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

IN THE MATTER OF: GOMER'S ASB OIL COMPANY 7414 TROOST KANSAS CITY, MISSOURI 64131	)))))	DOCKET NO. 033260

INITIAL DECISION OF PRESIDING OFFICER

This proceeding originated in a complaint issued by the Director, Enforcement Division, Environmental Protection Agency, Region VII, alleging violations by respondent of 40 CFR 80.22(b), 80.22(d), and 80.22(e)(2), promulgated pursuant to Section 211(c) of the Clean Air Act, in that respondent at its retail outlet "failed to properly display the 'Federal law prohibits ...' sign, failed to properly label leaded pump number 4-66442, and failed to offer for sale unleaded gasoline," all on or about December 23, 1975. The complaint proposed to assess a civil penalty of $500.00.

Pursuant to written request of respondent, the matter was assigned for hearing to John H. Morse, Regional Counsel, Environmental Protection Agency, Region VII, as presiding officer, and a hearing was held by such presiding officer on October 6 1976, pursuant to written notice to the parties. Complainant appeared by Henry F. Rompage, Legal Branch, Enforcement Division, EPA Region VII; and Edward Moody, President and principal or sole owner of respondent corporation, appeared for respondent. The parties introduced oral testimony and documentary evidence; and subsequently, after receiving transcripts of the evidence, the parties filed with presiding officer their respective suggested findings and supporting memoranda.

The presiding officer having heard the evidence, reviewed the transcript, and considered the oral and written arguments of the parties, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Prior to respondent's involvement with the retail outlet in question, a retail gasoline business was operated on those premises for several years by Clark Oil Company under lease from the owner, a non-resident, and by sublease to its "dealer," one Andy Calia. These lease arrangements were terminated and the statio relinquished to the owner on August 15, 1975.

2. On or about August 15, 1975, the real estate agent managing the property contacted Mr. Moody and shortly thereafter leased the premises to him. Respondent received possession sometime in September and was in business by October 1, 1975.

3. Mr. Moody was aware that a Clark Oil station had been operated on this premises for several years as he passed it daily on his way to his principal place of business, which included another service station.

4. Mr. Moody did not know the volume of business in gallons or dollars which the Clark Oil station had done; did not seek such information either from Clark or from the sublessee Mr. Calia, and probably would not have received this information if he had sought it. From his casual observation of Mr. Calia's operation, Mr. Moody had not thought that the past volume was as much as 200,000 gallons per year; but he fully believed that under his operation, he could far exceed that volume, and at the time of the alleged violation, he was selling approximately 8,000 gallons per week.

5. The Director, Enforcement Division, Environmental Protection Agency, Region VII, mailed a letter to respondent dated October 22, 1975, designated "Notice of apparent violation of 40 CFR Part 80" which referred to an earlier inspection on October 2, 1975, disclosing that unleaded gasoline was not available and offered for sale. The letter attached a copy of the applicable unleaded fuel regulations and stated in summary that unleaded gasoline was required to be offered for sale "at all retail outlets selling 200,000 or more gallons of gasoline." The letter requested respondent to sign and return the attached "statement of applicability," which was a form on which could be checked one of two alternate statements, the first being a statement that the regulation does not apply to the retail outlet in question because it had not sold the required number of gallons in any calendar year beginning with 1971, and the second being simply a statement that the regulation does apply to the retail outlet in question. Mr. Moody signed and returned this statement with the following marginal notation opposite the first (or does not apply) alternate statement: "have been in business only 90 days." Returned to EPA with this statement of applicability was the entire letter including the copy of the regulation, at the bottom of which respondent wrote this notation: "We leased this station effective 8/15/75. Have not been able to obtain allocation for no lead yet. Should be available in next several weeks."

6. On December 23, 1975, respondent was not offering for sale at such retail outlet unleaded gasoline. Respondent obtained and offered for sale unleaded gasoline at this retail outlet approximately two weeks after a conference with complainant's personnel following receipt of the complaint.

7. On December 23, 1975, respondent failed to display in the immediate area of its outside island or pumpstand, the required sign or notice: "Federal law prohibits the introduction of any gasoline containing lead or phosphorous into any motor vehicle labeled 'Unleaded Gasoline Only'"; and also failed to label leaded gasoline pump No. 4-66442 at such retail outlet as containing lead anti-knock compound.

Conclusions of Law

1. At the time of the alleged violation, on December 23, 1975, respondent was the lessee and operator of the retail outlet, Gomer's ASB Oil Company, 7414 Troost, Kansas City, Missouri, and was a "retailer" within the definition of 40 CFR 80.2(k).

2. By reason of the facts set forth in Finding of Fact No. 7 above, respondent was in violation of 40 CFR 80.22(d) and 80.22(e)(2), as alleged in the complaint.

3. Complainant has failed to prove an affirmative case, by preponderance of the evidence, with reference to the issue whether respondent was required by law or regulation to offer unleaded gasoline for sale at said retail outlet on December 23, 1975. Accordingly, no violation of 40 CFR 80.22(b) is established.

Discussion

The lack of the required warning sign on one pumpstand or island, and the required label on the one leaded gasoline pump, were not controverted, either in respondent's answer or in the testimony.

With respect to complainant's contention that respondent was required to offer unleaded gasoline for sale, the preponderance of the evidence indicates that respondent had not sold as much as 200,000 gallons in the calendar year 1975, which was its first year of operation of this retail outlet. Complainant offered only the testimony and report of its inspector, Mr. Stitt; but the notation in the report that the sales at the station were about 16,000 gallons per week was purely hearsay, apparently based on a statement attributed by the inspector to one Ron Smith, an employee of respondent, who is not shown to have had any authority to

make such statement or any knowledge on which to base it. Respondent's president testified that the sales were about 8,000 gallons per week; and that is the only competent evidence on that issue. Complainant seeks to establish respondent's obligation to offer unleaded gasoline for sale by evidence indicating that respondent's predecessor at this location had sold more than 200,000 gallons of gasoline in each year of its operation from 1971 through August 15, 1975. This evidence is in the form of a letter (Exhibit C-2) from an official of Clark Oil and Refining to complainant's attorney, itemizing the total gallons for each of such years which the company delivered to that station and sold to the retail operator Andy Calia. Although respondent made no objection to the introduction of this exhibit in evidence, it should be noted that this not only is an unsworn statement, but does not specifically relate to actual retail sales, although there is logic to complainant's contention that if the document is to be considered evidence of deliveries to the station, 400,000 to 900,000 gallons per year, there is a reasonable inference to be drawn that retail sales in one or more of those years must have exceeded 200,000 gallons. However, I have concluded that these sales at the Clark Oil station, even if proved, cannot be used to establish, either by themselves or in conjunction with admitted sales by respondent in 1975, an obligation on the part of respondent to offer unleaded gasoline at the time of the alleged violation. This obligation is imposed by the regulation, 40 CFR 80.22(b) on an operator of "one or more retail outlets with gasoline sales as described in paragraph (b)(1)(i) of this section." That paragraph requires that unleaded gasoline be offered for sale "at each retail outlet: (i) at which 200,000 or more gallons of gasoline were sold during any calendar year beginning with the year 1971." It is highly questionable whether the retail outlet operated by respondent is the same retail outlet which was selling gasoline at the same geographic location prior to August 15, 1975. Since that date there has been a change of lessee-operator, a change of business name, a change of gasoline brand and source of supply, and a change in some of the equipment including some pumps. Moreover, where an obligation to sell unleaded gasoline is predicated on historic facts, respondent should not be held accountable unless those facts were known to or reasonably ascertainable by respondent. That is not the case here. Not only did respondent not know of the previous sales volume, but there is no evidence that he could have obtained such figures. There is no evidence that the Clark Oil station offered unleaded gas or that it was ever cited for not offering it.

Respondent's notations in response to complainant's letter of October 22, 1975, indicated respondent's belief that Section 80.22(b) did not apply to its business, or at the very least indicated some confusion on that point; but apparently no effort at clarification was made by complainant until the inspection on December 23, 1975, which led to the issuance of the complaint.

Civil Penalty

Respondent indicated in its answer and elaborated in Mr. Moody's testimony that it had displayed the required signs and labels on its pumpstands, but had removed some in replacing certain pumps and had inadvertently failed to put back all of the signs and labels. This was done promptly after the inspection on December 23, 1975. This rather minor violation might have been excused except for the fact that on an earlier inspection, prior to the changing of pumps, the lack of certain signs and labels was brought to respondent's attention and corrective action was then taken. The requirement for such signs and labels is an integral part of a carefully detailed regulatory scheme intended to guard against costly accidental damage to emission control devices in automobiles designed to operate only on unleaded gasoline. While the evidence does not indicate any wrongful intent or willful disregard of the regulations on the part of respondent, it does show some want of proper diligence. With this consideration of the gravity of the violation and in view of the facts that respondent's business was at the time of the violation in a developmental stage and that, except as above noted, there is no adverse history of respondent's compliance with the Clean Air Act, and respondent's prompt action to remedy the violation and comply with the regulations, I recommend that a civil penalty be assessed against respondent in the sum of $100.00.

This initial decision and the following proposed final order assessing penalt shall become the final order of the Regional Administrator unless appealed to or reviewed by the Regional Administrator as provided in 40 CFR 80.327(c):

FINAL ORDER

It having been determined that respondent Gomer's ASB Oil Company, 7414 Troos Kansas City, Missouri, violated 40 CFR 80.22(d) and 80.22(e)(2), as alleged in

the complaint issued herein, a civil penalty is hereby assessed against said respondent in the sum of $100.00, and said respondent is ordered to pay the same by Cashier's or Certified Check, payable to the United States Treasury, within sixty (60) days of receipt of this order.

This initial decision is signed and filed this 25th day of April, 1977.

John H. Morse
Presiding Officer