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UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

In re:)
EXXON COMPANY, U.S.A.)
Respondent)

Docket No. CAA(211)-129

Violation of the Clean Air Act and applicable regulations as set forth in the complaint found by the preponderance of the evidence to have occurred. Penalty assessed and proposed order issued.

Darrell L. Williams and Charles R. Ashwanden for complainant.
Robert D. Arredondo and David Bates for respondent.

INITIAL DECISION BY WILLIAM J. SWEENEY
ADMINISTRATIVE LAW JUDGE (Ret.)

By complaint filed on May 21, 1980 the United States Environmental Protection Agency charged that the respondent had violated Section 211 of the Clean Air Act (42 U.S.C. 7545) and regulations promulgated thereunder. The specified violation was that on March 5, 1979 certain gasoline represented to be unleaded was sold, dispensed or offered for sale at a retail outlet leased and operated by Angus L. Jackson d/b/a Jackson's Exxon in Houston, Texas, contrary to the provisions of 40 CFR Sections 80.2(g) and 80.22(a). The latter regulations provide that gasoline represented to be unleaded must contain not more than 0.05 gram of lead per gallon. The respondent is charged as a refiner as defined in 40 CFR Section 80.2(i). A penalty of \$6,200 is proposed under the authority of 40 CFR Section 80.5. A motion filed by complainant on October 27, 1980 requested amendment of the complaint to allege that the violation occurred on March 8, 1979 rather than March 5, 1979; the motion was granted. On January 6, 1981 a motion was filed by

complainant requesting an amendment of the amended complaint to allege that the violation occurred on March 7, 1979 rather than March 8, 1979; the motion was granted.

On June 25, 1980 the Judicial officer designated the undersigned as presiding officer in this proceeding which was subsequently combined for hearing and decision with a complaint against Angus L. Jackson d/b/a Jackson's Exxon (Docket No. CAA(211)-128) as a retailer, for the same alleged violation. A hearing requested by the respondents was held on August 18-19, 1981 in Houston, Texas. At the hearing the complainant called Angus L. Jackson as its first witness and at the conclusion of his testimony moved that the complaint against him be dismissed with prejudice; the motion was granted. The remaining parties have filed briefs, proposed findings of fact and conclusions of law, and reply briefs. It was stipulated at the hearing that respondent Exxon Company, U.S.A., hereinafter called Exxon, is a refiner, and that the records of that respondent and complainant are business records.

Angus Lee Jackson testified that he had leased a gasoline station from Exxon and had operated it for nine years. Gasoline sold at the station is purchased from and delivered by Exxon in trailers with three compartments. In March 1979 when the alleged violation occurred, there were three grades of gasoline being sold, namely, premium, regular and unleaded. Each grade was stored in a separate underground tank, and each tank was connected directly to a gasoline pump; the storage tanks were not interconnected. The intake pipe to each storage tank is clearly marked as to the grade of gasoline and is locked; only Jackson and the Exxon drivers have keys to such locks. Neither Jackson nor his employees assist in the unloading of gasoline. Sometimes the gasoline is unloaded after midnight when the station is closed. The station and each pump bear the brand name Exxon.

On February 28, 1979 Jackson was present when Exxon delivered 1,500 gallons of premium gasoline, 3,000 gallons of regular gasoline, and 4,600 gallons of unleaded gasoline. He was not present on March 6, 1979 when 1,305 gallons of premium gasoline, 4,321 gallons of regular gasoline, and 3,201 gallons of unleaded gasoline were delivered. Exxon drivers take dip stick measurements of the storage tanks before and after unloading. Jackson takes dip stick measurements only before ordering gasoline, and his bookkeeper takes such measurements at the end of each month. The metered pumps are read daily in order to record daily sales.

The lease agreement between Exxon and Jackson provides that "Quality Assurance Guidelines for Exxon Unleaded Gasoline-Retailer" shall be a part of the agreement. One of the guidelines provides that the retailer maintain stock control procedures such as product stick readings to balance tank inventory with daily sales. As noted earlier, Jackson does not take daily stick readings.

Virgil E. Lehmborg, Chief of the Engineering Section, Bureau of Air Quality Control, City of Houston Health Department, testified that he supervised five engineers and four environmental technicians. The department had a contract with the United States Environmental Protection Agency during March 1979 which provided for it to conduct inspections of gasoline retail outlets in Houston. One of the engineers, Hal Nichols, was supervisor of such inspections which were conducted in accordance with instructions given in person by employees of the United States Environmental Protection Agency: information gathered during inspections was entered on serially numbered forms provided by the agency.

Hal Nichols, Engineer, Bureau of Air Quality Control, City of Houston Health Department, testified that the inspectors he supervises have been instructed to ask permission before engaging in inspections at retail outlets. Such outlets are selected at random for inspections which include the taking of samples of unleaded gasoline. The inspector notes on the EPA inspection form the names of the station, owner, and person who gave permission to inspect and address of

the station. Samples of unleaded gasoline are identified with the serial number of the inspection form, the name and address of the station, and the date. If any contamination ~~is~~ shown upon testing a second sample is taken. Upon confirmation of contamination the retailer is notified of such fact but is not directed to cease selling the gasoline. At 10:15 a.m. on March 9, 1979, Nichols notified Angus L. Jackson that the lead content of the unleaded gasoline being sold at his station was excessive.

Brandt Mannchen, Environmental Technician, Bureau of Air Quality Control, City of Houston Health Department, testified that on March 5, 1979 he inspected Jackson's Exxon gasoline station in Houston after receiving permission from F. M. Coleman who was in charge of the station at the time. He took a sample of unleaded gasoline and preserved it in an 8-ounce can which was sealed with a gummed label running across the cap in the can and down both sides. The label was identified with the serial number of the inspection form and the date. The sample was sent to the Houston Health Department chemistry laboratory.

John Albert Chadwick, a former Environmental Technician with the Bureau of Air Quality Control, City of Houston Health Department, testified that he took a sample of unleaded gasoline at Jackson's Exxon station on March 7, 1979. He used the same inspection form as had been filled in by Mannchen two days earlier and took a sample from the same pump identified by number on the form. The sample was sealed by a gummed label on which Chadwick remembered only that he had written his name. He took the sample to the Houston Health Department chemistry laboratory and left it there with the inspection form.

Clifford Frazier, Chemist, City of Houston Health Department, testified that he tested the sample of unleaded gasoline taken by Chadwick. The sample was sealed by a label bearing the same serial number as the inspection form. The test was made on March 9, 1979 and was conducted in accordance with procedures

prescribed in 40 CFR Section 80.3, Appendix B. The test result showed a lead content of 0.158 gram per gallon which exceeded the legal limit of 0.05 gram per gallon.

Tollar Bryan testified that in March 1979 he was a Marketing Analyst and Distribution Engineer for Exxon, and that he supervised sales representatives who took samples of unleaded gasoline from Exxon Stations on a random basis for testing in an effort to maintain an uncontaminated product at all stations. The contract and lease with Jackson was identified and it was stated that the terms thereof required Jackson to take daily stick readings. Such contract did not prohibit Jackson from purchasing gasoline elsewhere, but the witness was not aware that he had ever done so.

Joe MacKnight, Fleet Superintendent, Exxon, testified that in March 1979 he had been Assistant Terminal Manager at the Houston terminal which serves Jackson's Exxon station. He supervised both terminal and fleet operations. The trailers used by Exxon for gasoline deliveries have four compartments and they are, by law, visually inspected annually for leakage; Exxon makes inspections more often voluntarily. The trailers had been inspected in October 1978 and no leaks were found. The drivers load gasoline into the compartments through a loading arm after checking their orders and setting the meter for the amount ordered. Compartments are checked to insure that they have been drained dry. If there is any residue from the prior load, it is drained into a sump tank at the terminal. A driver trainer spends time with new employees until he is sure they are capable of proper driving, loading and unloading procedures. Each driver is issued a safety handbook which includes instructions for the proper loading and unloading of gasoline. Monthly safety meetings are held and handling procedures are reviewed with all drivers several times a year.

When unleaded gasoline reaches the terminal via pipeline, it is sampled from the top, center, and bottom of the storage tank and tested for lead content;

if there is excess lead content, no deliveries of such gasoline are made. Tests of unleaded gasoline at the terminal prior to the deliveries to Jackson's Exxon on February 28, 1979 and March 6, 1979 showed lead content of 0.003 gram of lead per gallon or less. The line from the unleaded gasoline storage tank to the loading arm at the terminal loading rack is dedicated to the pumping of unleaded gasoline.

New drivers work only six hours per day after they have spent at least seven days with the driver trainer and experienced drivers making deliveries. This short work schedule contrasts with ten hours per day worked by experienced drivers and permits new drivers to be unhurried while gaining experience working alone. Loading procedures at Exxon require loading unleaded gasoline first, in case a compartment leak has developed, and unloading it last. If a driver unloads leaded gasoline into an unleaded gasoline tank at a station, he is under orders to report that fact immediately so that sales may be stopped and the tank pumped out and purged. The witness estimated that one gallon of leaded gasoline would contaminate 1,000 gallons of unleaded gasoline.

Route cards are maintained at the terminal for the use of drivers. These cards give the route to be driven from the terminal to each Exxon station in the Houston district and show how to enter the station to reach the drop area.

Sales representatives take samples of unleaded gasoline at Exxon stations on a random basis. If excess lead content is shown by test, the contaminated gasoline is pumped out and the tank is purged. When Exxon was notified on March 9, 1979 by Jackson concerning the contamination at his station, he was told to shut down the pump. Exxon secured a sample of the gasoline and contamination was confirmed. A truck was sent to pump out the tank and the tank was purged by an independent contractor. The tank was refilled and sales commenced within 24 hours of notification of the contamination.

Daniel Pavlos is a driver trainer for Exxon. He testified that drivers use identification tags which are snapped onto compartments being loaded to

identify the type of gasoline in each compartment. Similar identification tags are on the intake pipes to storage tanks at the retail stations. Additionally, to assure proper unloading, color codes are used for the grades of gasoline; unleaded gasoline is yellow; premium gasoline is dark red; and regular gasoline is orange. There are side glasses on the unloading hose fittings and the driver is able to see that gasoline of the right color is being unloaded into the tank for that grade of gasoline.

On February 28, 1979 Pavlas, in his capacity as driver trainer, accompanied a new driver on a delivery to Jackson's Exxon. He observed the driver taking gauges before and after unloading, and unloading each compartment into the correct storage tank. At the terminal he had observed the driver check for dry drainage prior to loading, and loading into the proper designated compartment in the trailer.

Roland E. Cordobes is an Operations Specialist for Exxon and his specialty is safety and compliance with government regulations. A computer is used to randomly select three percent of all Exxon direct service states in the United States each month. Tests are made of unleaded gasoline samples taken at the selected stations. Normally, by the time Cordobes sees test results showing excess lead content, the problem has been corrected by the prompt pumping out and purging of the contaminated tank.

Cordobes named three possible ways that contamination can be caused by the retail station operator. Some dealers ask the driver to dump leaded gasoline into an unleaded tank because the profit margin is higher on unleaded gasoline than on regular gasoline. Such a request is normally reported by the drivers. In some instances a customer buying leaded gasoline cannot pay for it. The dealer will siphon the gasoline from the customer's tank and can possibly dump it into the unleaded storage tank. Another possible way to contaminate is for a dealer to buy gasoline from a supplier other than Exxon and the leaded gasoline can be dumped mistakenly or on purpose into the unleaded storage tank.

DISCUSSION

On brief the respondent argued that the chain of custody shown for the handling of the sample of gasoline taken on March 7, 1979 was inadequate to insure that such sample was the same as the one tested on March 9, 1979. Such contention cannot be sustained. The evidence shows that the sample which was tested had an unbroken seal which bore the serial number of the accompanying inspection form used by the inspector on March 7, 1979. On this record it appears that the complainant has proven by a preponderance of the evidence that unleaded gasoline being sold at Jackson's Exxon station on March 7, 1979 had a lead content in excess of that permitted by the governing regulations. The respondent Exxon, whose brand name appeared at the station and on the pumps, is a gasoline refiner within the meaning of 40 CFR Section 80.2(i), and is liable for the proven violation of 40 CFR Section 80.22(a) pursuant to 40 CFR Section 80.23.

The penalty of \$6,200 proposed in the complaint is based on the civil penalty assessment table for a party in respondent's category of income without prior violations. Special circumstances may be considered to recommend a penalty other than the one proposed. The respondent was not charged with a violation occurring on March 7, 1979 until January 6, 1981, a lapse of 22 months which could inhibit any defensive investigation. It was prevented from making a full investigation of the circumstances because the retailer had failed to take daily dip stick measurements of gasoline in storage tanks as prescribed in his contractual agreement with respondent. When informed by the retailer of contamination the respondent acted promptly to remedy the violation.

The respondent maintains a thorough inspection system for lead content of unleaded gasoline received at its terminals. It has developed a careful procedure for the loading of unleaded gasoline in uncontaminated compartments of its trailers, and for the unloading of such gasoline into the proper storage tanks at retail

outlets. New drivers are given theoretical and actual on-the-job training for the loading, movement, and unloading of unleaded gasoline. Continuing education and training is given to all drivers in an effort to maintain safe procedures for the handling and movement of gasoline. Sample testing of the lead content of unleaded gasoline sold at Exxon retail outlets is performed on a random basis.

The foregoing facts show special circumstances which warrant a penalty less than the amount proposed by complainant. It is recommended that the penalty be mitigated to \$1,000. See the Final Order of Judicial Officer Ronald L. McCallum in Texaco, Inc., Docket No. CAA(211)-98, entered on May 20, 1981.

FINDINGS AND CONCLUSIONS

The respondent, Exxon Company, U.S.A., was the refiner of unleaded gasoline offered for sale at Jackson's Exxon station on March 7, 1979 and which was represented to be unleaded but which contained more than 0.05 gram of lead per gallon. This constitutes a violation of Section 211 of the Clean Air Act and regulation 40 CFR Section 80.22(a) promulgated thereunder. Based on the facts of record it is found that a civil penalty of \$1,000 is just, reasonable and warranted.

PROPOSED ORDER

The Findings of Fact and Conclusions of Law contained in the Initial Decision are hereby incorporated into this Final Order. It is HEREBY ORDERED that this matter be terminated as provided in the Initial Decision.

In accordance with said Initial Decision and considering the gravity of the violation, respondent's history of compliance, the size of respondents business, respondent's ability to continue in business, and the terms of the Initial Decision, a penalty of one thousand dollars (\$1,000) is assessed against the respondent. Within sixty (60) days of issuance of the Final Order, respondent shall pay one thousand dollars (\$1,000) by cashier's check or certified check payable to the "United States of America". Payment shall be made to the Hearing Clerk, Mail Code A-110, Room 3708, United States Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. Failure to make such payment or to perform the terms of the Initial Decision in full compliance with this Final Order may result in referral of this matter to the United States Attorney General for collection pursuant to Section 211(d) of the Clean Air Act (42 U.S.C. Section 7545[d]).

Dated: February 10, 1982

William J. Sweeney
William J. Sweeney
Administrative Law Judge (Ret.)

CERTIFICATE OF SERVICE

I hereby certify that copies of the Initial Decision were sent by certified mail, return receipt requested, on February 10, 1982, to:

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