Pearl S. Lee 5/24/96

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Bell Thunderbird Oil Co., Inc.	)	Docket No. CAA-95-H-005
	)	
Respondent	)	

ORDER GRANTING PARTIAL ACCELERATED DECISION
and
ORDER SCHEDULING HEARING

Proceedings

The United States Environmental Protection Agency, Air Enforcement Division, Office of Regulatory Enforcement and Compliance Assurance (the "Complainant" or "EPA") commenced this proceeding by filing and serving an administrative Complaint dated June 15, 1995 against Bell Thunderbird Oil Co., Inc., (the "Respondent" or "Bell Thunderbird"), a corporation headquartered in El Paso, Texas. The Complaint charges Respondent, a gasoline retailer and distributor, with two violations of the Clean Air Act's ("CAA") gasoline volatility or Reid Vapor Pressure ("Rvp") standards. These violations arise under the CAA §211(h), 42 U.S.C. §7545(h), and the implementing volatility regulations at 40 C.F.R. §§80.27 and 80.28. Pursuant to the provisions of the CAA §§211(d)(1) and 205(c), 42 U.S.C. §7545(d)(1) and 7524(c), the Complaint seeks assessment of an administrative civil penalty of $18,000 against Respondent for the alleged violations.

The alleged violations stem from an inspection conducted by EPA agents at a gasoline station owned by Respondent on July 29, 1992. EPA initially sent Respondent a Notice of Violation on September 25, 1992 under an informal administrative procedure to attempt to resolve such violations. Bell Thunderbird responded to that Notice of Violation in a letter dated October 23, 1992. The parties failed to resolve the matter informally, leading to the filing of the instant administrative Complaint on June 15, 1995.

Respondent filed an Answer *pro se*, by its President, Eugene Bell, on July 7, 1995 in which it denied the material allegations of the Complaint. Mr. Bell, on behalf of Respondent, also sent letters with attachments explaining its position denying liability for the violations on June 27 and July 17, 1995.

The Complainant filed a Motion for Partial Accelerated Decision on December 7, 1995. The undersigned was designated the presiding Administrative Law Judge ("ALJ") in this proceeding on February 27, 1996. In a Prehearing Order dated March 28, 1996, the

ALJ set a schedule for the Respondent to submit a response to Complainant's motion for partial accelerated decision, and for the parties to submit prehearing exchanges pursuant to the EPA Rules of Practice, 40 C.F.R. Part 22. Respondent has not filed a response to Complainant's motion, but both parties have filed initial prehearing exchanges as of the date of this Order.

Ruling on Complainant's Motion for Partial Accelerated Decision

The EPA Rules of Practice, at 40 C.F.R. §22.20(a), empower the Presiding Officer to render an accelerated decision "without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." Numerous decisions by the EPA Office of Administrative Law Judges and Environmental Appeals Board have noted that this procedure is analogous to the motion for summary judgment under Section 56 of the Federal Rules of Civil Procedure. See, *e.g.*, In re CWM Chemical Serv., TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes v. Kress, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir., 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits, and other evidentiary materials submitted in support or opposition to the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. §22.20(a); F.R.C.P. §56(c). The Rules further provide that if an accelerated decision is rendered on less than all the issues in a proceeding, the ALJ shall "issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed." 40 C.F.R. §22.20(b)(2).

The Complaint charges Respondent with two volatility violations at a branded retail outlet, a Fina station in El Paso, under 40 C.F.R. 80.27(2)(ii). That section prohibits any person, including any retailer or distributor, from supplying, transporting, selling or offering for sale, from 1992 on, any gasoline whose Rvp exceeds the applicable standard. At the time of the alleged violations, July 29, 1992 the Rvp standard for El Paso was 7.8 pounds per square inch ("psi"). The El Paso area is designated a serious nonattainment area for ozone under 40 C.F.R. §81.344. Under 40 C.F.R. §80.27(2)(ii), the standard for Texas nonattainment areas is an Rvp of 7.8 psi from June through

September, and 9.0 in May.

Where, as here, a respondent fails to respond to a motion, the Rules provide that the party "may be deemed to have waived any objection to the granting of the motion." 40 C.F.R. §22.16(b). The ALJ is nevertheless free to rule as he sees fit based on his assessment of the merits of the motion. In the Matter of Asbestos Specialists, Inc., 4 EAD 819, 825-826 (EAB, October 6, 1993).

Although Respondent denied many of the allegations of the Complaint in its Answer, its subsequent correspondence and submissions to the EPA contradict several of those denials. In that correspondence, Respondent has not contested the facts indicating the occurrence of the volatility violations, but has consistently maintained that the violations were the fault of the refiner and the dealer to whom Respondent leased the station. Respondent's position can thus be construed as contesting liability under the defenses afforded by the regulations for distributors and retailers who do not cause the violations: 40 C.F.R. §§80.28(g)(3) and 80.28(g)(5).[1] In its Answer, Respondent did deny the allegation that the Respondent failed to meet those defenses.[2]

In its Answer, Respondent denied the Complaint's allegations that it was a "retailer" and "distributor" as those terms are defined in the regulations, 40 C.F.R. §§80.2(k) and 80.2(*l*)[3]. However Respondent has submitted bills of lading and delivery receipts that show it transported three gasoline shipments, in its own trucks, from the Chevron refinery in El Paso to a Fina branded retail outlet in May and June of 1992. Complainant has also submitted a copy of Respondent's contract with Fina Oil and Chemical Company, in which Bell Thunderbird is explicitly designated as the "distributor." Respondent therefore transported gasoline between a refiner's facility and a retail outlet, and meets the regulatory definition of "distributor."

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[1] 40 C.F.R. §80.28(g)(3) provides that a distributor shall not be deemed in violation of a volatility requirement if he can demonstrate: "(i) That the violation was not caused by him or his employee or agent; and (ii) Evidence of an oversight program conducted by the distributor or reseller, such as periodic sampling and testing of gasoline, for monitoring the volatility of gasoline that the distributor or reseller sells, supplies, offers for sale or supply, or transports."

40 C.F.R. §80.28(g)(5) provides that a "retailer . . . shall not be deemed in violation if he can demonstrate that the violation was not caused by him or his employee or agent."

[2] Complaint, ¶25; Answer ¶25.

[3] Complaint, ¶8; Answer, ¶8.

In its correspondence Respondent stated it leased the subject gasoline station to E. And M. Enterprises, which operated the station. In its prehearing exchange, Respondent also submitted an addendum to its lease contract for the period covered in the Complaint. This proves that Respondent owned a "retail outlet," as that term is defined in the regulations, 40 C.F.R. §80.2(j), and that Respondent is a "retailer" as that term is defined at 40 C.F.R. §80.2(k).

Respondent does not challenge the results of EPA's sampling and testing which found that the Rvp exceeded 7.8 psi in the samples taken by the inspector on July 29, 1992. The affidavits of the inspector, John Mesic, and the chemical engineering technician who performed the Rvp testing, Carl A. Scarbro, establish that proper sampling, chain of custody, and testing methods were used, as required by the regulations, 40 C.F.R. §80.27(b). The results show that the sample taken from the premium pump had a Rvp of 9.23 psi, and that from the regular pump had an Rvp of 8.11 psi.

All the facts discussed above are deemed established in this proceeding. Thus, a violation of the applicable Rvp standard was detected at a branded retail outlet as alleged in the Complaint. Pursuant to 40 C.F.R. §80.28(e), the retailer and distributor, along with the refiner and carrier (if any), are deemed in violation, unless they can claim the defenses in paragraphs (g)(3) and (g)(5) (see footnote 1). Thus, Respondent's liability depends on whether it can claim the benefit of those defenses.

Respondent wears two "hats" for the purposes of this proceeding -- as a distributor and a retailer. In both capacities, the party may escape liability if "the violation was not caused by him or his agent." For a distributor, however, a respondent must also show evidence of conducting a volatility oversight program, to monitor the Rvp of the gasoline it supplies, sells, or transports. Respondent has claimed it did not cause the violations. Respondent blames its supplier, Chevron, for selling gasoline with an Rvp of 9.0 after the May 1, 1992 date on which it was supposed to switch to supplying 7.8 gasoline.[4] Respondent also blames its lessee for not keeping the station open enough to sell the higher Rvp gasoline before the June 1 start of the ozone volatility season.[5]

On a motion for accelerated decision the record must be read most favorably to the non-moving party, in this case, the Respondent. Nevertheless, Respondent as a distributor cannot be

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[4] Letter from Leonard Durling to Marilyn Bennett, U.S.EPA, dated October 23, 1992; Letter from Eugene Bell to Hearing Clerk, U.S. EPA dated June 27, 1995; and Letter with prehearing exchange from Eugene Bell to the undersigned, dated April 15, 1996.

[5] See the latter two letters cited in note 3 above.

said to have not contributed to causing this violation. Moreover, Respondent has not offered any evidence whatever to show it has a volatility monitoring program in place that would satisfy the second element of the defense for a distributor in 40 C.F.R. §80.28(g)(3). Therefore, an accelerated decision can be granted finding Respondent liable for the two violations. Respondent's contentions that it was not at fault will, however, be considered as potentially mitigating factors that could reduce the amount of the penalty sought by Complainant. A hearing on the amount of the penalty will be necessary to determine that issue.

The October 23, 1992 letter by Leonard Durling indicates that he was informed by Chevron that after May 1, 1992, the El Paso refinery would only supply gasoline with an Rvp no higher than 7.8 psi. Mr. Durling and Mr. Bell repeatedly assert that Chevron "should have" supplied 7.8 gasoline in the two May 1992 shipments. However, both the May 1 and May 6, 1992 bills of lading clearly state on their faces that the deliveries consisted of gasoline with a maximum Rvp of 9.0 psi. Regardless of what Chevron should have done, Respondent was fully aware that the gasoline it actually received from Chevron, and then transported and supplied to its Fina station in El Paso, had an Rvp of 9.0. Respondent also admits in the Durling letter that its tanks were low in May before those deliveries. Thus, Respondent must have known that its tanks contained entirely high Rvp gasoline throughout May 1992. The test results show that the June 8, 1992 delivery of 7.8 gasoline was not enough to blend the fuel down to the 7.8 standard by the time of the EPA's inspection on July 29, 1992.

Although the refiner and Respondent's lessee, who is also a "retailer" may have contributed to the violations, so did Respondent. Respondent as both a distributor and owner/retailer had considerable, if not total, control over the contents of the deliveries and gasoline tanks at the Fina station. Bell Thunderbird was required by law to ensure that after June 1, 1992 only gasoline with a maximum Rvp of 7.8 psi was offered for sale at its retail outlet. Respondent failed to comply with this requirement. Moreover, even if it could be said Respondent did not primarily cause the violation, Respondent did not have a volatility monitoring program in place to fully meet the requirements for a defense as a distributor under 40 C.F.R. §80.28(g)(3). Complainant's motion for accelerated decision on liability is therefore granted.

The precise extent of Respondent's control, or the practicality of taking some action with respect to Chevron or the dealer to prevent the violations, is not clear in the current record. Respondent claims it was forbidden to exercise control over the dealer under the Petroleum Marketing Act.[6] The facts concerning

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[6] Bell letter of June 27, 1995.

the options Respondent had in these circumstances remain to be elaborated at hearing, as relevant to determining the degree of Respondent's culpability and the appropriate amount of the civil penalty to be assessed.

The CAA §205(c), 42 U.S.C. §7524(c) authorizes the assessment of administrative civil penalties of up to $25,000 per day for violations of the volatility regulations. Paragraph (c)(2) of that section lists the factors to be considered by the Administrator in determining the amount of any such civil penalty assessed:

> ". . . the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require."

These factors remain as potential issues for hearing.

Although this decision finds that Respondent did "cause" the violations within the meaning of the regulations, its claim that it was not at fault gives rise to a factual issue in terms of the degree to which Respondent caused the violation compared to the refiner and dealer. Those facts could affect the penalty factors concerning the gravity of the violation, action taken to remedy the violation, and such other factors as justice may require. In past correspondence, (but not in the prehearing exchange) Respondent has also attempted to raise the issue of the size of its business and perhaps ability to continue in business.[7] The hearing will proceed on some or all of these issues as further directed in the Order below.

Order

1. Complainant's motion for partial accelerated decision on Respondent's liability for the violations alleged is granted. The facts alleged in the Complaint, addressed above in this ruling, are deemed established for the purposes of this proceeding.

2. A hearing will be held, as scheduled below, on the amount of the civil penalty to be assessed for the violations.

3. Pursuant to the ALJ's Order of March 28, 1996 the parties have until June 13, 1996 to file supplements to their prehearing exchanges. In light of this decision limiting the hearing to the penalty factors, the parties should modify and direct their

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[7] Bell letter of June 27, 1995, with attached Texas Corporation Franchise Tax Report for 1995.

supplemental exchanges to address those issues.

Order Scheduling Hearing

The hearing in this matter will be held beginning at 9:30 A.M. on August 13, 1996 in El Paso, Texas, continuing if necessary on August 14, 1996.

The EPA Hearing Clerk will make arrangements to secure a hearing room and the services of a stenographic reporter. When those arrangements are made, the parties will be advised of the exact location and other procedures pertinent to the hearing.

Andrew S. Pearlstein

Andrew S. Pearlstein
Administrative Law Judge

Dated: May 20, 1996
Washington, D.C.

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Order Granting In Part Accelerated Decision & Order Scheduling Hearing was filed in re Bell Thunderbird Oil Company, Incorporated; Docket No. CAA-95-H-005 and copies the same were mailed to the following:

(Interoffice)

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Dated: May 20, 1996