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

P 3: 24

In re	)	
	)	
MOBIL OIL CORPORATION	)	DOCKET NO. CAA(211)-25
	)	
Respondent	)	

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

APPEARANCES:

Frederick A. Pfirrmann for Respondent.

Joseph P. Boland and Richard Friedman 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 February 20, 1980. The complaint alleges that Respondent, Mobil Oil Corporation (Mobil), is liable for violations of the EPA Regulations of Fuel and Fuel Additives (40 CFR Part 80). More specifically, EPA charges that Mobil branded gasoline, represented and offered for sale as unleaded on September 10, 1979, at Hank Reese's Mobil service station, Cheektowaga, New York, in fact contained in excess of 0.05 grams of lead per gallon, in violation of 40 CFR §80.22(a), thereby also violating

Section 211 of the Clean Air Act (42 U.S.C. §7545). The complaint alleges two separate violations, one with respect to Mobil regular unleaded gasoline and the other involving Mobil super unleaded gasoline, both occurring at the same gasoline station on the same day. The hearing herein was held on October 2, 1981, in Buffalo, New York. Thereafter, EPA and Respondent have filed initial and reply briefs.

II. Stipulations

At the hearing the parties agreed to the following stipulations:

1. That Hank Reese operated and controlled, under lease with Mobil, Hank Reese's Mobil service station, a retail outlet, located at 3105 William Street, Cheektowaga, New York.

2. That an unleaded fuel inspection was conducted at Hank Reese's Mobil on September 10, 1979.

3. That following the September 10, 1979 inspection, EPA issued complaints alleging that the unleaded gasoline failed to conform to specifications.

4. That subsequent to the issuance of the complaints, Mobil investigated Hank Reese's retail outlet and concluded that Mr. Reese was not purchasing gasoline from suppliers other than Mobil.

5. That up until the point where the gasoline was loaded by Mobil onto trucks for subsequent transportation and delivery to retail outlets, Mobil's unleaded gasoline met EPA specifications concerning lead content.

6. That the field testing kit employed by Mobil to test gasoline samples is accurate and reliable for field testing purposes only, that is for screening gasoline samples for the indication of lead contents, but it is not determinative of violations, nor is it as accurate and as reliable as the more sophisticated atomic absorption test.

7. That on September 19, 1979 after notification of EPA's complaints, a Mobil employee took samples of unleaded gasoline at Hank Reese's Mobil and tested them the next morning with a field test kit; and that the tests indicated a lead level of 0.055 grams per gallon for the super unleaded gasoline.

III. The Basic Facts

Mobil is a refiner of petroleum products. Hank Reese's Mobil ("Reese") is a retail gasoline station in Cheektowaga, New York, supplied by Mobil and bearing and displaying Mobil brand indentifications. On September 10, 1979, an EPA inspector conducted an inspection at Reese. He obtained two samples, one of each of the two types of unleaded gasoline offered for sale at the station; one was regular and the other was super unleaded gasoline. The samples were placed in sealed metal containers and sent to a chemical laboratory for analysis. The EPA prescribed and approved atomic absorption spectrometry tests showed that the samples had a lead content of 0.123 and 0.326 grams per gallon, respectively.

After receiving notice of the violations, Mobil tested Reese's gasoline on its own nine days subsequent to the EPA inspection. Respondent found that both types of unleaded gasoline had lead levels lower than those determined by EPA. Mobil's tests showed lead conents of 0.013 and 0.055 grams per gallon for the regular and the super unleaded gasoline, respectively. Respondent's tests were performed with a field test kit, which admittedly were less accurate than the atomic absorption analyses performed by EPA in accordance with the regulations. However, the variance in the degree of accuracy does not explain entirely the differences

between the lead levels measured by EPA and those of Mobil. With respect to the regular unleaded gasoline, it appeared that Reese had received in the intervening period two additional deliveries which fact would explain the discrepancy in the lead content, since the new gasoline substantially diluted the old gasoline. As to the super unleaded gasoline, there had been no additional deliveries between September 10 and 19, 1979, prompting Mobil to investigate whether Reese was purchasing gasoline from some other source. Mobil's investigation showed that Reese was not buying any gasoline except from Respondent. Mobil attempted to recover gasoline from the samples EPA had taken on September 10, in order to run its own tests thereon; but when the containers were received at Mobil's laboratory, there was no gasoline left therein because of leakage.

The two gasoline deliveries to Reese which took place immediately prior to the inspection were made on August 30, 1979 by Mobil and September 4, 1979 by its contract carrier.[1/] The respective drivers responsible for those deliveries testified that, though they could not specifically remember the circumstances of the particular deliveries, they believed that they had followed normal procedures and had not made any mistakes in loading and unloading the involved leaded and unleaded gasoline. The drivers,

1/ The delivery on August 30, 1979 consisted of 2,500 gallons of regular leaded gasoline and 3,750 gallons of regular unleaded gasoline; and the delivery on September 4, 1979 consisted of 4,700 gallons of regular unleaded gasoline, 2,500 gallons of regular unleaded gasoline, and 1,275 gallons of super unleaded gasoline.

however, conceded that errors do happen and have from time to time occurred, resulting in contaminations. If a mistake happens and the driver knows of it, but does not report it promptly, disciplinary action may be expected to be taken against him. The documents regarding the delivery on August 30 shows that the loading of the truck had been performed by a different driver a day earlier.

At Mobil's regional terminals from which gasoline is distributed by truck to retailers spot samples of unleaded gasoline are periodically tested to make sure that the lead content does not exceed acceptable levels. At the Buffalo terminal from which Reese is supplied, Mobil samples its trucked unleaded gasoline approximately once per month. Mobil's truck drivers are taught basic safety procedures that include instructions on the importance of preventing contamination of unleaded gasoline. The driver's normal procedure is to load leaded and unleaded gasoline into separate compartments of the delivery truck. Each compartment is indiscriminately used for either leaded or unleaded gasoline, depending upon the volumes of the particular products involved. The driver visually inspects the compartment to make sure that it is empty before loading any new gasoline into it. The compartments are not marked or tagged with the type of gasoline loaded therein; and the drivers must therefore rely upon his memory as to which compartment contains which product, to avoid contamination when unloading at destination. The "first in, first out" practice is generally followed;

that is, the driver loads and unloads unleaded gasoline first, before handling any leaded gasoline. The same hose is used to unload both the leaded and unleaded gasoline. The hose is supposed to be drained or cleared between the delivery of each type of product by tipping it upward and walking it around until it appears empty, or by pumping a small amount of gasoline through it. The covers of the storage tanks at the terminal and at the retail stations are color-coded by gasoline type; and if the color has faded, the driver must check with the station owner as to which tank holds what type of gasoline before unloading. Drivers are instructed to call their supervisors if there are any questions or problems at the destination station. Mobil now includes a specific standard provision in its retail sales contracts requiring a high degree of care on the part of the retailer in handling, storing, and selling unleaded gasoline to prevent contamination. The latter provision was not contained in Mobil's agreement with Reese which was in effect at the time the alleged violations occurred.

IV. Positions and Contentions of the Parties

The principal issues presented here are whether the unleaded gasoline at Reese was contaminated and, if so, whether Mobil has established an affirmative defense under 40 CFR §80.23(b)(2) which provides, in pertinent parts, as follows:

> 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 nor such acts are violations of law in the jurisdiction where the violation of the requirements of this part occurred, or

* * * *

(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....

Complainant maintains that the testimony and evidence presented amply proves that two violations occurred by reason of contamination of the unleaded regular and super unleaded gasoline at the Reese's station. EPA contends that Mobil has not established that the violations were not caused by it, or its employees or agents. EPA alleges that Mobil conducted its own investigation after the discovery of the contamination, but was unable to find any evidence that either Hank Reese or any other individual outside its own company had been responsible for the violations. Therefore, EPA asserts, Mobil has failed to meet the first requirement under 40 CFR §80.23(b)(2). EPA argues further that even assuming, arguendo, that Mobil could make such a showing, there is no evidence which would support a finding that the violations were caused either by any of the specified acts listed in subparagraph

(ii), or by the retailer in violation of his contractual obligation, within the meaning of the provisions of subparagraph (iv). Since Mobil has failed to prove an affirmative defense, EPA concludes that Mobil is liable for the two violations.

On the other hand, Mobil contends that EPA has not met its burden of establishing a prima facie case. First, Mobil challenges the alleged contamination of Reese's unleaded gasoline on September 10, 1979, and questions the sampling and testing procedures employed by EPA. Second, Mobil asserts that the contamination was not caused by it or its agents or employees but by someone else, relying upon the provisions of 40 CFR §80.23(b)(2)(viii), which states:

> In paragraph (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.

Mobil argues that the stipulation, that its unleaded gasoline was uncontaminated up to the point it was loaded onto the delivery trucks at its terminal, coupled with the testimony of its drivers that they committed no errors during delivery, shows that the violations involved here were not caused by Mobil or its agents or employees. Finally, Mobil avers that it has established an appropriate defense under 40 CFR §80.23(b)(2)(iv); that its contract with Resse, an independent businessman and the operator of the station, required him to bear responsibility for the quality of unleaded gasoline stored on his premises; and that Mobil employed adequate procedures to ensure that its gasoline

remained uncontaminated once it was delivered to Reese.[2/]

V. Discussion

As noted, the principal issues here are: (1) whether EPA has established a *prima facie* case of contamination of the unleaded gasoline; and (2) assuming EPA has done so, whether Respondent has successfully established an affirmative defense by showing (a) that the violations were not caused by Mobil, or its agents or employees, but by someone else, and (b) that Reese was subject to a contractual undertaking imposed by Mobil and designed to prevent the action which resulted in the violations and that Mobil's program of enforcing the contract constituted a reasonable effort to ensure compliance.

A. Did EPA Establish That Contamination Of Unleaded Gasoline Had Occurred?

EPA's credible evidence shows that on September 10, 1979, samples were taken from Reese's regular unleaded and super unleaded gasoline storage tanks and that the tests performed on these samples indicated that they both contained lead in excess of 0.05 grams per gallon. The samples were taken and handled in accordance with the common and regular practices and procedures of the agency. When Mobil's own investigators later tested Reese's gasoline, they found that both the regular and super unleaded

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2/ Mobil has also raised, mainly in its answer to the complaint, several challenges to the constitutionality and legality of the regulations promulgated by the Administrator under the Clean Air Act. It appears that these same issues have already been raised in other proceedings, pending in court. Since the post hearing briefs of Mobil are devoid of any substantial support and detailed discussion of these legal questions, and since it is doubtful that the Presiding Officer has authority to override the Administrator, and declare the regulations invalid and unconstitutional, these issues will not be considered in this Initial Decision.

gasoline contained lead in far smaller quantities than those found by EPA; and that only the latter type of gasoline showed a lead level slightly in excess of that permitted by the regulations. The initial observations to be made with respect to this evidence of Respondent are the Mobil's own tests confirm that at least one violation occurred; and that, as to the regular unleaded gasoline it tested, the nature of that product had been substantially changed by dilution with two subsequent deliveries. In addition, it is noted that Mobil's tests were run on a field test kit, which tests are much less reliable and less accurate than the atomic absorption analyses expressly provided by the regulations and employed by EPA. Mobil's principal challenge to the EPA test results consisted largely of speculation that some gasoline may have evaporated from the containers prior to testing, thus leaving a higher concentration of lead in the remaining sampled gasoline than the actual lead level in Reese's storage tanks. This argument is unpersuasive, considering the facts that the container tops were tightly screwed and sealed and that no leakage whatever was detected when the containers arrived and handled in the laboratory. Based upon the preponderance of the evidence of record, the Presiding Officer finds that EPA has proven that on September 10, 1979, at Hank Reese's Mobil, both the regular unleaded and the super unleaded gasoline contained lead in excess of 0.05 grams per gallon, in violation of 40 CFR §80.22(a).

B. Were the Violations Caused by Mobil or its Agents or Employees?

The record does not contain any direct testimony concerning the immediate cause of the contamination of the unleaded gasoline. The parties have, in effect, stipulated that the gasoline was not contaminated at the time it was loaded onto the delivery trucks at Mobil's Buffalo terminal. Nor is there any evidence here showing any actual action or inaction by Reese which might have caused the contamination. As noted above, Mobil argues that neither it, nor its own driver, nor the driver of its contract carrier agent, could or should be held to have caused or have been responsible for the violations. However, this argument does not hold up under close scrutiny of the direct and circumstantial evidence presented and the reasonable inferences to be drawn therefrom.

The practices and procedures of Mobil and its drivers handling its products seem not only to have failed to prevent contamination of the unleaded gasoline, but also to have directly or indirectly caused or at least contributed to the likelihood of the contamination. As seen, Mobil uses the same trucks to deliver both leaded and unleaded gasoline, and the same compartments within each tank truck to transport either leaded or unleaded gasoline, with only visual inspection to make sure that a compartment is empty of leaded gasoline before unleaded gasoline is pumped into it and with no marking or sign to identify the product actually carried in each compartment. It is entirely possible that some unleaded gasoline could remain undetected in a compartment and contaminate unleaded gasoline subsequently pumped into it,

or that a driver could forget the particular type of product loaded in a particular compartment. Similarly, Mobil uses common hoses to unload both leaded and unleaded gasoline at the delivery point, relying solely on the driver to make sure that the hoses are drained or emptied of leaded gasoline before unloading unleaded gasoline. These practices and procedures, to a greater or lesser extent, are too unreliable and fallible to allow the Presiding Officer to conclude here that their use, without more, establishes that neither Mobil, nor its employees, nor its agents caused the violations. This conclusion is fortified by the admission of the involved two drivers that in the past they had made mistakes resulting in contamination of unleaded gasoline during deliveries. And their further statement that drivers are subject to severe disciplinary action for causing such violations diminish the credibility of their bare assertions that they made no errors in the deliveries to Reese. Accordingly, it is found, based upon a preponderance of the evidence, that Mobil has failed to make an adequate showing that it was not responsible for the violations.

C. Were the Vilations Caused by Another and Did the Agreement Impose a Duty on the Retailer Designed to Prevent the Action that Caused the Violation and Did Mobil Make Reasonable Efforts to Insure Compliance?

Having found that Mobil has not met the threshold requirement of subparagraph (i) of 40 CFR §80.23(b)(2), there is no need to consider the other elements of any defense provided by that section. Nevertheless, even if it were assumed, arguendo, that that first requirement has been fulfilled, Mobil still cannot prevail here.

In order to show that the violation "was caused" by someone else, Mobil must "demonstrate by reasonably specific showings by direct or circumstantial evidence the the violation was caused or must have been caused by another". 40 CFR §80.23(b)(2)(viii). No such demonstration has been made. Other than a purely speculative reference at the hearing to the possibility of vandalism at Reese's station, Mobil's only evidence on this point showed nothing more than that Reese had not received gasoline from any other source. As previously noted, there was no showing here of any acts of commission or omission by Reese or anyone else which would tend to establish their culpability. Mobil has, therefore, failed to prove by "reasonably specific showings" that the violation was caused by another, including the retailer.

Again, assuming, _arguendo_, that Mobil has somehow shown that the violations were caused by the action of Reese, nowhere in the contract in effect at the time was there any specified provisions imposing an undertaking on the retailer designed to prevent contamination of unleaded gasoline. Mobil points and quotes two standard contract provisions, the first of which requires Reese to indemnify Mobil against actions for death, personal injury, or property damage; and the second of which pertains to paying taxes and fees and to obtaining permits and licenses to operate the business. Mobil argues that these provisions, which allude to the storage and handling of gasoline and compliance with applicable laws and regulations, mandate compliance with the Clean Air Act and the regulations promulgated thereunder. However, these

provisions clearly refer to and emphasize certain other circumstances and governing rules and regulations, but do not even mention the Environmental Protection AGency, its regulations generally or those affecting the handling of unleaded gasoline in particular, or the Clean Air Act. Their inclusion in the contract does not satisfy 40 CFR §80.23(b)(2)(iv). The only clause in the contract that refers to unleaded gasoline is the so-called "unleaded rider". It merely states that Reese's "failure to prevent contamination of unleaded gasoline subsequent to delivery shall constitute a default" under the contract. Since this clause does not appear to impose any specific and affirmative duties upon Reese, it is doubtful that it meets the requirements of the provisions of 40 CFR §80.23(b)(2)(iv). In contrast, Mobil's contract executed by Reese subsequent to the occurrence of the subject violations included the following additional explicit provision: "Buyer hereby covenants and agrees that it will exercise the highest degree of care and diligence in the handling, storage and sale of unleaded gasoline." Be this as it may, the record reveals no sufficiently reasonable oversight efforts on Mobil's part which would insure complaince with ~~any~~ contractual obligations, if any existed, to prevent contamination by Reese as the retailer. The evidence shows only that Mobil, approximately once a month, tested unleaded gasoline at its own Buffalo terminal, and that it has engaged a~~n~~ ~~interde~~consulting firm to suggest the number and locations of retail outlets in the region to be inspected periodically. However, Mobil's

witness was not familiar with the details of, and the reasons behind, the latter program, nor with any specific facts relating to any monitoring of Reese's station. In fact, no tests have ever been made at Reese until the instant violations were discovered.

The required policing, including periodic sampling, by the refiner has two purposes. First, to detect any contamination that has already occurred. And second, a prospective and preventive purposes -- to provide the retailer with a concrete impetus to continually examine his practices to make sure that they conform to his obligations under the contract. It is precisely because a retailer as Reese is an independent entrepreneur and is not subject to the direct control of the refiner that a formal agreement is required under 40 CFR §80.23(b)(2)(iv). Such an agreement must be enforced with reasonable strictness to ensure that its objective of avoiding contamination is achieved, otherwise the refiner must suffer the consequences. Under the facts and circumstances presented, it is found that Mobil has failed to show here that it exerted sufficiently reasonable efforts to insure that Reese complied with his contractual obligations to prevent contamination, assuming there were any such obligations under the then effective agreement. Accordingly, it is further found that Mobil has not established any valid affirmative defense absolving it from liability for the violations.

D. Amount of Penalty

The maximum statutory penalty for each violations if $10,000, or a total of $20,000 for the two violations. EPA, however, proposes the assessment of a total penalty of $16,900 against Mobil.

The five factors to be considered in determining the size of a penalty are found in 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.

EPA contends that $16,900 is an appropriate penalty based on the Guidelines for the Assessment of Civil Penalties, 40 Fed. Reg. 39973 (August 29, 1979). According to EPA, Mobil is a Category IV business (having had over $5 million gross revenues for the previous year), the highest classification; contamination of unleaded fuel is one of the most serious violations of the regulations promulgated pursuant to the Clean Air Act, rendering inoperative emission controls on motor vehicles and contributing to air pollution hazardous to health; and Mobil's previous history of compliance with the Act included two previous violations in Region II. Mobil responds by arguing that EPA's proposed penalty contains no breakdown as to what part of the penalty is being assessed for each violation, nor any detailed explanation of how and on what basis it was computed. Respondent also states that, although it has been charged with two prior violations of 40 CFT §80.22(a) in this region, according to Mobil's records, there has been no final determinations as to any such violations.

The record shows that both violations here were serious, in that they resulted in lead levels far in excess of that permitted for unleaded gasoline to be used in motor vehicles especially designed for such fuel. As EPA correctly notes, the

violations carried with them the distinct danager of increased air pollution and damage to the catalytic converters of the automobiles of innocent and unsuspecting motorists. Mobil does not dispute that it is a Category IV business, nor does it contend that the proposed penalty will affect its ability to continue in business. However, EPA has not cited any specific orders, nor has it indicated the posture of the particular proceedings, dealing with the alleged prior two violations charged against Mobil. There are now a number of complaints pending against Respondent and we are left to pure conjecture as to the status of the cases involving the two alleged previously committed violations. In these circumstances, Mobil will be considered as having had no prior violations. With respect to Mobil's actions to remedy the specific violations, the record indicates that Mobil seemed to be more interested in gathering evidence to contest EPA's case against it than in taking steps to remedy the situation, especially as to the super unleaded gasoline found by its own tests to be contaminated. Under the guidelines, for a Category IV business with no prior violations, the range of the penalty to be assessed for a violation due to contamination is $6,000 to $7,000. Considering all factors, it is found that the appropriate penalty for each of the violations should be the upper limit of this range, i.e. $7,000, or $14,000 for the two violations. Accordingly, the proposed penalty is reduced by $2,900, from $16,900 to $14,000.

ULTIMATE CONCLUSIONS AND ORDER

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

(1) Respondent Mobil Oil Corporation, as the involved refiner, is liable, pursuant to 40 CFR §80.23(a)(1), for violations of 40 CFR §80.22(a) and, as a result, for violations of Section 211 of the Clean Air Act.

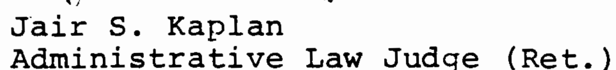
(2) Respondent Mobil Oil Corporation has failed to establish an adequate defense under 40 CFR §80.23(b)(2) to be absolved from liability for the indicated violations.

(3) Respondent Mobil Oil Corporation should, accordingly, be assessed a civil penalty in the amount of $14,000, 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 penalty in the amount of Fourteen Thousand Dollars ($14,000) be, and it is hereby, assessed against Respondent Mobil Oil Corporation.

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



By the Presiding Officer
November 26, 1981

Jair S. Kaplan
Administrative Law Judge (Ret.)

CERTIFICATE O' 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 the Complainant, to the addresses that follow:

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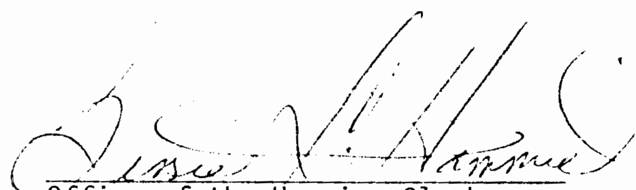

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202/755-5476

DATED: November 30, 1981