UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Tower Central, Inc., Docket No. CAA-III-030

Respondent

ORDER GRANTING IN PART EPA'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

This case arises under Section 113 (d) of the Clean Air Act (the "Act"), 42 U.S. C. § 7413 (d). The U.S. Environmental Protection Agency ("EPA") seeks civil penalties against Tower Central, Inc. ("Tower"), totaling $33,423, for three alleged violations of the Section 609 of the Act. 42 U.S.C. § 767 1 h. Following the filing of an amended complaint and an amended answer, EPA moved for accelerated decision on the issue of liability as to each of the three counts.

The Consolidated Rules of Practice allow for the issuance of an accelerated decision "if no genuine issue of material fact exists" and the prevailing party is entitled to judgment "as a matter of law". 40 C.F.R. § 22.20(a). While the evidentiary record that exists at this early stage admittedly is limited, it nonetheless is adequate to support entry of an accelerated decision in favor of EPA on the merits with respect to Counts I and III. The record, however, is not adequate to support the entry of an accelerated decision with respect to Count II. EPA's motion for accelerated decision, and Tower's opposition, are discussed more fully below.

Count I

EPA alleges that between August 13, 1992, and August 2, 1993, Tower performed service on fourteen motor vehicle air conditioners. EPA further alleges that this activity by Tower constituted "service involving refrigerant" within the meaning of 40 C.F.R. § 82.32(h), as well as "service for consideration" within the meaning of 40 C.F.R. § 82.32(g). Moreover, complainant asserts that Tower serviced the fourteen motor vehicle air conditioners prior to obtaining

refrigerant recycling equipment approved pursuant to 40 C.F.R. § 82.36. Accordingly, EPA submits that in servicing the fourteen motor vehicle air conditioners, without using approved refrigerant recycling equipment, Tower violated Section 609 of the Clean Air Act. 42 U.S. C. § 7671 h. Amended Compl. ¶¶ 7-11.

Despite filing an amended answer denying the allegations set forth in Count I, Tower has submitted documentation to EPA in which it actually admits to the violation charged. In that regard, in a letter to EPA dated August 2, 1993, Tower stated that it provided a refrigerant service to 14 motor vehicle air conditioning units during the time period referenced in Count I.[1] Tower also admitted that it did not use a refrigerant recycler in servicing these 14 units. *See* EPA Exhibit B.[2]

Of crucial importance at this juncture is the fact that the substance of Tower's August 2, 1993, letter to EPA has been confirmed by respondent in defending against EPA's motion for accelerated decision. In its response, Tower states:

Although Tower in the letter *admitted it did not comply with the requirements of § 609 of the Act,* Tower insisted in the letter that it was an honest mistake as Tower was under the assumption that since the company was doing work on its own vehicles it was not doing service for consideration and was therefore not subject to Section 609 of the Clean Air Act ....

Response at 3 *(emphasis added).* Moreover, in its amended answer, Tower further admits that it did not obtain approved refrigerant recycling equipment required by 40 C.F.R. § 82.36 until July 29, 1993. Amended Answer ¶ 10.

Accordingly, given these admissions by Tower that it had committed the violation of Section 609 as alleged in Count I, EPA is awarded accelerated decision as to the merits of this count.

Count II

Here, EPA alleges that one of the technicians who performed the air conditioning service referenced in Count I was not properly trained and certified by a 40 C.F.R. § 82.40 technician certification program, as required by 40 C.F.R. § 82.34(a). Again, as proof of the violation charged, EPA points to Tower's August 2, 1993, letter responding to the Agency's Section 114 information request. In this instance, however, a different result obtains.

Unlike Count I, here Tower's admission of liability in its Section 114 letter response is not so clear-cut. For example, while Tower states that Rick West, an uncertified trainee, worked on the motor vehicle air conditioning units involved in this case, it also states that West performed these services under the supervision of Mike Walters, a certified technician. Given this response, it is still an open factual question as to whether Tower violated Section 609 of the Clean Air Act as alleged in Count II.

Count III

In this count, EPA charges Tower with servicing the air conditioning units referenced in Count I without first having submitted the certification required by Section 609(d)(1) of the Act and 40 C.F.R. § 82.42. These provisions require certification that the person servicing the air conditioning unit is properly trained and certified and that such person is properly using approved equipment.

In its August 2, 1993, response to EPA's Section 114 information request, Tower has admitted to the violation alleged in Count III. In that regard, Tower stated: "Since our client was under the mistaken impression that he was not required to seek EPA certification, we do not have information that is requested in paragraph 7 but certainly intend to obtain the proper certification immediately." EPA Ex. B at 2.[3] The effect of this response is to admit to the violation alleged in Count III. Accordingly, as to this count EPA is entitled to accelerated decision concerning liability.

Tower's Other Defenses

Aside from arguing that issues of fact exist with respect to the three counts involved here,

Tower raises several additional defenses. These defenses warrant only brief discussion.

First, Tower asserts that there exists a question of fact as its "knowledge and intent at the time of the alleged violations." Resp. at 3. Tower argues that this factual issue was created by its "honest niistake" in believing that it was not subject to the provisions of Section 609 of the Clean Air Act because it was doing refrigerant work on its own vehicles. This argument has no relevance to the issue of whether Tower committed the violations of Section 609

as alleged. To the extent that this argument is relevant to this case, it is more appropriately considered during the penalty assessment phase.

Second, Tower argues that it is not subject to the provisions of Section 609 because it "has never engaged in the business of repairing or servicing a motor vehicle for consideration." Resp. at 3. To the extent that anyone in this case is liable for violating the Clean Air Act, Tower suggests that it is the technicians who actually performed the work. Resp. at 4. *See* Amended Answer at 3 (First Defense).

In response, EPA essentially argues that respondent's interpretation of Section 609 is illogical and that it would turn the statute on its head. EPA is correct. Section 609(a) of the Clean Air Act, 42 U. S. C. § 767 1 h(a), states that "the Administrator shall promulgate regulations in accordance with this section establishing standards and requirements regarding the servicing of motor vehicle air conditioners." As noted by EPA, the Administrator has indeed promulgated such regulations. In promulgating the final rule establishing standards for servicing motor vehicle air conditioners, the Administrator in part stated:

The Agency would like to clarify *that fleets of vehicles,* whether private, or federal, state or local government owned, are covered because the *technicians doing the service are being paid.* Other examples of establishments doing service covered by the regulations include, but are not limited to, independent repair shops, service stations, *fleet shops,* body shops, chain or franchised repair shops, new or used car and truck dealers, rental establishments, radiator repair shops, mobile repair operations, vocational technical schools (because instructors are paid), farm equipment dealerships, and fleets of vehicles at airports.

57 Fed. Reg. 31246 *(emphasis added).* Moreover, as noted by EPA, Tower is a "corporate entity" which clearly falls within Clean Air Act Section 302(e)'s definition of the term "person". 42 U.S. C. § 7602(e).

Given the scope of coverage of the Section 609 regulations intended by the Administrator, which specifically includes "fleets of vehicles" and "fleet shops", and given the definition of the term "person" in Section 302(e) of the Clean Air Act to include corporate entities, it is clear that Tower's operation is subject to the provisions of Section 609 of the Act. This result is consistent with the plain wording of Section 609, as well as with the remedial purpose of the Clean Air Act.

Finally, for the reasons expressed by EPA, Tower's Small Business Policy argument likewise fails. *See* EPA Mem. in Supp. of Mot. at 25-27. As recited by EPA, "Tower did not discover the alleged violations as a result of receiving on-site compliance assistance from a government or a government supported program that offers services to small businesses or by conducting an environmental audit and promptly disclosing in writing to EPA all violations discovered as part of the environmental audit." *Id.*, at 27.

ORDER

Accordingly, for the reasons mentioned above, the motion of the U. S. Environmental Protection Agency for accelerated decision as to liability is *Granted* as to Counts I and III. EPA's motion for accelerated decision is *Denied* as to Count II. The hearing scheduled for April 16, 1997, will involve the question of liability for Count II, and any related penalty assessment issues, as well as the appropriate civil penalty to be assessed for the violations listed in Counts I and III.

Carl C. Charneski

Administrative Law Judge

Issued: April 14, 1997

Washington, D.C.

[1] Tower's letter was in response to a request by EPA to provide information pursuant to Section 114 of the Clean Air Act, 42 U. S.C. § 7414. *See* EPA Exhibit A for Section 114 information request.

[2] Exhibit B is Tower's response to EPA's request for information pursuant to Clean Air Act Section 114. This Section 114 response resembles an answer to an interrogatory. *See* Fed. R.Civ. P., Rule 56(c) ("...[J]udgment shall be rendered forthwith if the pleadings, depositions, *answers to interrogatories,* and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Emphasis added)*

[3] Paragraph 7 of EPA's Section 114 information request asked for the following:

A copy of the company's certification to EPA that the company has acquired, and is properly using, approved equipment and that each individual authorized to use the equipment is properly trained and certified ....

EPA Ex. A at 2.

IN THE MATTER OF TOWER CENTRAL, INC., Respondent

Docket No. CAA-III-030

Certificate of Service

I certify that the foregoing Order Changing Date of Hearing , dated April 14, 1997, was sent this day in the following manner to the below addressees.

Original by Regular Mail to: Ms. Lydia Guy

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Copy by Facsimile and by Regular Mail to:

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Dated: April 14, 1997