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REGIONAL HEARING
JUN 28 1977
REGION VII

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

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

DOCKET NO. 059363

INITIAL DECISION OF PRESIDING OFFICER

This proceeding was initiated on November 9, 1976, by the issuance of complaints by the Director, Enforcement Division, Environmental Protection Agency, Region VII (the Complainant), against Rose City Oil Company, Melton's 66, and Phillips Petroleum Company (the Respondent, hereinafter known as "Phillips"), alleging that, on or about November 4, 1976, the retail outlet, Melton's 66, offered for sale unleaded gasoline containing in excess of .05 grams per gallon lead content, in violation of 40 CFR 80.22(a) and 80.23(a). It was alleged that the gasoline was delivered to Melton's 66 by Rose City Oil Company. A penalty of $6,000 was proposed against Phillips, the refiner which supplied the gasoline subsequently furnished to Melton's 66 by Rose City Oil Company.

On November 18, 1976, Phillips filed an answer, replying that there had been no violation, that Phillips does not directly supply and deliver nor operate, control or supervise the station. It was further alleged that the violation, if any, was caused by Rose City Oil Company, the reseller, or Melton's 66, the retailer, all in contravention of contractual undertakings and despite reasonable efforts by Phillips to ensure compliance with the contractual undertakings. Phillips also objected to the appropriateness of the $6,000 penalty, and requested a hearing on the matter.

On February 18, 1977, a Consent Agreement and Final Order executed by Rose City Oil Company and Complainant was filed, wherein Rose City Oil Company admitted the facts alleged in the complaint, waived the right to a hearing, and consented to an order that it should pay a civil penalty. On February 24, 1977, the Complainant, "on the basis of new information," concluded that no violation had been committed by Melton's 66, and withdrew the complaint against that party.

7. During the period in which the violation occurred, Phillips was engaging in random sampling of retail outlets to determine their compliance with unleaded gasoline regulations, at the rate of approximately once each six months.

8. Pursuant to the advisory requirements of the various memoranda distributed by Phillips to its jobbers and distributors, Phillips was engaged in the practice of acting upon the advice of any of those parties that a retail outlet was about to offer unleaded gasoline product for the first time, by dispatching a representative of Phillips to draw a sample of the product to be offered as unleaded gasoline, and analyzing such product to determine whether it met EPA requirements.

9. Prior to the violation in this instance, Rose City Oil Company had advised Phillips of the conversion or the intended conversion of leaded gasoline facilities to unleaded gasoline at other retail outlets.

10. In the present instance, Rose City Oil Company did not advise Phillips of the fact that Melton's 66 was offering for sale unleaded gasoline, either before or on November 4, 1976.

11. The only visit by a Phillips representative to Melton's 66 prior to the alleged violation was sometime in the early part of the summer of 1976, but no discussion was made of unleaded gas requirements.

Conclusions of Law

1. The violation alleged in this instance was caused by an action of Rose City Oil Company in the handling and supply of unleaded gasoline to Melton's 66, in contravention of a contractual obligation imposed by Phillips or by the failure of Rose City Oil Company to notify Phillips that Melton's 66 was preparing to offer for sale unleaded gasoline; however, it cannot be found upon the record that Phillips exercised reasonable efforts to ensure that any applicable contractual obligations would be followed to prevent such a violation.

2. The failure of Phillips to adequately carry out a campaign of oversight of the contractual obligations imposed on Rose City Oil Company prevents Phillips from meeting the test necessary to establish the affirmative defense of 40 CFR 80.23(d)(2).

Discussion

It is well established by case law and other administrative decisions that the rationale behind the unleaded gas regulatory requirements is to ensure to the general public the availability of unleaded gasoline and the freedom from contamination of such gasoline, in order that the protection and enhancement of air quality may be carried out without undue delay. Specifically, certain motor vehicles introduced during the 1975 model year and thereafter are equipped with catalytic converters which are susceptible to contamination by leaded gasoline. These catalytic converters depend upon the availability and quality assurance of unleaded gasoline.

In the implementation of congressional intent to provide for air quality, EPA published regulations imposing a high duty of responsibility on refiners of unleaded gasoline to ensure that their jobbers and dealers would handle and distribute unleaded gasoline in such a manner that the possibility of contamination would be minimized. In the furtherance of this intent to prevent contamination of unleaded gasoline, EPA established regulation 40 CFR 80.22(a) and 80.23(a), which establish penalties for the sale or offer for sale of contaminated unleaded gasoline, and impose upon the refiner which supplied such product a penalty, if the refiner's name was displayed at the retail outlet. The refiner may escape liability by establishing an affirmative defense described more fully in 40 CFR 80.23(b)(2).

As relevant to this matter, that defense consists of two elements: First, that the violation was not caused by the refiner, or his employee or agent, and, second, that the violation was caused by the reseller, or retailer supplied by the reseller, in violation of a contractual undertaking imposed by the refiner, and despite reasonable efforts by the refiner (such as periodic sampling), to ensure compliance with such contractual obligations. It is the latter portion of this test that Phillips has failed to meet, in that reasonable oversight would have prevented the violation alleged.

It is significant that the active portion of the campaign of oversight prosecuted by Phillips at the time of this violation consisted principally of a "random" six month sampling frequency, at which violations by retail outlets known to be dispensing unleaded gasoline might be detected.

The document known as Exhibit A to the Branded Jobber Sales Contract contains several references to sampling, but appears to relate only to sampling of Rose City Oil Company by Phillips, and does not require Rose City to sample the retail outlets which it supplies. At any rate, the contract cannot be viewed as a clear instruction to Rose City to sample the unleaded gasoline offered for sale by the retail outlets which it was supplying, and to pass the gathered information along to Phillips in order that Phillips might be assured of compliance by its branded retail outlets, nor does it appear that Phillips engaged in any active monitoring of retail outlets such as Melton's 66 other than through the random six month sampling program, and such tests as might be performed at newly offered unleaded pumps when Phillips received timely notification.

It is also significant that the contractual relationship between Phillips and Rose City did not include any requirement for Rose City to notify Phillips when it began to supply a retail outlet with unleaded gasoline for the first time, but that this requirement existed only through general instructions directed by Phillips to all its jobbers and dealers. While the contract does contain a requirement for Rose City to instruct its employees and retailers in respect of EPA regulations and the contractual requirements, nothing in the contract can be viewed as a requirement for Rose City to notify Phillips of conversions to unleaded gasoline by retailers which it supplies. While it must be acknowledged that not every contingency which may lead to a violation can be foreseen and prohibited by contract, it may be observed that, if Phillips had chosen to more closely monitor the first time offerings for sale of unleaded gasoline, it might have required of its jobbers and dealers, by contract, that it be given notice and opportunity to sample the product to be offered before the first sale. At the time of this violation, Phillips was instead relying on advisory memoranda requiring such notification, which apparently were not closely observed by Rose City.

It is not possible to ascertain from the record the specific direct cause of the violation, although it is apparent it occurred sometime during the handling or delivery of the unleaded gasoline by Rose City Oil Company. While Phillips had established an advisory requirement that it be notified of the opening of new or converted unleaded gasoline tanks, prior to the

offer for sale of product therefrom, it is apparent that Rose City Oil Company either did not understand this requirement or took it so lightly that it did not observe the requirement, since Phillips' witness testified that the unleaded gasoline probably was offered for sale two or three months prior to the time of the violation.

In this context, the requirement for notification to Phillips may not have been sufficient to prevent the violation alleged, even if it had been observed, since the act which caused the violation may have occurred several months after the first offer for sale, and, therefore may not have been detected and prevented by an initial test such as that which Phillips suggests as its method of contractual oversight. More essential to the violation is the fact that Rose City Oil Company either was not familiar enough with the Phillips advisory memoranda concerning dedication of new tanks to unleaded gasoline or the requirements for draining and flushing of tank delivery vehicles to take sufficient action to prevent the violation which occurred, or simply did not consider such advice important enough to be heeded. It is understandable that through the press of business, Rose City initially might have forgotten or neglected to advise Phillips that Melton's 66 was to be supplied with unleaded product, so that Phillips could perform its sampling routine, but the fact that two or three months lapsed after the unleaded gasoline was offered for sale by Melton's 66 and before the violation was discovered by EPA, and that Rose City had not yet notified Phillips indicates strongly that Rose City was paying small attention to any requirement that it notify Phillips of such situations, and that Phillips had not sufficiently impressed Rose City with this scheme of oversight to make it viable. It is more precisely in this area of oversight that Phillips failed to exercise the degree of care required by the applicable EPA regulations, and upon which its liability is founded.

Proposed Civil Penalty

In evaluating the appropriate civil penalty, I have reviewed the entire record and given consideration to the factors of 40 CFR 80.330(b).

The gravity of the violation is viewed from the nature of the misconduct, and the degree of the harm that may result therefrom. Phillips' failure to exercise sufficient oversight is negated to some extent by the

fact that there was in existence at the time of violation a procedure established by Phillips which might have prevented the violation had the procedure been observed, and if the violation did, in fact, result from a "first time fill" of an unleaded gasoline tank. However, as noted above, due to the length of time between the point of time when the tank was given over to storage of unleaded gasoline and the discovery of the violation, the violation may as well have resulted from simple careless handling or delivery practices by Rose City Oil Company.

In addition, the extent of the violation must be considered, and it is found that the excess of lead content is not greatly above that allowed by EPA regulations. Further, Phillips has instituted the foundation of a program, which if more vigorously applied, should operate to prevent similar violations.

Therefore, a civil penalty of $3,000.00 is appropriate, and assessment of that amount against Phillips 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 set forth in 40 CFR 80.327(c).

Final Order

It is hereby determined that Phillips Petroleum Company has violated 40 CFR 80.22(a) as alleged in the complaint issued by the Director, Enforcement Division, Region VII, EPA; and a civil penalty is hereby assessed against Phillips in the amount of $3,000.00, and Phillips is ordered to pay the said amount by cashier's or certified check payable to the United States Treasury within 60 days of the receipt of this order.

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

David R. Tripp
Presiding Officer