77 MAY 16 AM 10: 53

REGIONAL HEAR. MAY 10 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. 030756

INITIAL DECISION OF PRESIDING OFFICER

This proceeding was initiated on October 8, 1976, through the issuance of complaints by the Director, Enforcement Division, Environmental Protection Agency, Region VII, (the complainant) against Bartley 66 Service, J & D Oil Company, and Phillips Petroleum Company, alleging that, on or about September 21, 1976, Bartley 66 Service, Bartley, Nebraska, offered for sale unleaded gasoline with lead content in excess of .05 grams per gallon, in violation of 40 CFR 80.22(a) and 80.23(a). It was further alleged that said gasoline was supplied by J & D Oil Company. A penalty of $6,000 was proposed against Phillips Petroleum Company, the refiner whose brand name appeared at the retail outlet.

On November 3, 1976, Phillips Petroleum Company (the respondent) answered by denying any violation of the relevant regulations, stating that "Phillips does not directly supply and deliver any leaded or unleaded gasoline to Bartley 66 Service Station, nor does it own, lease, operate, control or supervise such service station." The answer by Phillips suggested that, if any violation occurred, it was not caused by Phillips but by an action of the retailer or the reseller, in contravention of contractual obligations, and despite reasonable efforts by Phillips to ensure compliance with these contractual obligations and the relevant regulations.

The complaint against J & D Oil Company was resolved by a consent agreement and final order issued by Charles V. Wright, Acting Regional Administrator, on November 12, 1976, which included a finding of fact that:

> On or about September 21, 1976, the retail outlet, Bartley 66 Service, ... offered for sale unleaded gasoline containing in excess of .05 grams per gallon lead content, said gasoline having been supplied by J & D Oil Company.

The final order also contained a conclusion of law "By reason of the facts set forth in the 'Findings of Fact,' it is concluded that the respondent has violated 40 CFR 80.21."

The complaint against Bartley 66 Service was withdrawn by complainant on November 11, 1976, "on the basis of new information."

On January 3, 1977, the undersigned was designated by Charles V. Wright, Acting Regional Administrator, as Presiding Officer in this matter for purposes of the further proceedings. On January 6, 1977, an order was issued setting hearing for February 9, 1977, advising the parties to proceed with presentation of documentation necessary to the hearing, and any appropriate settlement proceedings.

By motion of January 31, 1976, complainant requested a setting for submittal of proposed findings of fact, conclusions of law, and associated documents, stating that a stipulation of January 24, 1977, obviated the need for a hearing.

The stipulation entered between the complainant and Phillips on January 24, 1977, states, in part: "8. That the unleaded gasoline delivered to the distributor was in conformity with Section 80.2(g)," "9. That the testimony of John W. Cameron in the hearing of 11/22/76, ... be adapted (sic) as applicable to this matter and be incorporated by reference ...," and "11. That there remains for factual determination only the issue of whether or not Phillips can establish the affirmative defense provided at 40 CFR 80.23(b)(2) et seq."

The provisions of 40 CFR 80.23(b)(2)(iii) et seq., which appears to be the only section applicable in light of the material submitted by the parties, state as follows:

> In any case in which a retailer or wholesale purchaser-consumer, a reseller (if any), and 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:
>
> ...
>
> 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 insure compliance with such contractual obligation.

Having reviewed the entire record, including the exchanges between the parties, the stipulation, and the briefs and proposed findings of fact and

conclusions of law and orders submitted by the parties, I have concluded that the violation alleged in the complaint against Phillips Petroleum Company did occur, that Phillips Petroleum Company is legally responsible for the violation and should be assessed a civil penalty based on the following findings of fact and conclusions of law:

Findings of Fact

1. On September 21, 1976, the retail outlet, Bartley 66 Service, Bartley, Nebraska, did offer for sale unleaded gasoline with a lead content in excess of .05 grams per gallon.

2. The unleaded gasoline containing lead in excess of .05 grams per gallon was supplied to Bartley 66 Service by the distributor, J & D Oil Company, Kearney, Nebraska.

3. On September 21, 1976, Bartley 66 Service displayed the Phillips Petroleum Company corporate, trade, or brand name.

4. J & D Oil Company has consented by stipulation with complainant to a conclusion that, on or about September 21, 1976, it violated 40 CFR 80.21, in that, on or about September 21, 1976, the retail outlet, Bartley 66 Service, Bartley, Nebraska, offered for sale unleaded gasoline containing in excess of .05 grams per gallon lead content, said gasoline having been supplied by J & D Oil Company.

5. On September 21, 1976, Phillips Petroleum Company was a "refiner" within the meaning of Section 80.23.

6. By the stipulation dated January 24, 1977, Phillips Petroleum Company and complainant have agreed that the gasoline delivered to the distributor was in conformity with Section 80.2(g).

7. The stipulation of January 24, 1977, acknowledges the agreement of complainant and Phillips that "A valid finding of contamination has been made and established in this case."

8. The transcript of the testimony of John W. Cameron given in the matter of Phillips Petroleum Company, Docket No. 059317, has been stipulated by the parties as applicable to this matter and to be incorporated by reference to this matter. That testimony describes the program of Phillips Petroleum Company for informing its jobbers and dealers of the requirements of the unleaded gas program through a series of letters directed to those parties,

providing for the procedures which must be followed in various circumstances such as the furnishing of unleaded gas when a new tank is to be utilized solely for unleaded gas, the changeover of an existing leaded gasoline tank to an unleaded tank, the requirements attendant thereto with respect to flushing of existing appurtenances, and the requirements for testing of the unleaded gasoline product delivered through such system before it is offered for sale.

9. Through the affidavit of Mr. George P. W. Boll, a Phillips employee, it has been shown that Phillips took periodic samples of the unleaded gasoline at Bartley 66 for the purpose of testing the lead content thereof, with two tests having been conducted in the 14 months preceding the violation.

Conclusions of Law

1. The violation which is the subject of this proceeding was caused by an act of J & D Oil Company, a distributor of Phillips gasoline.

2. A contractual relationship existed between Phillips Petroleum Company and J & D Oil Company at the time of the violation.

3. The record is insufficient to establish that the contractual relationship between the respondent and J & D Oil Company was sufficient to prevent a violation such as the subject of this action.

4. It has not been established upon the record that Phillips Petroleum Company exercised reasonable efforts to assure that the distributor, J & D Oil Company, and its employees, understood that the contractual agreement between the parties was intended to prevent actions such as those which created the violation in this instance, or that Phillips Petroleum Company undertook a reasonable program of oversight to ensure compliance with any such contractual obligations.

Discussion

It has been well established that the regulations which are pertinent in this proceeding serve a valid and important public health protection role by the prevention of the introduction of lead and other pollutants into the ambient atmosphere. In the implementation and maintenance of this program of regulatory control, the Environmental Protection Agency has seen fit to provide that refiners of gasoline exercise a certain degree of care, not only

in the manufacture of their unleaded gasoline product, but also in the manner in which the unleaded gasoline product is distributed and sold. Accordingly, the regulations clearly provide that, when a retailer or distributor of gasoline acts contrary to certain sections of the regulations, the refiner shall be deemed to have violated the regulations as well.

Exceptions to this concept are found in the section which the parties have stipulated in this matter as determinative of whether Phillips has violated Section 80.22. Section 80.23(b)(2)(iii) affords the refiner a legal excuse if he can establish that the violation was caused by action of a reseller or retailer in violation of a contractual undertaking imposed by the refiner, and despite reasonable efforts by the refiner to ensure compliance with the contractual obligation.

The question of what actions are sufficient to constitute "reasonable" efforts to ensure compliance with contractual obligations was discussed extensively by Administrative Law Judge Jones in the matter of Performance Stop, Docket No. 05937, a proceeding which is closely analogous to the one at hand, in that it involved the same respondent, Phillips Petroleum Company, and contractual language which is similar, if not identical, to that evident in this case. The parties have acknowledged the significance of that matter by adopting as appropriate to this proceeding, a portion of the transcript of the testimony given by a Phillips employee which is apparently intended to show the program of education and oversight exercised by Phillips to prevent the sale or offer for sale of unleaded gasoline in violation of Environmental Protection Agency regulations.

However, there are several important factual distinctions between the Performance Stop case and this matter which are deserving of notice. First, in the transcript of the testimony of Mr. Cameron, taken from the Performance Stop proceeding, at page 17, line 15, a document is discussed which is identified as a "Quality Assurance Obligation," purportedly controlling the manner of handling, loading, and unloading of unleaded gasoline by the distributor. That contractual relationship has not been shown to exist between Phillips and J & D Oil Company since it is not within the record to be considered for this proceeding; therefore, the demonstration by Phillips of contractual undertakings to prevent a violation of the regulations falls short of the showing made in the Performance Stop case.

In addition to the absence of such specific instructions to J & D Oil Company, there is a further distinction to be drawn in that the basis for a finding concerning the reasonable efforts by Phillips to ensure compliance with the contractual obligations which existed in the Performance Stop case was based, in part, upon the testimony of the tank truck driver who had delivered the unleaded gasoline product in such a manner as to cause a violation of Section 80.22. The driver testified that, had he known of the amount of product required to create a violation, he might have acted in a different manner. That testimony tended to show Phillips' failure to exercise reasonable oversight.

In the instant matter, there is no such testimony, nor in fact, is there any testimony tending to indicate that the distributor or its employees had any knowledge of the quantity of leaded gasoline which might create a violation, if added to unleaded gasoline. The only documents which tend to show that Phillips did attempt to educate the distributor concerning the possibilities of a violation of the unleaded gas regulations are general documents relating to the availability of unleaded gasoline, and warnings that the distributor should familiarize its employees with those regulations. There are certain general instructions as to the requirements for the first time filling of storage tanks for unleaded gasoline, with specific instructions as to tanks which have not been used before, those previously utilized for leaded gasoline product which are to be converted to unleaded gasoline, and the flushing procedures which are necessary to clear connecting lines, pumps, and hoses if there may be leaded product within those appliances.

In fact, the contractual obligations which respondent points to as an example of its efforts, at Section 10 of the jobber sales contract with J & D Oil Company, may be as well construed as an effort to prevent the jobber from mingling Phillips Petroleum products with gasoline of another brand, or other chemical additives which may adulterate Phillips product and thereby impugn the business reputation of Phillips by the offering for sale of a "watered down" Phillips product.

Regardless of the adequacy of the contractual undertakings by Phillips in this instance to prevent violations such as the one under consideration, there is not sufficient information in the record to constitute a showing

of reasonable efforts to ensure compliance with any contractual undertakings. The testing program which Phillips proposes as a demonstration of its exercise of reasonable efforts to ensure compliance with the contractual undertakings of J & D Oil Company and Bartley 66 is reflected in the affidavit of Mr. George P. W. Boll. Mr. Boll states that he sampled the unleaded gasoline offered for sale at Bartley 66 on July 11, 1975, and on May 15, 1976, at which times the unleaded gasoline contained less than .05 grams of lead per gallon. While efforts such as these to determine whether the distributors and retailers utilizing Phillips products are, in fact, offering and distributing such products in compliance with Environmental Protection Agency regulations, are laudable, they are, of themselves, not sufficient to excuse Phillips from liability. It is more significant that the only indication in Mr. Boll's affidavit of efforts by Phillips to educate J & D Oil Company concerning unleaded gas requirements is a statement that "Phillips had previously made J & D Oil Company aware of the proper procedures for flushing and dedicating tanks to unleaded gasoline. These procedures were not followed...." The only actual proof of Phillips' attempts to make J & D Oil Company aware of unleaded regulations is through the testimony of Mr. Cameron in the Performance Stop case, stipulated as applicable to this matter, and the exhibits attached thereto. As noted above, the exhibits show communications by Phillips to jobbers and distributors such as J & D Oil Company (although, as in the Performance Stop case, there is no direct proof of mailing to individual distributors), but nowhere in the exhibits is there any evidence of instructions to distributors such as J & D Oil Company concerning distributor tank truck operations for compliance with unleaded gas requirements, except for one statement that "Tankwagon and transport special handling instructions at exchange points and terminals will be forthcoming." (Attachment 1 to testimony of Cameron.) Such general instructions as have been shown to have been directed to J & D Oil Company do not meet the test of "reasonable efforts to insure compliance."

In conclusion, the record has failed to show that Phillips exerted reasonable efforts to assure that its distributors and retailers, particularly J & D Oil Company, would conduct their affairs in the distribution and sale

of Phillips product to prevent the offer for sale of unleaded products with a lead content greater than 0.05 grams per gallon. Accordingly, a civil penalty must be assessed against Phillips Petroleum Company.

Proposed Civil Penalty

The penalty of $6,000.00, proposed by complainant, has been reviewed in light of the provisions of 40 CFR 80.330(b), and the guidelines published August 29, 1976, 40 FR 39973. Of the factors to be considered, suggested in that guideline, the following are applicable:

1. The action taken by Phillips to remedy the violation consisted of the prevention of the possibility of sale of the contaminated unleaded gasoline after the notice of violation by the complainant. It is not clear from the record whether this action was taken by Phillips, at the direction of Phillips, or simply by action of Bartley 66, but, at any rate, the pump through which the contaminated product might be delivered was locked until tested by a Phillips employee, and only reopened for sale after the unleaded gasoline was found to be in compliance with Environmental Protection Agency regulations.

The further actions of Phillips to remedy the possibility of such violation are noted in complainant's brief where the existence of a new contract with jobbers such as J & D Oil Company is recognized, which apparently places further responsibilities on such jobbers to avoid the actions which led to this violation.

2. The history of performance of Phillips Petroleum Company in connection with violations such as the subject of this proceeding is difficult to ascertain, as Phillips is a refiner whose service area encompasses the entire nation, and the number of violations which may have occurred with respect to factual circumstances similar to this incident cannot be readily found. It seems germane to this proceeding to view the history of performance as confined to the parties involved. In this light, there can be no additional liability levied against Phillips on the facts of this case.

3. In addition to these factors, it is significant that the violation at hand occurred despite Phillips' good faith efforts to educate its jobbers and retailers, and that Phillips did not actively participate in the immediate actions which led to the violation, but resulted instead from its passive

failure to fully carry out its responsibilities under the unleaded gas regulations. Upon consideration of the foregoing factors, I find that a civil penalty of $3,000.00 is appropriate and such amount should be assessed against Phillips.

Final Order

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

This order shall become final unless appealed or reviewed by the Regional Administrator as provided by 40 CFR 80.327(c).

This decision is signed and filed this 9th day of May, 1977, at Kansas City, Missouri.

David R. Tripp
David R. Tripp
Presiding Officer