UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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REGION VII

IN THE MATTER OF:	)	DOCKET NO. 066892
	)	
Charles Eaton, d/b/a	)	Marvin E. Jones
Chuck's Mobil	)	Administrative Law Judge
Dawson Oil & Transport Co, Inc.	)	1735 Baltimore
Mobil Oil Corporation	)	Kansas City, Missouri 64108

INITIAL DECISION

By Complaints filed July 11, 1977, the Respondents Charles Eaton d/b/a Chuck's Mobil (Chuck's),a retail outlet, Dawson Oil and Transport Company (Dawson), a reseller and distributor of Mobil products, and Mobil Oil Corporation (Mobil) were, severally, charged with violation of 40 CFR 80.22(a), said Section being applicable under the provisions of Section 80.23(a)(1), in that on or about June 22, 1977, the retail outlet (Chuck's), displaying the Mobil brand name at its location in Nebraska City, Nebraska, at 1220 South 11th Street, offered for sale gasoline represented to be "unleaded" but which contained lead content in excess of 0.05 grams per gallon.

Chuck's and Dawson mailed their respective answers, in letter form, generally answering and denying the allegations in the Complaints directed to them. On or about July 25, 1977, the formal answer of Mobil was duly filed which denied generally the allegations in the Complaint directed to it, asserted affirmative defenses, and filed therewith its Motion for Summary Judgment which was denied in my Order dated August 29, 1977, by which Order said cause was set pursuant to Respondents' request for an Adjudicatory Hearing, which was held in Room 255, Federal Building and Court House, 100 Centennial Mall North, Lincoln, Nebraska, on Thursday, October 20, 1977, beginning at 9:00 a.m. By the Order aforesaid, all parties were requested to furnish, in advance, the names of its witnesses and other data pursuant to Section 80.319(e).

Said Order was complied with by Complainant and Mobil. It was noted on the record by Complainant that Chuck's and Dawson were unresponsive to said request; since both appeared per se at said hearing in which they participated and testified but proffered no other witnesses, it was ruled that no sanctions against said parties was warranted and no exception was taken to said ruling.

Having heard the testimony and having reviewed the entire record including pretrial exchanges, the hearing transcript, and exhibits received, all briefs and proposed findings, conclusions and orders submitted, I have concluded that the violation alleged did occur and that Respondent Dawson is legally responsible for such violation based on the following Findings of Fact:

1. Respondent Mobil Oil Corporation was, on June 22, 1977, and is now, a refiner as defined in 40 CFR 80.2(i) whose brand name was displayed at all times pertinent herein at Chuck's Mobil, a retail outlet as defined in 40 CFR 80.2(j) at 1220 South 11th Street, Nebraska City, Nebraska, where "unleaded" gasoline was at all such times offered for sale.

2. Dawson Oil and Transport Company, Nebraska City, Nebraska, is a "distributor" and "reseller" as defined in Sections 80.2(l) and (n), respectively, and at all times pertinent herein supplied unleaded gasoline to said retail outlet (Chuck's).

3. Unleaded gasoline so supplied by Dawson is purchased from Mobil pursuant to a written contract (Mobil Exhibit No. 1), entitled "Wholesale Distributor Agreeement", dated September 26, 1975, which contract contains an Unleaded Gasoline Rider or Addendum, dated June 14, 1976, (Mobil Exhibit No. 2) under which Dawson agrees to adhere to prescribed procedures in the handling of said unleaded gasoline, and to institute and maintain a reasonable program of contractual oversight with respect to retail dealers served by Dawson.

4. None of the employees of Chuck's or Dawson are employees or agents of Mobil.

5. Prior to July 1, 1974, Mobil prepared brochures (Mobil Exhibits No. 4 and 6) entitled "New Mobil Unleaded Gasoline--All The Information You Must Know To Comply With Unleaded Gasoline Government Regulations" and "Delivering Unleaded Gasoline By Tank Vehicles Equipped With Isolated Compartments and Lines", which Dawson certified he had read and understood (Mobil Exhibit No. 5).

6. That the unleaded gasoline received by Dawson from Mobil was uncontaminated, as indicated by Mobil's unleaded tracking log (Mobil Exhibit No. 7) is unquestioned in this record.

7. Dawson hauls its product from the Omaha terminal to its bulk plant. The last date (prior to June 22, 1977) when delivery of unleaded gasoline was made to Dawson by Mobil from its Omaha Terminal was on June 9, 1977, at which time a test showed lead content of said product to be 0.02 grams lead per gallon.

8. A routine sample taken by Mobil from the customer pump at Dawson's bulk plant service station on June 13, 1977, showed the unleaded gasoline there offered for sale to have a lead content of 0.011 grams. Unleaded gasoline sold to Chuck's on June 22, 1977, was drawn through this pump into the Dawson transport for delivery to Chuck's.

9. Mobil obtained and tested a sample of the unleaded gasoline offered for sale at Chuck's on June 21 (the day before the instant EPA inspection) and found its lead content to be 0.045 grams per gallon (Mobil Exhibit 7, at page 2; TR 78).

10. Said EPA inspection on June 22, 1977, consisted of taking a sample of unleaded gasoline from Chuck's unleaded pump (after five gallons

had been first drawn) and said Inspection was within an hour after delivery by Dawson's transport to Chuck's of 300 gallons of unleaded gasoline. Said sample identified as No. 066892 was forwarded to the EPA Laboratory in Kansas City, Kansas (EPA Lab).

11. Said sample was received at EPA Lab on June 30, 1977, and tested by an EPA Physical Science Aid on July 1, 1977, with a field test kit and found to be contaminated in that the lead content exceeded 0.05 grams lead per gallon, for which reason it was referred for analysis on the Atomic Absorption Spectrophotometer (AA).

12. Said AA analysis was made on July 1, 1977, and revealed that the lead content of said sample was 0.057 grams lead per gallon.

13. There is no direct evidence on how the subject contamination occurred.

14. The test for lead in gasoline (AA), (see finding 11, supra) is prescribed by Appendix B to 40 CFR Part 80--Regulation of Fuels and Fuel Additives and is essentially that used by the American Society for Testing and Materials (ASTM), see 39 FR 24891 et seq.

15. Said Appendix B, Section 8.1.2 (Page 232) Reproducibility provides: "The results submitted by each of two laboratories should not be considered suspect unless the two results differ by more than 0.01 g/gal."

16. A test by other laboratories achieving answers showing lead content of the test sample as 0.047 g/gal or 0.067 g/gal would each be compatible with EPA's laboratory test finding of lead content of 0.057 g/gal, under the provisions set out in Finding 15, supra (TR 74).

17. To facilitate protection of the integrity of unleaded gasoline, Mobil uses a system of color coding for both the product and hardware at the Omaha Terminal and all other facilities including bulk and retail outlets. Premium and Regular are dyed, unleaded gasoline is undyed. Hardware is red and white for premium; red for regular; and red and blue for unleaded.

18. Mobil uses a system of random sampling where sample-taking simulates the sampling by EPA. Said samples are tested at Mobil's Princeton Laboratory who reports "failures" to Mobil immediately. Mobil calls the sales district who in turn notifies the dealer to stop selling that unleaded gasoline. The facilities, including lines are flushed and the station is resampled before sale of unleaded gasoline to the consumer is resumed.

19. Mobil's sampling program is used by them as a means to insure that the distributors and dealers are adhering to their guidelines for handling unleaded gasoline up to the sale to the consuming public. (TR 83, 84).

20. Dawson has handled Mobil unleaded gasoline for several years and the subject Complaint is the only instance where the lead content of such product has been found, or alleged, to exceed 0.05 grams lead per gallon. On receiving a call from Mobil's district office, in this instance, the pumps were locked and sales were resumed only after sampling and advice that the test was "good". (TR 104).

21. Dawson has been taught the procedures for handling unleaded gasoline and adheres to them strictly.

22. Dawson received notice of the instant Complaint on July 13, 1977, and immediately advised Chuck's who agreed not to sell unleaded

product until sampling and testing. The sample then taken was "driven" to Western Laboratories where it tested 0.014 grams per gallon (Dawson Exhibit No. 1). From June 22 to July 13 several deliveries had been made to Chuck's, so the batch of unleaded gasoline tested by EPA had been sold when Dawson's sampling was done.

23. Dawson handles approximately 5,000 gallons of unleaded gasoline per month. Over the years, he has personally made 50 to 70 percent of tank wagon deliveries.

24. Sampling and testing by Dawson was accomplished again on August 8, 1977, showing lead content of less than 0.005 grams (Dawson Exhibit No. 2).

25. The subject delivery of unleaded gasoline from Dawson to Chuck's (by tank wagon) was made by Dawson's son, who has made such deliveries for two or three years, and has received training in procedures for handling of unleaded gasoline from Dawson himself. Young Dawson was not called as a witness, nor could Dawson state whether a mishap of any description did in fact occur at the time of the subject delivery to Chuck's (TR 109).

26. Dawson's son was aware that 2 gallons of residue left in the tank wagon (compartment) was sufficient to contaminate the said 300 gallons delivered to Chuck's, and had been instructed as to the importance of draining the lines and using the diesel side of the pump to meter unleaded gasoline.

27. Each separate compartment of the Dawson tank wagon has its own outlet, there being five valves across the rear. A separate hose is used for unleaded gasoline. Drivers are instructed on making deliveries to unload unleaded first.

28. After Mobil's test on June 21, 1977 (Finding 9, supra), the only addition to Chuck's unleaded gasoline storage was the delivery by Dawson, which was approximately one hour before the EPA sample was taken (TR 128). Approximately 35 gallons was in said tank prior to subject delivery.

29. After the subject delivery on June 22, Chuck's received a subsequent delivery from Dawson on June 28, prior to the July Notice of Contamination (TR 129).

30. Neither the tanks nor pumps at Chuck's are locked at night; however a main switch (on the inside), when thrown, deactivated the pumps.

31. The filler pipes of the tanks, which were unlocked at night, are alongside a busy highway. Sufficient surveillance exists that anyone in that area would be seen, for which reason witness and Respondent Eaton (Chuck's) did not consider vandalism as a valid theory to explain the subject contamination (TR 132).

32. The operator of Chuck's had no control over the quality of the unleaded gasoline sold by him, as all deliveries to his storage were made by Dawson.

CONCLUSIONS OF LAW

On the basis of the facts contained in this record:

1. Mobil has proven the defense provided by 40 CFR 80.23(b)(2)(iii) in that the subject violation [under Section 80.22(a)], was caused by the action (the employee) of its reseller (Dawson) in violation of a contractual undertaking imposed by Mobil on such reseller designed to prevent

such action, and despite reasonable efforts (by Mobil) to insure compliance with such contractual obligation.

2. Dawson, a "reseller", as that term is defined by Section 80.2(n), is liable for the violation as here charged under the provisions of Section 80.21(a) for the reason that he has failed to prove or demonstrate by substantial evidence that subject violation was not caused by his employee, when such fact is indicated by consideration of all of the substantial evidence in the record.

3. The evidence shows that Respondent Charles Eaton (Chuck's) is not liable for the violation for the reason that said Respondent did not have the means or opportunity to have caused the violation charged.

4. Findings of Fact 15 and 16 (Reproducibility) should be considered in determining the gravity of the subject violation.

DISCUSSION

I have concluded hereinabove that Mobil has imposed a contractual obligation on Dawson designed to prevent violations such as here found and that such violation occurred despite reasonable efforts on the part of Mobil to insure compliance by Dawson and his employees. On this record, it is also apparent that the violation occurred despite reasonable efforts on the part of Dawson, to insure delivery of an uncontaminated product; however, we must conclude, on the basis of the evidence here presented, that such violation was caused by the act of Dawson's agent or employee, for which action Dawson is legally accountable.

Complainant points out that Mobil's sampling program, as promulgated, is inadequate and therefore urges that reasonable efforts

were not by Mobil expended to such an extent as to afford a defense under Section 80.23(b)(2)(iii). However, here, as in other cases previously decided, we examine the facts presented on this record, to find what action was taken in the instance under consideration. Though relevant, what action was possibly contemplated under the quality control program then in existence is not determinative of the inquiry as to whether reasonable efforts were exerted to insure compliance with such contract. The salient question in this and like cases is whether the duty placed on Mobil to protect the integrity of its unleaded product up to the point it is offered at retail was by it recognized; and whether the actions taken by it pursuant to said recognition were reasonably calculated to require its reseller to so comply with its contractual obligations in its handling of said product that said duty could be satisfied.

On this record, Mobil presented its unleaded gasoline tracking log showing that its product sold to Dawson and sampled at Dawson's bulk plant customer pump on June 13, 1977 (9 days prior to the EPA sampling) had a lead content of 0.011 grams per gallon. Mobil further obtained and tested a sample at the subject retail outlet on June 21--the day prior to the EPA sampling--and said product tested 0.045 grams lead per gallon.

This action demonstrated that Mobil was then exerting efforts to insure compliance by Dawson with requirements respecting the handling of unleaded gasoline. Dawson's testimony on this record and his past history of compliance demonstrates in a number of ways that he was well informed as to the hazards present in the handling of unleaded gasoline and that it is his contractual duty as a reseller to use measures available to prevent contamination of the product. In the premises, whatever the cause of the subject contamination, I do not find it is attributable

to a failure on the part of Mobil to exert reasonable efforts to insure compliance by Dawson with his contractual obligations.

It should be apparent that the findings made and the conclusions reached herein are confined to the cause here under consideration, and are based solely on the facts and circumstances revealed by the instant record, which I have endeavored to comprehensively outline in the foregoing Findings of Fact.

CIVIL PENALTY

In determining the amount of the civil penalty properly to be assessed on the basis of the facts contained in this record, I have given consideration to factors set forth in 40 CFR 80.330(b)(1), which provides, as follows:

> "(1) In evaluating the appropriateness of such proposed penalty, the Regional Administrator must consider (i) the gravity of the violation, (ii) the size of respondent's business, (iii) the respondent's history of compliance with the Act, (iv) the action taken by respondent to remedy the specific violation, and (v) the effect of such proposed penalty on respondent's ability to continue in business."

I am authorized, under Section 80.327(b) to increase or decrease the amount proposed pursuant to Guidelines for Assessment of Penalties, and the Regional Administrator is granted such authority under Section 80.330(b)(2).

Gravity of the violation can and will be considered from the standpoints, first, of gravity of misconduct and, second, gravity of potential harm that could result. On the facts in this record the violation, based on hard, though circumstantial, evidence indicates that the subject violation occurred in the face of enlightened, ongoing and determined efforts on the part of Dawson to maintain the integrity of the unleaded gasoline distributed by him. Considered together with his history of compliance--this is the only instance where product distributed by him has been found or claimed to be in violation--the gravity, from the standpoint of misconduct, is slight. Gravity of potential harm is slight, also, as the test admittedly was 0.057 grams lead per gallon; and this, though unquestioned in the record must be considered in light of the Appendix B comment on "reproducibility", i.e., that a test by another laborabory could vary in an amount of .01 gram per gallon greater than the quantum of violation charged and not be "suspect". The action taken by Dawson, though after the fact, was, as he emphatically here points out, his first opportunity to check the lead content of the product after he learned of the complaint. No sample is required by the regulations to be left with the operator of the retail outlet--thus none was left. But Dawson demonstrated his determination that the Mobil product at outlets served by him be free of contamination. He drove and carried a sample to the laboratory immediately following notice of the violation, receiving assurance that the product was free of contamination; then a later test was procured to make sure that the product remained in compliance. These good faith efforts in the face of the facts shown on the record are commendable action that should be encouraged and indicate that future violations are unlikely.

By reason of the foregoing, I find that a civil penalty in the sum of $50.00 is appropriate and assessment against Dawson in such amount is hereby proposed.

PROPOSED FINAL ORDERS

This Initial Decision and the following proposed Final Orders assessing a civil penalty and two proposed Final Orders of Dismissal shall become the Final Orders of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided in 40 CFR 80.327(c):

"FINAL ORDER NO. 1

It being hereby determined that Respondent Dawson Oil and Transport Company, Inc. has violated 40 CFR 80.21(a), as alleged in the Complaint issued herein, a civil penalty is hereby assessed against Respondent in the sum of $50.00 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."

"FINAL ORDER NO. 2

I do not find that Respondent Charles Eaton, d/b/a Chuck's Mobil is answerable for the violation charged against him and said Complaint against said Respondent is hereby dismissed."

"FINAL ORDER NO. 3

I do not find that Respondent Mobil Oil Corporation is answerable for the violation charged against it and said Complaint is hereby dismissed."

This Initial Decision is signed and filed this 15th day of December 1977, at Kansas City, Missouri.

Marvin E. Jones

ALJ