UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
1735 BALTIMORE
KANSAS CITY, MISSOURI 64108

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IN THE MATTER OF:)
)
PHILLIPS PETROLEUM COMPANY,)
)
Respondent)

DOCKET NO. 030383

INITIAL DECISION OF PRESIDING OFFICER

This proceeding was initiated on November 3, 1976, by the issuance of complaints by the Director, Enforcement Division, Environmental Protection Agency (EPA), Region VII (the Complainant), against Bower 66 Service, retailer, Ward Transport, distributor, and Phillips Petroleum Company, refiner. The complaint alleged that, on or about October 5, 1976, Bower 66 Service offered for sale unleaded gasoline containing in excess of .05 grams per gallon lead content, said gasoline having been delivered by Ward Transport. A penalty of $6,000 was proposed against Phillips Petroleum Company.

On November 19, 1976, Phillips Petroleum Company (the Respondent, hereinafter "Phillips"), answered that there had been no violation of the regulations by Phillips, that the premises occupied by Mr. O. E. Bower were leased by Phillips but controlled, operated and supervised by Bower, although Phillips did supply Bower with gasoline stock. Phillips further argued that Amoco Company, et al. v. EPA 543 Fed. 2d 270 (D.C. Circuit, 1976), contains language which provides that refiners might escape liability for unleaded gas violations by retailers if they can prove that the contamination was caused by the action of a directly supplied lessee. Phillips further argued that the violation occurred despite reasonable efforts by Phillips to prevent such a violation or that the violation was caused by the action of the distributor, Ward Transport, not subject to a contract with Phillips, but despite reasonable efforts by Phillips to prevent such contamination. Phillips also objected to the reasonableness of the proposed penalty and requested a hearing.

The complaint against Bower 66 Service was resolved by a Consent Agreement and Final Order executed by O. E. Bower and Complainant, wherein Bower acknowledged that on or about October 5, 1976, it offered for sale

unleaded gasoline containing in excess of .05 grams per gallon lead content, said gasoline having been delivered by Ward Transport. Bower further acknowledged that it had violated 40 CFR 80.22(a) and consented to a civil penalty. That agreement was entered on December 13, 1976. The complaint against Ward Transport was withdrawn by Complainant on the basis of new information.

On January 12, 1977, the undersigned was designated as Presiding Officer by Charles V. Wright, Acting Regional Administrator. On January 13, 1977, an order was issued, setting a hearing in the matter on March 1, 1977. Pursuant to motion of counsel for Complainant, the order for hearing was rescinded; and an order for accelerated decision entered, requiring the parties to submit any stipulations, proposed findings of fact, conclusions of law, and briefs in support thereof.

A stipulation dated March 3, 1977, between Phillips and Complainant was entered, acknowledging that a sample was taken, tested, that the test results found .205 grams per gallon lead content, that a valid finding of contamination had been established in the case, that Bower 66 Service is a Phillips branded retail outlet, that the unleaded gasoline delivered to Bower 66 was in conformity with Section 80.2(g), that the testimony of John W. Cameron in the hearing of November 22, 1976, regarding Docket No. 059317 be adopted as applicable to this matter and incorporated by reference, and that there remains for factual determination only the issue of whether or not Phillips can establish its appropriate affirmative defenses. From a review of the record it appears that 40 CFR 80.23(b)(2)(i)(iii) and (iv) are applicable. Those sections provide 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:
>
> That the violation was not caused by him or his employee or agent; and ...
>
> That the violation was caused by the action of a reseller or a retailer supplied by such reseller, in violation of a contractual undertaking imposed by the refiner on such reseller designed to prevent such action, and despite reasonable efforts by the refiner (such as periodic sampling) to insure compliance with such contractual obligation, or

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.

Having reviewed the entire record, including the stipulation, the briefs, proposed findings of fact, conclusions of law and orders submitted by the parties, as well as the attachments thereto, I have concluded that the violation alleged in the complaint against Phillips Petroleum Company did occur, that Phillips Petroleum Company is legally responsibile for the violation alleged, and should be assessed a civil penalty based on the following findings of fact and conclusions of law:

Findings of Fact

1. Respondent Phillips is a refiner within the definition of 40 CFR 80.2(i).

2. On November 5, 1976, the retail outlet, Bower 66 Service did offer for sale unleaded gasoline with lead content in excess of .05 grams per gallon.

3. The unleaded gasoline offered for sale at Bower 66 Service was supplied to Bower by the distributor, Ward Transport.

4. The unleaded gasoline offered for sale by Bower 66 Service on November 5, 1976, was in compliance with EPA regulations when delivered to it by Ward Transport.

5. On November 5, 1976, Bower 66 Service did display the Phillips Petroleum Company corporate, trade, or brand name.

6. Bower 66 Service has consented to the entry of an order based upon a finding that it did offer for sale unleaded gasoline containing in excess of .05 grams per gallon lead content, said gasoline having been delivered by Ward Transport, and that it did violate 40 CFR 80.22(a).

7. Complainant and Phillips have agreed by stipulation that the gasoline delivered to Bower 66 was in conformity with Section 80.2(g), and that a valid finding of contamination has been made and established in this case.

8. The transcript of the testimony given by John W. Cameron in the matter of Phillips Petroleum Company, Docket No. 059317, has been stipulated by the parties as applicable to this matter and to be incorporated by reference to this matter. That testimony describes the campaign of Phillips Petroleum Company to inform its jobbers and distributors of the requirements of the unleaded gas program through a series of memoranda directed to those parties. The memoranda describe such procedures as those to be followed when a new tank is to be dedicated to the storage of unleaded gas, and those procedures to be followed when a tank used for the storage of leaded gasoline is to be converted to the storage of unleaded gasoline, as well as the cleansing procedures that must be followed thereupon.

9. Through the affidavit of Mr. Alvin T. Alexander, Phillips has shown that it had been aware that Bower 66 Service was interested in offering unleaded gasoline for sale, but that Phillips had discouraged Bower by not offering financing for such a conversion. However, Phillips was aware that Bower was interested in the purchase of equipment required for the conversion without Phillips' assistance. Phillips was not notified when the station was actually converted.

10. The affidavit of Mr. George T. Neal, a Phillips employee, states that the station was converted from the sale of premium gasoline to unleaded gasoline on August 16, 1976, approximately a month and a half prior to the date of violation.

11. Bower 66 is a leased service station, said lease being held by Bower 66 from Phillips Petroleum Company.

Conclusions of Law

1. The immediate cause of the violation of November 5, 1976, was the failure of Bower 66 to properly clean its existing storage tanks before converting them to use for unleaded gasoline.

2. The actions of Phillips Petroleum Company with respect to the activities which led to the violation of November 5, 1976, are not sufficient to excuse Phillips under the test of reasonable efforts to ensure compliance with any applicable contractual obligations.

Discussion

The regulations which are applicable to this proceeding have been established by EPA to serve a valid and important role in the protection

of public health by the attempt to reduce the amount of lead content of gasoline utilized in certain automobiles introduced in the 1975 model year. Those automobiles are equipped with catalytic converters which are extremely sensitive to the presence of lead in an automobile exhaust, and fail in their function of reducing automobile pollutants if they are contaminated by excessive lead particulates. In the pursuit of an effective program to protect the catalytic converters and reduce the amount of lead in automobile exhausts, EPA has seen fit to establish liability upon refiners of gasoline when a retailer or distributor supplied by the refiner violates certain other portions of the regulations by the sale or offer for sale of contaminated unleaded gasoline, unless the refiner can prove that it has qualified for an affirmative defense established in 40 CFR 80.23(b)(2) subsections (i) and (iv), set forth above.

Phillips argues that the modification of EPA's regulatory language worked by Amoco Company, et al. v. EPA (supra) provides a defense to refiners whereby they may escape liability if they can prove the contamination was caused by the action of a directly supplied lessee. The defense contemplated by this ruling is embodied in Section 80.23(b)(2)(i) and (iv), which, as described above, afford the refiner a legal excuse if he can establish that the violation was not caused by him or his employee or agent, and that the violation was caused by the action of a retailer who is supplied by the refiner, in violation of a contractual undertaking designed to prevent such violation, and despite reasonable efforts by the refiner to ensure compliance with such contractual obligation.

In the present instance it has not been clearly established that the refiner did have adequate contractual prohibitions designed to prevent a violation such as that which has occurred. A document known as "Reseller's Contract," and amendments thereto have been introduced, all of which were in effect on the date of violation. The latter of those contains a provision that "buyer shall handle and sell petroleum products delivered hereunder in accordance with all requirements of law or governmental regulations now in existence or which may hereafter be issued from time to time, and buyer shall have its employees properly instructed in respect of said rules and regulations." (Amendment of August 28, 1975, paragraph K.)

Although this language, if liberally construed, may be accepted as imposing a contractual obligation on Bower 66 Service that would have operated to prevent the violation herein, if the contract were observed, it can be seen that a vigorous program of education and oversight is necessary in addition to the contract to provide the substance necessary to protect the integrity of any unleaded product which Bower 66 Service might offer for sale.

To supplement the contract, Phillips engaged in a mailing campaign, described in the affidavit of John W. Cameron, wherein numerous communications were directed to Phillips' jobbers, dealers, and station managers. Of these communications, only one, designated as Attachment 11, directed "To All Dealers" mentions the procedure which must be followed when an existing tank has been converted to unleaded, and states "It must be filled to capacity with unleaded product after purging." This document represents the only indication in the record of any direct communication to Bower 66 Service of the correct procedures for converting an existing tank, and it is ambiguous in that it does not completely explain the necessity of draining the tank until there is less than 25 gallons or 15 gallons of leaded product remaining, or whatever amount is sufficiently minimal to ensure that contamination of the unleaded product will not occur. "Purging" to the dealer may simply have meant running the existing pump until it would pump no more, whereupon sufficient leaded gasoline might remain to cause a contamination.

Phillips also offered through its witnesses to show that it would have engaged in additional activities to test the lead content of the product being offered for sale at Bower 66, had it known that the station was preparing to sell such product. This argument does not suffice as a demonstration of reasonable oversight in that Phillips was engaged in a direct supply to Bower, and, in fact, did provide Bower 66 with the unleaded product for nearly a month and a half before the contamination was discovered by an EPA inspector. In addition, through the affidavit of Mr. Alexander, a Phillips employee, it has been revealed that Mr. Bower of Bower 66 Service did discuss with a Phillips representative his intention to offer unleaded gasoline for sale, but was informed that Phillips would not finance such a conversion because of the low volume of sales at Bower 66. Phillips should

have been additionally aware of Bower's intent to offer unleaded gasoline because of the information given Phillips by its consignee that Bower intended to purchase the new equipment required for the conversion without the assistance of Phillips (affidavit of Alexander, paragraph 4). Although these notifications do not amount to actual notice of the offer for sale of unleaded gasoline, they should have been sufficient to make Phillips aware that Bower 66 did intend to offer unleaded gasoline for sale, and to have given Phillips ample opportunity to explain the correct procedures for conversion, and to monitor the activities of Bower to the extent necessary to prevent a violation of the unleaded gas requirement.

Accordingly, it is concluded that Phillips did not meet the test of reasonable oversight, if, in fact, it did have sufficient contractual obligations to prevent the violation, and must be responsible for a civil penalty.

Proposed Civil Penalty

The penalty of $6,000 proposed by complainant has been reviewed in light of the provisions of 40 CFR 80.330(d) and the guidelines of August 29, 1976, 40 FR 39973. The following considerations are pertinent to this penalty:

The gravity of the offense under consideration created by Phillips in its failure to impose either adequate contractual obligations or a program of reasonable oversight is mitigated to some extent by the fact that Phillips did have a program of education designed to prevent violations such as the one which occurred, and apparently did not cause this violation in bad faith. The record does not indicate a history of previous violations such as the one which occurred in this instance.

The potential harm which might result from this violation is shown through the fact that the analysis of the sample taken by the EPA inspector revealed that the lead content of the sample was .025 grams per gallon of lead content, or over four times that allowed by EPA regulations. That this violation could have and, in fact, may well have caused serious damage to catalytic converters is significant to the penalty which must be imposed. In mitigation of this factor, it must be acknowledged that the sale of this contaminated product apparently was stopped immediately after the notice of violation was issued by EPA, and the offending storage tank properly cleansed and filled with complying unleaded gasoline.

Upon consideration of these factors, I find that a civil penalty of $3,500.00 is appropriate and should be assessed against Phillips.

Proposed Final Order

This Initial Decision and the following Proposed Final Order assessing a civil penalty shall become the Final Order of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided by 40 CFR 80.327(c).

Final Order

It is hereby determined that the Respondent Phillips Petroleum Company has violated 40 CFR 80.22(a), as alleged in the complaint issued herein; and a civil penalty of $3,500.00 is hereby assessed against respondent, and respondent is hereby ordered to pay the same by cashier's or certified check payable to the United States Treasury within 60 days after receipt of this order.

This Initial Decision is signed and filed this 28th day of June, 1977, in Kansas City, Missouri.

David R. Tripp
Presiding Officer