the sample was, in fact, taken on November 22, 1979, it claims that the EPA inspector was not sure whether he was working on that Thanksgiving Day. Shell also points to the conflict between the testimony of that witness (who recalled that the inspection took place at approximately 11:00 a.m.) and that of Sylvia (who testified that ordinarily the station did not open on holidays until 1:00 p.m.). These circumstances, Shell contends, raise serious doubts that a sample was actually taken at Sylvia's station. Shell further argues that the sample at the time it was drawn was not identical to, and the same as, the one tested by Bionetics. It asserts that, since the sample container was leaking and, admittedly, the leakage might have raised the relative level of the lead content of the gasoline, any test results are thereby rendered inaccurate and invalid.

Alternatively, Shell contends that even if it is determined that EPA made a prima facie showing of a violation, Respondent has established an affirmative defense to liability under 40 CFR §80.23(b)(2). As pertinent, that section provides that a refiner, such as Shell, will not be held liable for contamination,

if it can show that the contamination was not caused by it, but was caused by the action of the retailer, in violation of a contractual obligation designed to prevent contamination, and despite the refiner's reasonable efforts to police such an obligation by such measures as periodic sampling, as specified in paragraphs (i) and (iv) thereof. Shell also notes that, under the provisions of the regulations, particularly 40 CFR §80.23(b)(viii), it is not required to affirmatively prove who or what actually caused the contamination, but only that it "must have been caused" by a third party. Thus, Shell maintains that the steps it took, at each stage of the handling of the gasoline, to prevent contamination, establish that the alleged violation was not caused and could not have been caused by Shell; and that, if any contamination did exist, it must have been caused by the retailer or a third party. Shell claims that its Agreements with Sylvia imposed binding obligations on the latter to prevent contamination and that Shell's oversight, including periodic sampling and testing of lead content levels at Sylvia's station, constituted reasonable efforts on its part to insure that the retailer complied with his obligations, as set forth in 40 CFR §80.23(b)(2)(iv). Although it doesn't point to any specific violation of the Agreements by Sylvia, nor to anything occurring at the station subsequent to the delivery which could have caused contamination, Shell nevertheless appears to argue that, if liability for the alleged violation must attach to somebody, it should

be attached to Sylvia. Shell observes that its district engineer and its territorial manager reviewed Sylvia's inventory records and physically audited Sylvia's storage tanks, both before and after November 22, 1979; and that both individuals testified that there was no unexplained loss of leaded gasoline at Sylvia's station and that, in fact, there was slightly more leaded gasoline than the records had otherwise indicated.

EPA's position is that Shell and Sylvia have not adduced sufficient proof to absolve themselves of liability for the alleged contamination. Specifically, EPA notes that Shell's driver, Mr. Garnder Seveney, once mistakenly commingled regular unleaded and premium unleaded gasoline. Complainant argues that this prior error shows that a "cross dump" here was highly probable. It contends that such a "cross dump" could not have been detected by the various inventory monitoring and reading systems developed by Shell, allegedly because the driver was sufficiently skillful and experienced to make "cross dumps" undetectable by normal methods of monitoring.

EPA also contends that Shell has not shown that any contamination which allegedly occurred was the result of Sylvia's violation of the Agreements. While acknowledging Shell's demonstrated precautionary and oversight measures, presumably even up to, and including, the delivery of the gasoline to Sylvia's station, EPA argues that the record is devoid of any evidence as to how the alleged contamination might have occurred. Complainant concludes that, in the absence of proof

by either Respondent that the alleged contamination might have occurred by reason of the other's or a third person's action or inaction, a defense under 40 CFR §80.23(b)(2) cannot be successfully maintained and, therefore, both Shell and Sylvia should be held liable.

IV. Discussion and Conclusions

A. Did the EPA Make an Adequate Showing that a Violation Occurred.

As noted, two questions have been raised as to whether EPA has established a prima facie showing that a violation occurred here. The first is whether Mr. William Blizzard, the witness on behalf of EPA, was, in fact, present on November 22, 1979, during the inspection of Sylvia's station, when the unleaded gasoline sample was drawn. While the testimony is not without some ambiguity, EPA has carried its burden on this point by a preponderance of the evidence. The preponderance of the evidence means simply that giving consideration to all of the adduced proof, one conclusion is more likely than an opposite conclusion. Although Shell has noted some inconsistency in the testimony as to the hours Sylvia's station might have been open on that Thanksgiving Day, nevertheless given the lapse of time and the uncertainty of recalling precisely the details of past events, Respondent Sylvia could not categorically deny the possibility that he or one of his employees might have opened the station earlier than it would have usually been done on a holiday. EPA's Exhibit No. 1, admitted into evidence

without any objections, is a document, entitled "Unleaded Gasoline Field Inspection", ordinarily filled and kept in a regular course of EPA's inspection operations. It bears Mr. Blizzard's signature and clearly indicates on its face that the inspection at Sylvia took place on November 22, 1979. Such documentary evidence, taken together with the testimony of Mr. Blizzard, whose credibility has not been effectively impugned, are more than sufficient to support a finding that the witness was actually present on the day in question when the sample was taken at Sylvia's station.

More perplexing is the second question raised by Shell as to whether the gasoline sample tested by Bionetics was identical to, and the same as, the one drawn at Sylvia's station at the time of the inspection. As noted, EPA's witness admitted that the leak in the container holding the sample could have raised the lead content of the gasoline to a higher level, expressed in terms of the relationship of weight to volume, than otherwise would have been true had there been no leakage. Since the volume of liquid varies among samples, it is impossible to determine here in any accurate and meaningful way what effect the leakage had on the original sample and, in turn, on the results of the test. EPA has nowhere attempted to explain away the above-indicated reasonable possibility, if not probability, conceded by its own witness, or otherwise to indicate why the Presiding Officer should not draw the obvious and logical adverse inference, i.e., that Bionetics test results of what remained of the sample must be disregarded as inaccurately reflecting the actual situation at Sylvia's pump. Again, the

standard of proof here is the preponderance of the evidence which, in the context of this proceeding, means that EPA must demonstrate that it is more likely than not that the gasoline sample received and tested by Bionetics was substantially the same as when it had been obtained a week earlier at Sylvia's station. Inasmuch as EPA did not or could not make this basic showing of identify of conditions of quality and quantity, the Presiding Officer must find that Complainant has not made here an adequate prima facie showing of a violation by reason of the existance of contamination; and that the complaints must, therefore, be dismissed.

B. Have Shell and Sylvia Established Affirmative Defenses to Liability.

Assuming, arguendo, that EPA has made a prima facie case that a contamination occurred, the Presiding Officer would still find that both Shell and Sylvia have established affirmative defenses to liability. It has already been noted that Shell made an extensive presentation regarding the steps it had taken to insure that unleaded gasoline was and remained uncontaminated. The only link in this elaborate protective chain which EPA challenges is the human element, i.e., it specifically intimates that Shell's driver-salesman, Mr. Gardner Seveney, must have caused the contamination here by commingling or "cross-dumping" the leaded and unleaded gasoline.

Again, because Mr. Seveney commingled different grades of unleaded gasoline once, EPA argues it is "highly probable"

that the alleged contamination here was also caused by him. The Presiding Officer rejects this line of argument and the conclusion reached by Complainant. It is very dubious that any finding of liability could be made based solely on one instance of commingling, even if that incident involved leaded and unleaded gasoline and, therefore, would have constituted a violation of the regulations. However, the commingling of different grades of unleaded gasoline does not constitute a violation of the regulations. Thus, in the latter situation there does not exist, either for Mr. Seveney or for Respondents Shell or Sylvia, the immediate impetus for guarding against commingling as in the former situation. Moreover, it seems that the delivery involved here occurred prior to the described commingling. Hence, it would appear to be quite improper automatically to infer a propensity to commingle leaded and unleaded gasoline from the subsequent occurrance of commingling different grades of unleaded gasoline. But the fatal defect in EPA's position is that Complainant attempts to draw an adverse inference of controlling significance merely from one isolated instance of conduct. Thus, to the extent that EPA implies that commingling of gasoline is a recurring practice of Mr. Seveney, a single episode will simply not suffice to establish such a habit. In short, EPA's reasoning is purely speculative and conjectural, and hardly constitutes the appropriate proof necessary for a finding of violation by Shell.

Furthermore, the Presiding Officer finds that Mr. Seveney's carefully observed demeanor as a witness does not lend any support or validity whatsoever to EPA's contention that the truth and veracity of his testimony must be doubted. On the contrary, Mr. Seveney appeared to be a very truthful and credible witness whose testimony should be believed. Aside from his background as a trusted and reliable long-time employee serving Shell for 27 years, as well as his public service as a state senator, the candid manner in which he unhesitatingly revealed and explained the incident of the commingling of the unleaded gasoline clearly demonstrates his sincere commitment to his oath to tell the truth, the whole truth, and nothing but the truth.

Next, we deal with EPA's alternative contention that, assuming there was sufficient proof that Shell's driver was not responsible for the alleged contamination, the record is devoid of any evidence as to how the contamination might have occurred; that Respondent's proof or lack thereof still leads to speculation as to the cause of the alleged contamination; and that, in the absence of a clear explanation as to who was responsible for the alleged violation and how it was caused, Shell and Sylvia are to be found liable. This argument must also be rejected because it seems to misperceive the language and the intent of the regulations.

As the EPA is well aware, the regulations impose a standard of strict vicarious liability on a refiner whose brand name is displayed at a retail station where contaminated gasoline is

detected. As noted, however, the regulations also provide the refiner with an opportunity to establish a defense to such presumed liability. The refiner may attempt to prove (a) that it was not the cause of the contamination and (b) that a third party caused or must have been the cause of the contamination. Needless to say, this is an exacting standard requiring the refiner to demonstrate, either directly or indirectly by circumstantial evidence, that its specific conduct in preventing contamination has been such that it is reasonable and logical to eliminate the refiner as a possible cause of the violation and to conclude that the violation must have been caused by someone else. EPA errs in contending that Shell is required to go beyond this quantum of proof and, in addition, must show how the contamination actually occurred -- in effect, specifically establishing both its own innocence and a third party's positive guilt. Such a contention appears to impose an unrealistic and an inappropriate burden of proof on Shell and seems to ignore the implications of the language of the regulations. Section 80.23(b)(2)(viii) expressly contemplates, in connection with the establishment of a refiner's defense, that:

> In paragraphs (b)(2)(ii) through (vi) hereof, the term "was caused" means that the refiner must demonstrate by reasonably specific showings by direct or circumstantial evidence that the violation was caused or must have been caused by another. (Emphasis added)

Shell has presented substantial evidence which appears to absolve, not only itself but also Sylvia, of liability for any

alleged contamination that might have occurred. As seen, Shell's physical audits of Sylvia's inventory, following the inspection herein, indicated that there was no unexplained or unaccounted losses of gasoline; and that, in fact, Sylvia might have had more leaded gasoline in his storage tank than the records had indicated. It was also shown that there were no defects in Sylvia's facilities which would have allowed a contamination to have occurred. Based on the foregoing, the only way contamination might have occurred would be if Sylvia, or one of his employees, had intentially and deliberately exchanged approximately 130 gallons of leaded gasoline for 130 gallons of super unleaded gasoline between the two respective storage tanks. But there seems to be no conceivable rational reason why such action should have been taken by Sylvia or any of his employees, and there is absolutely no support in the records to substantiate any such a determination. Accordingly, the Presiding Officer finds that Sylvia is also absolved from liability for the alleged violation, based similarly on reasonably specific showings based on circumstantial evidence.

However, even if we were to assume that Sylvia could and should have been found liable for the alleged violation, the Presiding Officer would not impose any penalty on him. The maximum statutory penalty per day for each violation of the unleaded gasoline regulations is $10,000. However, pursuant to the governing Guidelines for the Assessment of Civil Penalties under Section 211(d) of the Clean Air Act, EPA proposes the

assessment of a $1,100 penalty against Sylvia. The five factors to be considered in determining the size of a penalty are found in §22.34(e) of the Consolidated Rules of Practice (40 CFR §22.34(e)). 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.

Sylvia testified, and the Presiding Officer finds, that because of his dire economic and financial situation he was about to go out of business and give up his station on Friday, June 19, 1981, and take a job with another company. The station's losses have put Sylvia personally and heavily in debt, in an amount totalling about $30,000, as of the date of the hearing. In 1980, Sylvia had total earnings of only $16,000, considered as his salary, with no other or additional profit from the running of the gasoline station, to support his wife and five children. These facts bear directly upon the appropriateness of an assessment of a penalty. First, they indicate that under the guidelines there would be no reasonable basis for imposing a penalty against Sylvia since he no longer will have a going business, nor the wherewithal to pay any penalty. Second, since Sylvia is now no longer a gasoline "retailer", as that term is defined in the regulations, any imposed penalty would have only a retrospective, i.e., a punitive, effect.

However, the purpose of the civil penalties is primarily prospective, to foster future compliance with the regulations. Thus, a penalty assessed against Sylvia would be principally in the nature of retribution, something which the Presiding Officer cannot in good conscience endorse under the facts and circumstances presented here.

There seems to be no need to discuss the question of notice raised by Respondents. Suffice is to say that due process does not necessarily require that Respondents be given an opportunity to test their own samples of the gasoline involved. Cf., Exxon Company, USA, Docket No. CAA(211)-54, Order Denying Respondent's Motion to Dismiss, dated October 6, 1980. Prompt notice may well have some bearing upon the opportunity of Respondents to take expeditious action to remedy a specific violation, and, thus, a factor to be considered in mitigating a proposed penalty. However, in view of the conclusions reached above, that matter has been rendered moot.

V. 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:

Complainant EPA has failed to establish that a violation of 40 CFR §80.22(a) and, as a result, of Section 211 of the Clean Air Act, as alleged in the complaints, occurred.

WHEREFORE, IT IS ORDERED, subject to review by the Administrator on appeal, or sua sponte, as provided by Section 22.30 of the Consolidated Rules of Practice (40 CFR §22.30), that the complaints be, and they are hereby, dismissed.

Jair S. Kaplan

By the Presiding Officer
September 18, 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 counsel for Responderts, and by regular mail to counsel for Complainant to the addresses that follow:

Joseph H. Fields, Esq.
Shell Oil Company
One Shell Plaza
P.O. Box 2463
Houston, Texas 77001

John Adams, Esq.
Hunton & Williams
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Mr. Leonard V. Sylvia
Whaling Museum Shell
95 Union Street
New Bedford, Massachusetts 02740

Sylvia F. Hardy, Esq.
Eastern Field Office (EN 397R)
Field Operations & Support Division
6110 Executive Blvd, Suite 190
Rockville, Maryland 20852

Jair S. Kaplan, Esq.
Presiding Officer
Environmental Protection Agency
P.O. Box 699
Silver Spring, Maryland 20901

Office of the Hearing Clerk
Environmental Protection Agency
401 M Street, S. W., (A-110)
Washington, D.C. 20460

202/755-5476

DATED: September 18, 1981