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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR
Washington, D.C.

In re	)	
	)	
GEIGER ENTERPRISES, INC.	)	DOCKET NO. CAA(211)-64
	)	
Respondent	)	

Respondent found to be liable for violation of the governing statute and regulations as alleged in the complaint. The penalty proposed found to be appropriate. Order entered assessing such penalty.

APPEARANCES:

William E. Lawson for William H. Wehr, Trustee-Receiver of Respondent

Joseph P. Boland and Peter Murtha for Complainant

INITAL DECISION BY JAIR S. KAPLAN,
ADMINISTRATIVE LAW JUDGE (Ret.)

I. INTRODUCTION

This matter arises from a complaint issued by the United States Environmental Protection Agency, Office of Enforcement (EPA) on April 9, 1980. The complaint alleges that on September 10, 1979, an inspection revealed that gasoline represented to be unleaded was offered for sale at Schmidle Service, West Seneca, New York, but this gasoline in fact had a lead content greater than 0.05 grams per gallon, in violation of Section 211 of the Clean Air Act and the regulations promulgated thereunder, in particular 40 CFR §80.22(a). The complaint alleges further that Respondent, Geiger Enterprises, Inc. (Geiger), is a distributor within the meaning of 40 CFR §80.2(i)

and that it delivered and sold the contaminated gasoline to Schmidle Service, thereby violating 40 CFR §80.22(a) pursuant to 40 CFR §80.23(a)(2). Respondent filed an answer to the Complaint on May 8, 1980. Prior to the involved inspection and the issuance of the complaint Respondent had filed on August 15, 1979, a Chapter XI bankruptcy petition in the United States District Court for the Western District of New York. Subsequently, a trustee and receiver was appointed for Geiger on May 16, 1980. A hearing was held in the instant case on June 1, 1981, in Buffalo, New York. As of that date there had been no adjudication of the bankruptcy petition and that the Chapter XI reorganization proceeding was still pending. Respondent did not appear at the hearing. However, a special appearance was entered on behalf of the trustee-receiver, Mr. William H. Wehr, not on the merits of the case, but merely for the limited purpose of indicating that the trustee-receiver was not a proper party to this proceeding and that EPA had no jurisdiction over Mr. Wehr. Both Complainant and the trustee-receiver took the position that, if an order were to be entered herein, the order and any penalty imposed would lie against Respondent Geiger, the debtor, and not against the trustee-receiver.

Complainant filed a timely post-hearing brief. Respondent failed to file either an initial or a reply brief, although it had been given the opportunity to do so and had been supplied with a

free copy of the transcript of the hearing.

II. SUMMARY OF EVIDENCE

Schmidle Service is a retail outlet at which both leaded and unleaded gasoline are sold or offered for sale for use in motor vehicles. In September 1979, up to and including September 10, 1979, Schmidle's primary supplier of gasoline products, both leaded and unleaded, was Geiger. Scmidle also received a shipment of leaded and unleaded gasoline from King Petroleum, Inc. (King) on September 6, 1979. However, the shipment of gasoline received immediately prior to September 10, 1979, came from Geiger.

On September 10, 1979, inspectors from the Erie County Bureau of Weights and Measures conducted an inspection at Schmidle Service on behalf of the U.S. Environmental Protection Agency, taking a sample of gasoline from the unleaded gasoline pump. The sample was subsequently determined to have contained in excess of 0.05 grams of lead per gallon (the actual lead content was 1 gram per gallon). David Schmidle, owner of Schmidle Service during the relevant time period, testified that the gasoline sampled had been delivered to him by Respondent and that the previous shipment of gasoline, from King, had been completely or substantially sold by the time Geiger made the delivery that immediately preceded the September 10, 1979, sampling. William Anders, vice president and truck driver for King, testified that the unleaded gasoline delivered by his company to Schmidle Service on September 6, 1979, was not contaminated by lead in excess of the amount

allowed under EPA regulations. Mr. Anderson testifed further that his company routinely takes precautions to prevent contamination of unleaded gasoline. These precautionary steps include air-drying the delivery truck, to eliminate lead content; flushing the truck; color-coding the discharge valves on the truck to conform to the gasoline pumps at the receiving stations; visual inspection of the gasoline, when a storage tank is being filled, and noting the smell of the gasoline (leaded and unleaded gasoline differ in color and smell). King has never been found to have sold or supplied contaminated unleaded gasoline.

III. POSITION AND CONTENTIONS OF COMPLAINANT

It appears to be beyond dispute that the gasoline offered for sale as unleaded at Schmidle Service on September 10, 1979, had a lead content in excess of that permitted by 40 CFR §80.2(g). The principal issue in this case, therefore, is the determination of the party responsible for the contamination.

EPA argues that Geiger is responsible for the excessive lead content of the purported unleaded gasoline because Respondent supplied the contaminated gasoline. EPA contends further that the only other possible source of gasoline, King, cannot be found to be responsible for the contamination, because it took appropriate and adequate precautions to prevent contamination and it was unlikely that the latter supplier was the source of the contaminated

gasoline. Respondent has presented no countervailing evidence or any defense to the charged violation.

IV. DISCUSSION

As the Complainant in this action, EPA has the inital burden of going forward with and proving an affirmative case. Section 22.24 of the Consolidated Rules of Practice, (40 CFR §22.24). In order to make out a prima facie case, EPA must show that a violation of 40 CFR §80.22(a) has occurred. That regulation reads, in pertinent part:

> "After July 1, 1974 no retailer or his employee and after January 31, 1975 no wholesale purchaser-consumer or his employee or agent shall sell, dispense or offer for sale gasoline represented to be unleaded unless such gasoline meets the defined requirements for unleaded gasoline in §80.2(g)..."

Section 80.2(b) defines "unleaded gasoline" as "gasoline containing not more than 0.05 grams of lead per gallon".

The evidence adduced at the hearing shows a clear violation of §80.22(a). Schmidle Service, a retailer within the meaning of 40 CFR §80.2(k), offered for sale, on September 10, 1979, gasoline that purported to be unleaded, but which in fact contained in excess of 0.05 grams of lead per gallon. As previously noted, the only principal remaining issue is the assignment of liability for this violation.

EPA presented testimony that the contaminated gasoline was supplied, sold and delivered to Schmidle Service by Geiger. EPA's

evidence, accepted ~~have~~ here, rules out responsiblity for the contamination on the part of either Schmidle Service or its alternate distributor King. Pursuant to 40 CFR §80.23(a)(2), therefore, Respondent would be liable for the violation as the distributor of the contaminated gasoline.

The scenario presented by EPA provides a credible explanation as to the source of the contaminated gasoline offered for sale by Schmidle Service. Having thus met its burden of establishing a prima facie case, the burden of presenting a defense shifts to Respondent. Section 22.24 of the Consolidated Rules of Practice (40 CFR §22.24). Geiger, however, did not appear at the hearing and adduce any evidence or submit any legal arguments in opposition to the presentation made by Complainant. In the absence of any facts or arguments to contradict or refute EPA's presentation, the Presiding Officer finds and concludes that Respondent is liable for the violation of 40 CFR §80.22(a) that occurred at Schmidle Service on September 10, 1979.

V. PENALTY

The maximum statutory penalty per day for each violation of the unleaded gasoline regulations is $10,000. Complainant, however, proposes the assessment of a $7,000 penalty against Geiger, based upon the EPA's Guidelines for the Assessment of Civil Penalties under Section 211(d) of the Clean Air Act. (40 Fed. Reg. 39973, August 25, 1975). The five factors to be considered in determining the size of a penalty are found in §22.34(e) of the Consolidated Rules of Practice (40 CFR §22,34[e]). They are: (1) the gravity of the violation, (2) the size of the Respondent's

business, (3) the Respondent's history of compliance with the Act, (4) the action taken by Respondent to remedy the specific violation, and (5) the effect of the proposed penalty on Respondent's ability to continue in business.

EPA contends that $7,000 is an appropriate penalty because of the gravity of the violation (the lead content of the contaminated gasoline was twenty times that permitted by the regulation) and because Respondent had one prior violation of the Act (Respondent was previously assessed a penalty for a contamination violation in Region II). Complainant has not addressed the other three criteria to be considered in assessing penalties, but their consideration does not furnish any support for any mitigation of the proposed penalty. There is no evidence in the record that Respondent undertook any action to remedy the violation. And except for the bare fact that Geiger has filed a bankruptcy petition for reorganization under Chapter XI, there is nothing to indicate that the proposed penalty will have any effect on Respondent's ability to continue to do business. Geiger is a Category III business, with gross annual revenues of between one million and five million dollars and, as such, could normally be expected to pay a $7,000 penalty, without any substantial adverse results. EPA's position at the hearing was that any penalty imposed would be treated in the bankruptcy proceeding like any other debt owed to a creditor, and would be included in the list of priorities to

be established by the court. To the extent that funds may be available, Geiger should be assessed and should pay the proposed penalty. The Presiding Officer finds that a $7,000 civil penalty against Respondent to be appropriate under the circumstances presented here.

VI. ULTIMATE CONCLUSIONS AND ORDER

Upon consideration of the entire record, including the brief filed, and based upon a preponderance of the evidence and the foregoing discussion and findings, it is concluded that:

(1) Respondent Geiger Enterprises, Inc., as the involved distributor, is liable, pursuant to 40 CFR §80.23(a)(2), for violation of 40 CFR §80.22(a) and, as a result, for violation of §211 of the Clean Air Act, as alleged in the complaint.

(2) Respondent Geiger Enterprises, Inc., has failed to establish any defense under 40 CFR §80.23(d) to be absolved from liability for the indicated violation.

(3) Respondent Geiger Enterprises, Inc., should, accordingly, be assess a civil penalty in the amount of $7,000, and that such penalty is just, reasonable, and warranted under the circumstances presented herein.

WHEREFORE, IT IS ORDERED, subject to review by the Administrator on appeal, or sua sponte, as provided by Section

22.30 of the Consolidated Rules of Practice (40 CFR §22.30), that:

(a) A civil penalty in the amount of Seven Thousand Dollars ($7,000) be, and the same is hereby, assessed against Respondent Geiger Enterprises, Inc.

(b) Payment of the above-specified amount shall be made in full within sixty (60) days after service of this order by forwarding to the Hearing Clerk a cahsier's check or certified check payable to the United States of America.

Jair S. Kaplan

By the Presiding Officer
August 31, 1981

Jair S. Kaplan
Administrative Law Judge (Ret.)

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing document was filed and mailed by certified mail to the Respondent; and by regular mail to the Complainant to the addresses that follow:

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DATED: September 1, 1981