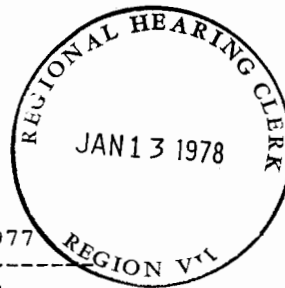


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ENVIRONMENTAL PROTECTION AGENCY



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IN THE MATTER OF:)
) DOCKET No. 063977
) -----
) Marvin E. Jones
Engles Oil Company) Administrative Law Judge
Laverne Hamann) 1735 Baltimore
Amoco Oil Company) Kansas City, Missouri 64108

INITIAL DECISION

By Complaint issued August 11, 1977, Respondent Amoco Oil Company (hereinafter Amoco) was charged with violation of 40 CFR 80.22(a), promulgated pursuant to Section 211^{1/} of the Clean Air Act, as Amended (the "Act") in that on or about August 2, 1977, the retail outlet Engles Oil Company (Engles), an Amoco branded retail outlet, offered for sale unleaded gasoline containing in excess of 0.05 grams per gallon lead content, said gasoline having been delivered (to Engles) by Laverne Hamann (Hamann), a carrier. Whether Hamann was a common or contract carrier and whether he acted for reseller or refiner is not revealed on this record.

Complaints arising from the subject alleged violation were also filed against said Engles, retailer, and against Hamann, a carrier. The Complaint against Engles was resolved on payment by it of \$300.00 under a Consent Agreement executed on October 24, 1977. The Complaint against Hamann was by the Complainant withdrawn. The decision herein concerns only the remaining Complaint against Amoco.

An Adjudicatory Hearing was first scheduled for November 3, 1977, in Omaha, Nebraska; when Complaints against Engles and Hamann were resolved, the Hearing was moved to -----

^{1/} Loc. cit. 40 U.S.C. 1857f-6c(c).

Kansas City, Missouri and set for December 1, 1977. Prior to said date, the parties requested and were permitted to submit said cause on a Stipulation of Facts, infra, along with exhibits numbered one through seven, separately submitted by Amoco, as follows:

1. Jobber Contract between Amoco Oil Company and Engles Oil and Tire, Incorporated.
2. Amoco's Jobber Lead-Free Gasoline Established Procedures Manual (including acknowledgment of receipt of Manual by Engles Oil and Tire, Incorporated).
3. Notation by J.B. Farmer, territory manager, Amoco Oil Company, of Engles Oil and Tire Company's assent and readiness to receive Amoco Premium Lead-Free gasoline.
4. Affidavit of A.A. Anderberg, Amoco Oil Company, concerning analysis of lead content of lead-free gasoline at Amoco's Council Bluffs, Iowa, terminal for applicable dates.
5. Amoco analysis sheets and lead-free gasoline reports of the retail outlet in question.
6. Affidavit of C.E. Henderson, coordinator, Air and Water Conservation, Amoco Oil Company, concerning the manner in which common venting causes contamination of unleaded gasoline (with attached drawing).
7. Affidavit of A.A. Anderberg, Amoco Oil Company, concerning Respondent's periodic sampling program and records.

Said Stipulation, dated November 3, 1977 and executed by Counsel representing Complainant and Amoco was submitted on November 22, 1977, and provides as follows:

1. On August 2, 1977, the corporate name, Amoco Oil Company (hereinafter "Amoco") a refiner, appeared on the pump stand and was displayed at Engles Standard, 915 J Street, Auburn, Nebraska, a gasoline retail outlet.
2. On August 2, 1977, Engles Oil and Tire, Incorporated, (hereinafter "reseller") a reseller, supplied gasoline to Engles Standard.

3. Prior to January 1, 1977, Amoco initiated a program to introduce Amoco Lead-Free Premium into the market in question effective on or about May 1, 1977. Amoco Lead-Free Premium is an unleaded gasoline having a higher octane rating than unleaded regular gasoline (the only unleaded gasoline theretofore on the market).
4. On January 31, 1977, the Reseller entered into a contract with Amoco in which the Reseller agreed to comply at all times with Amoco's established procedures for handling its lead-free products.
5. On February 25, 1977, Reseller acknowledged receipt and review of "Amoco Jobber Lead Free Gasoline Established Procedures Manual" which contains Amoco's unleaded gasoline handling instructions.
6. Reseller participated in the Amoco Lead-Free Premium program and indicated to Amoco on March 16, 1977, that he had complied with all of the requirements contained in the "Amoco Jobber Lead-Free Gasoline Established Procedures Manual" and that he was ready for delivery of unleaded premium gasoline.
7. As part of its unleaded gasoline handling policy, Amoco would not allow this station, or any other station supplied by Amoco or an Amoco-supplied reseller, to label as unleaded or attach nozzles having terminal ends with an outside diameter less than 0.930 inches until it obtained a gasoline sample from the proposed unleaded premium gasoline pump showing a lead content of less than 0.05 grams of lead per gallon.
8. On May 11, 1977, a gasoline sample taken from the proposed unleaded premium gasoline pump was found by Amoco to contain .030 grams of lead per gallon. Only after sampling and testing determined that the gasoline was in compliance, did Amoco permit the Reseller to attach an unleaded nozzle and label as unleaded the gasoline pump in question.
9. On August 2, 1977, a sample of said gasoline was found by the Environmental Protection Agency to contain .130 grams of lead per gallon.
10. On August 12, 1977, Amoco sampled the gasoline in question again, and found it to contain .033 grams of lead per gallon, but for the first

time Amoco noted common vent lines between the unleaded premium gasoline underground storage tank and the leaded gasoline underground storage tank.

11. Upon discovering this common vent line, Amoco immediately instructed the Reseller to, and the Reseller did, lock the unleaded premium gasoline pump. Amoco informed the Reseller that he must install a separate vent line for the unleaded premium gasoline storage tank in question pursuant to the instructions contained in the "Amoco Jobber Lead Free Gasoline Established Procedures Manual."
12. The Reseller completed installation of a separate vent line for the unleaded premium gasoline underground storage tank on September 14, 1977.
13. On September 15, 1977, Amoco again sampled the gasoline in question and found it to contain .014 grams of lead per gallon. After obtaining this compliant sample, Amoco permitted the sale of gasoline in question.
14. When the gasoline, found on August 2, 1977 to be noncompliant, left the custody of Amoco, its employees or agents, said gasoline contained less than 0.05 grams of lead per gallon.
15. The contamination of the unleaded gasoline on August 2, 1977, was caused by the common venting by the Reseller, which by siphoning action caused the mingling of leaded into the unleaded gasoline within the underground storage tanks at the retail outlet.

Thereafter Amoco and Complainant timely filed their proposed Findings of Fact, Conclusions of Law, Brief and Argument and on December 30, 1977, Amoco filed its reply.

The parties are in agreement that the only remaining issue herein is whether Amoco has, under said Stipulated Facts, proven the defense provided by Section 80.23(b)(2)(iii).

Said Section 80.23(b)(2) provides in pertinent part, as follows:

"(2) In any case in which ... 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

...

"(iii) 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 ensure compliance with such contractual obligation, or

"(iv) That the violation was caused by the action of the 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, ...

...

"(vii) In paragraphs (ii) through (iv) 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."

It is here stipulated (No. 15) by the Parties that the contamination was caused by common venting [of the unleaded premium gasoline underground storage tank (with) the leaded gasoline underground storage tank (No. 10)] which by siphoning action caused the mingling of leaded into the subject unleaded gasoline within the underground storage tanks at subject retail outlet.

It is further stipulated (No. 7) that Amoco would not allow (subject retail outlet) to (initiate sale) of unleaded gasoline -- until "it obtained a gasoline sample from the

proposed unleaded premium gasoline showing a lead content of less than 0.05 grams lead per gallon." Only after sampling and testing determined that the product was in compliance (0.030 gm/gal on May 11, 1977) did Amoco permit its sale (No. 8).

EPA took a sample of said product on August 2, 1977 and found it contaminated in that the lead content was 0.130 grams lead per gallon (No. 9). Amoco sampled on August 12, 1977 and noted for the first time the common vent line which, it is stipulated (No. 10), caused the subject contamination.

We find that the efforts of Amoco to insure compliance by reseller with its contractual obligation to "comply with Amoco's instructions for the handling of unleaded gasoline", while commendable, were not "reasonable" within the meaning connoted in said subparagraph (iii). This is not to say, as suggested by Amoco, that its oversight must be "infallible" as opposed to "reasonable"; but to be reasonable such oversight must be, at least, coextensive with the contract requirements imposed.

In Amoco Exhibit 1 (Jobber Contract), page 3, paragraph 12, the reseller contracts that he shall comply at all times with Amoco's established procedures for handling unleaded gasoline. Those procedures are detailed in Amoco Exhibit 2 (Manual) where Section IV there of (page IV-2) includes the following admonition:

"Procedures for drawing and flushing are:

"1. If the station's leaded gasoline storage tanks have a common vent, disconnect the vent line manifold and install

separate vents. This is to prevent contamination by a siphoning action that can occur." (emphasis supplied)

In Amoco's brief, page 6, the meaning to be applied to the word "reasonable" is discussed, citing both Webster's Seventh New Collegiate and Black's Fourth Edition. As we have previously stated (Sam Spain d/b/a Main Street Standard, et al, Docket No. 031555, EPA Region VII, 11/2/76, at page 6), we find the definition quoted by Black's from Parkes v Bartlett, 236 Mich. 460, 210 N.W. 492, to be appropriate in a regulatory case as here, where "reasonable" is defined as:

"Just; proper. Ordinary or usual. Fit and appropriate to the end in view." (emphasis supplied.)

Efforts will be considered reasonable that are fit and appropriate to "the end in view". Efforts that are commendable, valient, or even remarkable, while they may point up mitigating circumstances, are not "reasonable" if they are not adequate to accomplish the regulatory objective promulgated for the protection of the public interest.

Oversight by Amoco should be furnished, according to the facts and circumstances presented, to insure that the handling procedures are adhered to in the manner and to the extent provided by the contract. Certainly it cannot be disputed that flushing (of tanks, pumps, hoses) and sampling (at times meaningful to adequate and proper oversight) are commendable efforts. But to insure compliance with the contract every important provision of the contract must be considered to insure that the objective of maintaining product

free of contamination will be realized. Efforts exerted by Amoco are not "reasonable -- i.e. adequate oversight" unless they thoroughly consider the contractual obligations undertaken by the reseller and require the compliance with all such provisions applicable to the facts and circumstances present. Failure by Amoco to see that reseller's flushing procedure included the check as to how the underground storage was vented (a contractual obligation imposed by Amoco on reseller) points up the inadequacy of its oversight and that its efforts to insure compliance with such obligation falls short of being reasonable in the sense intended by 40 CFR 80.23(b)(2)(iii).

By reason of the foregoing, I find that Amoco has not proven the defense under said subsection (iii).

The foregoing constitute my Findings of Fact and Conclusions of Law.

CIVIL PENALTY

In evaluating a civil penalty, properly to be proposed on the basis of this record, I have given consideration to the factors set forth in 40 CFR 80.330(b).

Gravity of the violation is considered from the standpoints, first, of gravity of misconduct, and second, gravity of potential harm. In the latter respect, the lead content of such product was over two and one-half times the maximum that should be contained in unleaded gasoline. From the first standpoint, I do not find that Respondent Amoco evinces any evidence of bad faith; rather, as previously stated, Amoco has

formulated a commendable program from which the public will benefit, with more comprehensive oversight, coextensive with the provisions imposed on those handling unleaded gasoline. Amoco's policy of thoroughly checking retail outlets before they initiate the sale of unleaded gasoline is a commendable one which will be here considered in mitigation. As above indicated, I do not attribute the failure of checking the vents in the underground storage tanks as a lack of good faith, even though it is unquestioned that such failure was the actual cause of the violation found. Intent is not an element of the offense charged in a civil penalty case; however, the absence of intent can be and is here considered in mitigation of any penalty proposed.

By reason of the foregoing I find that a civil penalty of \$2,200 is appropriate and that assessment against Amoco in such amount is hereby proposed.

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 in 40 CFR 80.327(c):

"FINAL ORDER

It being hereby determined that Respondent Amoco Oil Company has violated 40 CFR 80.22(a), as alleged in the Complaint issued herein, a civil penalty is hereby assessed against Respondent in the sum of \$2,200.00 and Respondent is Ordered

to pay the same by Cashier's or Certified Check, payable to the United States Treasury, within sixty (60) days of the receipt of this Order."

This Initial Decision is signed and filed this 12th day of January 1978, at Kansas City, Missouri.


ALJ