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IN THE MATTER OF:	)	DOCKET NO. 056048
	)	
CLEVE STUTZMAN, d/b/a/ STUTZMAN FINA	)	Marvin E. Jones
JONES OIL COMPANY	)	Administrative Law Judge
AMERICAN PETROFINA, INC.	)	1735 Baltimore
	)	Kansas City, Missouri 64108

INITIAL DECISION

By amended Complaint filed on September 23, 1977, amending the original Complaint filed herein on June 30, 1977, Respondents Cleve Stutzman, d/b/a Stutzman Fina (Stutzman), a retailer; Jones Oil Company (Jones), a distributor; and American Petrofina, Inc. (Fina), a refiner, were charged with violation of 40 CFR 80.22(a), in that on or about June 13, 1977, at Stutzman, where Fina's brand name was displayed, gasoline represented to be "unleaded", but which contained lead content in excess of 0.05 grams per gallon, was offered for sale.

Stutzman on October 13, 1977, entered into a Consent Agreement, whereby he admits the jurisdictional allegations of and the facts alleged in the Complaint, as hereinabove set forth, waived his right to a hearing and consented to the issuance of a Final Order requiring payment by him of $400.00 as a civil penalty. On October 18, 1977, Complainant withdrew said Complaint filed against Jones. This decision shall, therefore, be directed to the outstanding Complaint against Fina.

By Stipulation of Facts, Complainant and Fina have agreed that Complainant has made a prima facie case herein and that the subject contamination was not caused by Fina or

Fina's agents or employees. The remaining issue for decision is whether Fina has established its defense under 40 CFR 80.23(b)(2)(iii) by demonstrating the following:

> "(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 insure compliance with such contractual obligation,..."

Fina contends that it has fully demonstrated the requirements provided by said sub-section. In order to fully consider Fina's arguments, the following essential facts, stipulated to by the parties, are hereinafter detailed:

1. The brand name Fina (under which subject respondent American Petrofina Company of Texas (Fina) sells (gasoline) is displayed at the subject Stutzman Fina station located in Grand Island, Nebraska.

2. Unleaded gasoline sold by Stutzman is supplied by Jones to whom said unleaded gasoline is supplied by Fina pursuant to a written contract.

3. The contract between Fina and Jones contains a clause which requires Jones to comply with all applicable laws and regulations relating to unleaded gasoline and with all procedures established by Fina for the decontamination of facilities formerly used for storing or dispensing leaded gasoline before using the same for unleaded gasoline, for the segregation of unleaded from leaded gasoline and from

contaminated facilities, for the testing of gasoline to determine its classification as leaded or unleaded, and for the dispensing of unleaded gasoline (Fina Finding 10, p. 3).

4. Procedures, supra, established by Fina included procedures to be observed by retail dealers, and Jones received and acknowledged receipt of a copy of same.

5. Unleaded gasoline sold by Jones to Stutzman is transported from the Williams Pipeline Company (Williams) terminal to Stutzman by trucks of Jones or by carriers designated by Jones.

6. No employee of Jones or Williams is an employee of Fina.

7. Jones is not Fina's agent; Williams is agent for Fina for purposes of delivering unleaded gasoline to Jones at Doniphan, Nebraska.

8. Unleaded gasoline which met the defined requirements of 40 CFR 80.2(g) was delivered by Fina to Jones at the Doniphan, Nebraska, terminal of Williams between March 25 and June 7, 1977; which product constituted the only unleaded gasoline obtained by Jones from Fina and delivered to Stutzman during said period and through June 13, 1977.

9. On June 13, 1977, unleaded gasoline offered for sale at Stutzman contained lead in excess of 0.05 grams per gallon.

On consideration of the transcript of record, the proposed findings of facts, conclusions of law, briefs and

arguments submitted by the parties, I make the following Finding of Fact not hereinabove set forth:

10. Fina has a contract of supply with Jones whereby it agrees to supply Jones with products for resale. Along with the supply agreement, an agreement respecting the handling procedures (for) unleaded (gasoline) was entered into whereby Jones agreed to follow the procedures specified by Fina in the handling of unleaded gasoline. Jones further agreed, in another instrument, that he would instruct all people involved in handling of (unleaded gasoline) concerning the procedures so specified by Fina. (T. 12)

11. Jones became a jobber for Fina on November 1, 1975, approximately one year following a four-day training and instructional session for jobbers in a three-state area conducted by Fina in Kansas City whereby jobbers were given full instructions on the procedures for handling unleaded gasoline, which included demonstrations.

12. Fina made sure (after Jones became a jobber) that Jones completely read and understood the specified procedures for handling unleaded gasoline before he signed an instrument to that effect (T. 13).

13. The instructions given Jones individually was substantially the same as given other jobbers at the training session when Fina first introduced unleaded gasoline into the market.

14. The subject retail outlet is owned by an insurance company and leased to Fina under a longterm lease; Fina leases

said premises to Jones who in turn, as an independent business man, arranges for its operation as a service station.

15. Where, as here, Fina has the primary lease or ownership of the unit and, in turn, leases same to a jobber or distributor for operational purposes, the unit is referred to as a "controlled station" (T. 14).

16. In an effort to see that contractual obligations are adhered to by Jones, Fina instructs their sales representatives to procure a field test of the unleaded gasoline at every station at least once in a three-months period and to maintain a record of such inspections by recording the date and results of each (T. 14).

17. A field test was taken by a Fina sales representative of the unleaded gasoline offered at subject outlet on January 6, 1977, showing a test result of 0.011 grams lead per gallon. On March 22, 1977, the loading and unloading procedure of a transport that hauled Jones product was observed by a Fina employee both at the pipeline terminal and at a retail outlet, other than subject outlet (T. 18), in an effort to verify that the procedures set out in Fina regulations for the handling of unleaded gasoline are adhered to (T. 15, 16).

18. The third quarter 1977 field test at subject outlet was on June 30, 1977 (following the subject EPA inspection on June 13) and consisted of obtaining and testing two samples which tested, respectively, 0.03 grams and 0.04 grams lead per gallon. Between June 13 and June 30, 1977, 1300 gallons of unleaded gasoline was delivered by Jones to subject outlet (T.28).

19. Fina demands of Jones that (he) instruct his employees on the Fina handling procedures on which Jones has been instructed by Fina (T. 25).

20. It was after the time of the alleged violation that Jones decided that instead of flushing a tank truck compartment to prepare for transporting unleaded gasoline, he would dedicate a compartment which would be used only for the transport of unleaded gasoline (T.26).

21. Use by Jones of the "flushing method" required that the tank truck compartment, hoses and pump be flushed, in an effort to avoid lead contamination, before unleaded gasoline was transported and delivered by use of such facilities (T. 26).

22. Color coding of Fina stations have been done by Fina. The unleaded gasoline is denoted by white with a black cross (T. 26).

23. Fina's theory is that the subject contamination resulted from misdumping or mishandling on the part of Jones' employee who made delivery of the subject unleaded gasoline to Stutzman (T. 27, 23).

CONCLUSIONS OF LAW

1. Even though a contractual undertaking has been imposed by Fina on Jones designated to prevent violations such as the violation here under consideration, Fina did not expend reasonable efforts to insure compliance by Jones with such contractual obligation.

2. Fina has violated 40 CFR 80.22(a) and thus is subject to the assessment of a civil penalty under the provisions of 40 CFR 80.23(a)(1) and 40 CFR 80.5.

DISCUSSION

Fina has submitted its Brief contending that it has demonstrated that it expended reasonable efforts "to insure compliance with" the contractual obligation admittedly imposed upon Jones. The burden placed upon Fina is the same as that stated in the holding of Amoco Oil Co. v EPA, 501 F.2d 722, l.c. 749, where the Court stated:

> "A refiner which can show that its employees, agents, or leasees did not cause the contamination at issue, and that the contamination could not have been prevented by a reasonable program of contractual oversight, may not be held liable under 40 CFR Section 80.23(a)(1)." (emphasis added).

The basis of my conclusion reached herein is that I do not find that the oversight by Fina (i.e., the efforts expended to insure compliance with Jones' contractual obligation) was "reasonable" as that term must be construed with respect to the instant regulatory program. "Reasonable" has been defined as "fit and appropriate to the end in view." (Black's Law Dictionary; see also In the Matter of Mobil Oil Corp., Region VI, US EPA, Docket No. 030191 January 1971, l.c. 7.)

As pointed out in 40 CFR 80.1, the regulations here applied are based upon a determination that

> "the emission product of a fuel or fuel additive will endanger the public health, or will impair to a significant degree the performance of a motor vehicle emission control device...".

We have previously noted that a program, to be effective, must be positive and continuous. In determining the effectiveness of this or any program, it is apparent that it is not its formulation that will insure compliance with the essential determinations of which it is comprised, but rather its execution.

I find, on this record, that Fina has formulated a commendable policy for the handling of unleaded gasoline, but that the execution of its compliance policy has been lacking -- reasonable oversight has not been exerted. The facts and circumstances contained in the foregoing Findings bear out the conclusion here reached.

The conclusion that the instant violation was caused by Jones, though circumstantial, is dictated by the Stipulation that until Jones handled the unleaded product it was uncontaminated and that Jones was the only person thereafter who had the opportunity to cause the contamination here found. As to whether the violation was caused by an omission on the part of Jones' employee or some other form of mishandling is the subject of considerable conjecture. It can be fairly surmised that since, at the time of the US EPA inspection, which is the subject of the instant complaint, Jones did not "dedicate" a compartment on his transport for unleaded gasoline, but relied on "flushing" said compartment as well as the pump and hoses used in said handling, that the contamination resulted from a failure on the part of Jones' employee to properly so "flush" prior to the handling here involved.

Fina's witness further concludes, quite logically, that the contamination could also have resulted from "misdumping". Question remains as to the identity of the individual employee of Jones who was apparently guilty of the mishandling which has been logically, though circumstantially established. Whether he had been instructed by Jones to the extent he was capable of informed judgment concerning the consequences of any mishandling or misdumping is not apparent on this record, except that Fina has demanded that Jones instruct his employees on the handling of unleaded product. The record reveals that Fina feels that the responsibility is that of Jones to instruct his employees on Fina handling procedures on which Jones has received individual instruction (see Finding No. 19). The contract with Jones so provides. I here stress that it is essential that such employee or employees be fully aware of the seriousness of their assigned duties and that they recognize the consequences of any "variation" (T. 25).

We have repeatedly pointed out that the refiner's duty of contractual oversight does not terminate or contractually shift to the distributor on delivery of product to him. Such duty must be reasonably executed from that point until the product is offered to retail customers. As to what can reasonably be expected in this regard from the refiner can be gauged in great degree from what is sought to be required contractually of the distributor. We have held that the degree of care and diligence required of every refiner by the regulation -- reasonable effort to insure compliance with a contractual obligation -- is equal to or greater than that required of a

distributor by the refiner. (see Sam Spain, et al., Docket No. 031555, US EPA Region VII, November 1976; in re Mobil Oil Co., supra).

At least in the particulars hereinabove set out, Fina has failed to "expend reasonable efforts" to insure compliance as required by said Section 80.23(b)(2)(iii). The person handling unleaded gasoline, whether it be Jones or someone designated to act for him, should be so informed that he will recognize that it is not the appearance of compliance but the strict adherence to proper handling procedures that will result in the protection to which the general public is entitled; and that person should receive sufficient instructions from the refiner -- if the distributor is incapable of providing it -- to make an informed judgment as to what degree of care and diligence must be exerted to prevent contamination from either mishandling (e.g., failure to flush) or misdumping. A person so informed will recognize the consequences of such acts which should prevent said contaminated product from being offered for sale.

In the premises, I have found that Fina is answerable for the violation as charged and recommend that a civil penalty in an appropriate amount be assessed against Fina.

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 can be considered from the standpoint, first, of gravity of misconduct, and second, gravity of potential harm that could result. The fact that Fina's failure to furnish effective and sufficient oversight to ensure compliance with pertinent regulations can be attributed, in part, to its failure to fully recognize the duties placed on a branded refiner even after its product leaves the terminal area and to the point where product is offered for sale at retail. For this reason, I find no evidence of bad faith. Further, this record does not indicate a record of previous violations.

In the second respect, the lead content of the subject sample, when determined first on the field kit, and later by atomic absorption spectometry, was, respectively, 0.056 grams and 0.069 grams per gallon. Since the contamination was slight, the gravity of the offense is also slight from the standpoint of potential harm which could result from its use by the general public (see Appendix B, 40 CFR p. 231 et seq.).

Fina's efforts to correct circumstances which likely contributed to cause the subject violation is here considered as a mitigating fact. I also find, as a mitigating fact, that Fina has in existence a program which, with more oversight, can serve to avoid further violations.

By reason of the foregoing, I find that a civil penalty in the sum of $1900 is appropriate and that assessment against Fina 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 American Petrofina, Inc. 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 $1900.00 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 3rd day of January 1978, at Kansas City, Missouri.

Marvin E. Jones

ALJ