UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Commercial Cartage Company,	)	**Docket No. CAA-93-H-002**
	)	
Respondent	)	

ORDER GRANTING MOTION TO DISMISS

The complaint in this proceeding under section 205(c) of the Clean Air Act (42 U.S.C. § 7524(c)) alleges that Respondent, Commercial Cartage Company (Commercial Cartage), violated section 211 of the Act and regulations promulgated thereunder, 40 CFR Part 80. The complaint alleges that Commercial Cartage, located in St. Louis, Missouri, and St. Louis W 70, a branded Unocal retail outlet, located at 3265 North Service Road East, Foristell, Missouri, were inspected by EPA on September 4, 1992, and that, as a result of the inspections, it was determined that the retail outlet was selling premium and regular unleaded gasoline having a Reid Vapor Pressure (RVP) exceeding 7.8 psi.[1/] The complaint further alleged that during the period June 5, 1992, through August 31, 1992, Commercial Cartage transported under nine identified bills of lading, premium and regular unleaded gasoline,

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[1/] The regulation at 40 CFR § 80.27(a)(2) indicates that the maximum permissible RVP for gasoline sold or dispensed from retail outlets in nonattainment areas in Missouri during the "high ozone season," June 1, 1992, through September 15, 1992, is 7.8 psi. Only the St. Louis area in Missouri, however, is designated nonattainment for ozone. See 40 CFR § 81.226.

having a RVP ranging from 8.2 psi to 8.4 psi, to the mentioned retail outlet. This was alleged to constitute 11 violations of gasoline volatility prohibitions set forth in 40 CFR § 80.27 pursuant to 40 CFR § 80.28(e). For these alleged violations, it was proposed to assess Commercial Cartage a penalty of $81,000. Commercial Cartage answered, denying the essential facts alleged in the complaint for want of knowledge, raising certain defenses including that the alleged violations were caused by acts or omissions of persons over whom it had no control, contesting the appropriateness of the penalty, and requested a hearing.

Accompanying Commercial Cartage's answer was a motion to dismiss upon the ground that the complaint failed to state a claim upon which relief can be granted. The motion was premised on the assertion that Commercial Cartage was a carrier as defined in 40 CFR § 80.2(t)[2/] and that, in accordance with 40 CFR § 80.28(f)(3),[3/] causation was an essential element of EPA's case.

[2/] The regulation, 40 CFR § 80.2(t), provides:

> (t) Carrier means any distributor who transports or stores or causes the transportation or storage of gasoline or diesel fuel without taking title to or otherwise having any ownership of the gasoline or diesel fuel, and without altering either the quality or quantity of the gasoline or diesel fuel.

[3/] The cited regulation, 40 CFR § 80.28(f), provides:

> (f) Violations at unbranded retail outlets or wholesale purchaser-consumer facilities. Where a violation of the applicable standard set forth in § 80.27 is detected at a retail outlet or at a wholesale purchaser-consumer facility not displaying the corporate, trade, or brand name of a refiner or any of its marketing

(continued...)

Commercial Cartage emphasizes that the complaint did not allege that it caused the violation, nor could it be inferred from the facts alleged that Commercial Cartage caused the violation. According to Commercial Cartage, it picked up gasoline designated by Unocal at a terminal designated by Unocal, and delivered the gasoline to a retail outlet designated by Unocal. Further, according to Commercial Cartage, at no time did it have any ownership interest in the gasoline, and nor did it alter the quality or quantity thereof.

Unlike other distributors, Commercial Cartage asserts that a carrier is not presumptively liable for violations detected at retail outlets and is not obliged to offer any defenses to liability alleged. Rather, Commercial Cartage says that the burden is on EPA to demonstrate that the carrier caused the violation. These contentions are supported by quotations from the preamble to

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[3/](...continued)
subsidiaries, the following parties shall be deemed in violation:

(1) The retailer or wholesale purchaser-consumer, except as provided in paragraph (g)(5) or (g)(8) of this section;

(2) The distributor (if any), except as provided in paragraph (g)(3) or (g)(8) of this section;

(3) The carrier (if any), if the carrier caused the gasoline to violate the applicable standard; and

(4) The ethanol blender (if any) at whose ethanol blending plant the gasoline was produced, except as provided in paragraph (g)(6) or (g)(8) of this section.

the final rule[4/] and by excerpts from a 1992 Volatility Question and Answer Document.[5/]

[4/] The preamble provides in pertinent part at 54 Fed. Reg. 11868-11883 at 11875 (March 22, 1989):

> 5. Carriers
>
> The Agency received several comments regarding presumptive liability for carriers. The proposal provided that carriers would be presumed liable for violations detected at their facilities. To rebut this presumption, carriers would have to provide documents from the refiner or importer at whose refinery or import facility the gasoline was produced or imported which represented to the carrier that the gasoline was in compliance with the applicable RVP standard when delivered to the carrier. In addition, the carrier would have to demonstrate that it had an oversight program, such as periodic sampling and testing of product that it carries, which shows that the carrier is attempting to ensure that the product which it carries meets the applicable RVP standards. Finally, the proposal provided that the carrier would have to show that it or its employees or agents did not cause the violation. <u>For violations detected at facilities downstream from the carrier, the proposal would have held a carrier liable only when the carrier actually caused the violation.</u> (emphasis added)
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> * * * *

The liability provisions for carriers were adopted as proposed.

[5/] The cited Q & A Document provides in pertinent part at 21:

> 11. Question: When a violation is found at a retail outlet, when is the carrier who delivered the gasoline to the retail outlet liable, and how may the carrier establish a defense?
>
> Answer: When a violation is found downstream from a carrier (i.e., not at the carrier's facility), the carrier is liable only if EPA is able to show that the carrier caused the gasoline to violate the standard. The only defense available to the carrier in such a case is to show that it did not cause the violation or that no violation occurred. The carrier defense at 40 CFR §

(continued...)

For the foregoing reasons, Commercial Cartage argues that the complaint must be dismissed.

Complainant's Motion For An Extension of Time

On July 9, 1993, Complainant filed a motion pursuant to section 22.16 for extension after expiration of prescribed time to file reply to Respondent's motion to dismiss and a reply to the motion to dismiss.[6/] The motion for an extension recites that the current version of the Consolidated Rules of Practice, 40 CFR Part 22 (1992), erroneously failed to provide that a party's written response to a motion must be filed within ten days of the service of the motion, unless additional time is allowed for such a response. The motion further recites that the instant action is the first administrative complaint filed by the Office of Air and Radiation, Field Operations and Support Division pursuant to the Clean Air Act as amended in 1990 and that counsel for Complainant relied on the Part 22 Consolidated Rules of Practice as published in the 1992 Code of Federal Regulations.

[5/](...continued)
80.28(g)(1) applies only to violations found at carrier facilities.

[6/] By a letter, dated July 8, 1993, counsel for Commercial Cartage pointed out that Complainant had not responded to the motion within the ten-day period plus five days for mailing specified by the Rules of Practice and, accordingly, may be deemed to have waived any objection to granting the motion. The letter requested that the motion to dismiss be granted.

Under date of July 13, 1993, Commercial Cartage served an opposition to Complainant's motion for an extension of time, asserting without elaboration that Complainant was relying on an out-dated version of the Rules of Practice as its excuse for failing to timely respond to the motion to dismiss,[7] alleging that Complainant had not shown excusable neglect for failing to file a timely request for an extension of time as required by section 22.07(b), that good cause for the extension had not been shown and that because of significant transaction costs in responding to the complaint, it would be prejudiced if the extension were granted.[8]

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[7] This is because the omission of the 10-day period for responding to motions, § 22.16 of the Consolidated Rules of Practice, has been corrected (57 Fed. Reg. 60129, December 18, 1992).

[8] Complainant filed a reply to Respondent's opposition to its motion for an extension of time on July 23, 1993, pointing out that a copy of the current and most recent version of the Consolidated Rules of Practice, which do not contain a requirement for filing a response to a motion within ten days of service of the motion, had been enclosed with the complaint. Complainant argued that justice would not be served by granting the motion to dismiss, stating that Commercial Cartage had admitted to transporting noncomplying gasoline to the retail outlet located in the Missouri nonattainment area (letter from Lawrence A. Lewis, President of Commercial Cartage Co. to Congressman William Clay, dated June 7, 1993). The EAB has indicated, however, that, absent a motion therefor filed in advance, replies to responses to motions, not being provided for in the rules, will normally be struck. Hardin County, Ohio, RCRA (3008) Appeal No. 92-11 (Order Denying Reconsideration, February 4, 1993).

Complainant's Reply to Respondent's Motion to Dismiss

Replying to Commercial Cartage's motion to dismiss, Complainant says that it has established a prima facie case for violations of § 211 of the Clean Air Act and regulations issued thereunder (40 CFR Part 80) and has stated a claim for which relief can be granted pursuant to §§ 211 and 205 of the Act and the Rules of Practice (40 CFR Part 22) (Reply, dated July 8, 1993). In support of these assertions, Complainant says that the Complainant provides fair notice of EPA's claim, sets forth the statutory and regulatory provisions upon which the claim rests, alleges facts necessary for a finding of liability, and prays for appropriate relief (Memorandum of Law).

According to Complainant, its belief that Commercial Cartage violated section 211 of the Act and regulations promulgated at 40 CFR Part 80 is based upon the following: (1) inspection on September 4, 1992, of Commercial Cartage Company, located in St. Louis, Missouri, and St. Louis W 70, a branded Unocal retail outlet, located at 3265 North Service Road East, Foristell, Missouri, and (2) evidence obtained during the inspections demonstrated that Commercial Cartage transported the premium and regular unleaded gasoline found in violation at the mentioned retail outlet on September 4, 1992, and that additionally, during the period June through August 1992, Commercial transported to that retail outlet nine other loads of gasoline having a RVP in excess of 7.8 psi. Complainant emphasizes that 40 CFR § 80.27(a), inter alia, prohibits a carrier from transporting gasoline having an RVP

in excess of the applicable standards, that the applicable standard for Foristell, Missouri, during the period June 1 to September 15 is 7.8 psi and Commercial Cartage as a carrier transported gasoline to a retail outlet in Foristell, Missouri, having an RVP in excess of 7.8 psi between June 1 and September 15, 1992.

Complainant denies that it must allege that Respondent caused the violation and argues that the motion to dismiss should be denied.

D I S C U S S I O N

A. Complainant's Failure To Timely Respond To The Motion To Dismiss

By filing a motion for an extension after the expiration of the prescribed time to file a reply to Respondent's motion to dismiss, Complainant has acknowledged that its response to the motion was not timely. Moreover, while Complainant alleges that it relied on the current published version of the Consolidated Rules of Practice, 40 CFR Part 22 (1992), the omission from section 22.16(b) of the requirement that responses to motions be filed within ten days after service of the motion was corrected as of December 18, 1992 (supra note 7).

Section 22.16(b) provides in pertinent part that, if no response [to a motion] is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. Excusable neglect within the meaning of section 22.07(b) in failing to timely move for an extension of time in which to respond to the motion has not been alleged or shown and

there can be little doubt that granting the motion to dismiss would be permissible under the Rules of Practice. See, e.g., In the Matter of E. I. du Pont de Nemours & Company, Docket No. TSCA-III-540, Order Granting Motion To Dismiss (June 25, 1992) and decisions there cited. Accordingly, I am permitted, but not required, to grant the motion to dismiss for Complainant's failure to timely respond thereto. Despite Complainant's 49-day delinquency in responding to the motion, the motion to dismiss in Dupont, supra, was granted only after a careful review wherein it was concluded that Complainant was unlikely to prevail on the facts alleged. In view of the fact that Complainant was four days late in filing its motion for an extension, and in view of the rule favoring resolution of cases on their merits, I will as a matter of discretion accept Complainant's late response to Commercial Cartage's motion to dismiss.

B. Motion To Dismiss

This is not a case where a violation was detected at the carrier's facility as specified in 40 CFR § 80.28(b).[9/] Rather, it appears that evidence gathered during the inspection of Commercial Cartage merely confirmed that it had transported, during the 1992 "high ozone season" nine loads of gasoline identified in

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[9/] If the violation were found at Commercial Cartage, it could escape liability only by showing, inter alia, that it had invoices, delivery tickets or other documents from the refiner representing that the gasoline conformed to the applicable standard; that Commercial Cartage had an oversight program, such as periodic sampling and testing; and that the violation was not caused by Commercial Cartage, its agents, or employees (40 CFR § 80.28(g)(1)).

the complaint and two other loads to St. Louis W 70, a branded Unocal retail outlet, located in Foristell, Missouri. Under these circumstances, the liability of Commercial Cartage, if any, must be premised on 40 CFR § 80.28(e) as the complaint alleges.

As we have seen, Commercial Cartage has premised its motion to dismiss on 40 CFR § 80.28(f). This is apparently because Commercial Cartage is not a branded facility or carrier. Be that as it may, the provisions of § 80.28(e) do not differ from § 80.28(f) insofar as pertinent here.[10/] Under the provisions of §

[10/] The cited section, 40 CFR § 80.28(e), provides:

> (e) Violations at branded retail outlets or wholesale purchaser-consumer facilities. Where a violation of the applicable standard set forth in § 80.27 is detected at a retail outlet or at a wholesale purchaser-consumer facility displaying the corporate, trade, or brand name of a gasoline refiner or any of its marketing subsidiaries, the following parties shall be deemed in violation:
>
> (1) The retailer or wholesale purchaser-consumer, except as provided in paragraph (g)(5) or (g)(8) of this section;
>
> (2) The distributor and/or reseller (if any), except as provided in paragraph (g)(3) or (g)(8) of this section;
>
> (3) The carrier (if any), if the carrier caused the gasoline to violate the applicable standard;
>
> (4) The refiner whose corporate, trade, or brand name (or that of any of its marketing subsidiaries) is displayed at the retail outlet or wholesale purchaser-consumer facility, except as provided in paragraph (g)(4) of this section; and
>
> (5) The ethanol blender (if any) at whose ethanol blending plant the gasoline was produced, except as provided in paragraph (g)(6) or (g)(8) of this section.

80.28(e), applicable to violations detected at branded retail outlets or wholesale purchaser-consumer facilities, and § 80.28(f), applicable to violations detected at unbranded retail outlets or wholesale purchaser-consumer facilities, the carrier, if any, is deemed in violation, only if it caused the gasoline to violate the applicable standard. If a carrier is deemed in violation only if it caused the violation, it follows that a complaint which merely alleges that a carrier transported gasoline found in violation at a branded or unbranded retail outlet and does not allege that the violation was found at the carrier's facility or that the carrier caused the violation, does not state a claim upon which relief may be granted. In addition to the quotes from the preamble to the regulation and the Q & R Document (notes 4 and 5 supra), this conclusion is supported by the NPR for the Regulation of Fuels and Fuel Additives: Standards for Reformulated Gasoline, 56 Fed. Reg. 31176-31225 (July 9, 1991).[11/]

[11/] The NPR provides at 56 Fed. Reg. 31215 in pertinent part:

> There are at least two options for ensuring that reformulated gasoline transported or stored by carriers conforms to the reformulated gasoline requirements. The traditional approach is to make carriers presumptively liable only for violations detected at the carrier's facility, unless the carrier is able to show that it did not cause the violation. Under this option, carriers would not be presumptively liable for violations found downstream from the carrier's facility, unless EPA is able to show the carrier in fact caused the violation.

There being no allegation that the violation was detected at Commercial Cartage and no allegation or apparent evidence that Commercial Cartage caused the violation, the complaint will be dismissed.

O R D E R

The complaint is dismissed with prejudice.[12/]

Dated this 23rd day of September 1993.

Spencer T. Nissen
Administrative Law Judge

[12/] Inasmuch as this order disposes of all issues and claims in the proceeding, it constitutes an initial decision which unless appealed to the EAB in accordance with § 22.30 of the Rules of Practice or unless the EAB elects, sua sponte, to review the same as therein provided, will become the final decision of the EAB in accordance with § 22.27(c).

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Order Granting Motion To Dismiss was filed in re Commercial Cartage Company; Docket No. CAA-H-002 and copies of the same were mailed to the following:

(Certified Mail)

Gary R. Letcher, Esq.
Colleen M. Morgan
THE HARKER FIRM
5301 Wiscousin Avenue, N.W., #740
Washington, D.C. 20015

(Interoffice)

Jocelyn Adair, Esq.
Field Operations and Support Division (6406J)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Bessie L. Hammiel,
Legal Assistant
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dated: Sept. 23, 1993