UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

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In re:	)	
HOWARD DICKERSON d/b/a/ HOWARD DICKERSONS CHEVRON SERVICE	)	
and	)	
ENERGY CARRIERS, INC., a California Corporation	)	Docket Nos. CAA(211)-177, 178 and 179
and	)	
CHEVRON U.S.A., INC.	)	
Respondents.	)	

Violation of the Clean Air Act and applicable regulations as set forth in the complaints found by the preponderance of the evidence to have occurred. Penalties assessed against each respondent and proposed order entered.

Marcia S. Ginley for complainant.
William K. Dial and Alexander D. Thomson for respondents.

INITIAL DECISION BY WILLIAM J. SWEENEY
ADMINISTRATIVE LAW JUDGE (RET.)

By complaints filed on July 7, 1980 the United States Environmental Protection Agency charged the respondents with violations of section 211 of the Clean Air Act (42 U.S.C. 7545) and regulations promulgated thereunder. The specified violations are that Howard Dickerson d/b/a/ Howard Dickerson Chevron Service had not affixed the label "unleaded gasoline" to one gasoline pump stand containing pumps for the introduction of unleaded gasoline into motor vehicles, and had not affixed the label "contains lead anti-knock compounds" to one gasoline pump stand

containing pumps for the introduction of leaded gasoline into motor vehicles, as of November 21, 1979, and that on the same date certain gasoline represented to be unleaded was sold, dispensed or offered for sale at a retail outlet owned, based, operated, controlled or supervised by such respondent in Westmoreland, California, contrary to the provisions of 40 CFR sections 80.22(a) and (d); this respondent is charged as a retailer. The cited regulations provide that gasoline represented to be unleaded must contain not more than 0.05 gram of lead per gallon, and that gasoline pump stands must have the designated labels affixed. A penalty of $1,450 is proposed under authority of 40 CFR section 80.5.

Energy Carriers, Inc. is alleged to have transferred gasoline represented to be unleaded which contained greater than 0.05 gram of lead per gallon to the aforesaid retail outlet in violation of 40 CFR section 80.21(a). This respondent is charged as a distributor and the proposed penalty in the complaint as amended at the hearing is $5,100. The cited regulation provides that no distributor shall transfer to any retailer any gasoline represented to be unleaded unless such gasoline does in fact meet the defined requirements for unleased gasoline, namely, contain not more than 0.05 gram of lead per gallon.

The corporate, trade or brand name of Chevron U.S.A. Inc. is alleged to have been displayed at the aforesaid retail outlet and such respondent is charged as a refiner for that outlet with violation of 40 CFR section 80.22(a) pursuant to 40 CFR section 80.23(a) (1). The latter regulation provides in pertinent part that a refiner shall be deemed in violation of 40 CFR section 80.22(a) irrespective of whether the retailer or agent thereof may have caused or permitted the violation. Liability under this regulation is cancelled if the refiner can demonstrate that it did not cause the violation and that someone else did cause the violation. The penalty proposed for this respondent is $6,100.

On July 29th and August 1, 1980 the Judicial Officer designated the undersigned as presiding officer in these proceedings which were subsequently combined

for hearing and decision. A hearing requested by the respondents was held on March 25 and 26, 1981 in Los Angeles, California. At the close of the hearing the parties engaged in oral argument on the record in lieu of filing briefs and proposed findings of fact and conclusions of law.

James Dunlap, a petroleum products investigator for the State of California, Division of Weights and Measurements, testified that inspections were made on behalf of the United States Environmental Protection Agency under contract. On November 21, 1979 he inspected the subject retail outlet with the approval of the owner, Howard Dickerson. The last delivery to the station had been made on November 15th from the Chevron refinery in El Segundo, California. Dunlap took a sample of gasoline from a pump labeled CHEVRON UNLEADED in letters about two inches high just under the glass face of the pump. The same pump in letters about one-half inch high near the bottom of the pump was labeled Gasoline--Contains lead and anti-knock compounds. To comport with the product being dispensed the latter labeling should have been "Unleaded Gasoline." Another pump bearing the label Chevron Supreme at the top part of the pump was not labeled "Contains lead and anti-knock compounds" at the base of the pump.

After taking the sample of unleaded gasoline the inspector sealed the sample can with wire and a lead seal. He finished work late that day and drove directly home. The next day was Thanksgiving Day, and he took personal leave on the following day. It was then the weekend so Dunlap did not deliver the sample to the laboratory in Downey, California until November 26th. That morning he was told by Hebert, a chemist at the laboratory, that the sample contained more lead than allowed by law. He phoned Dickerson who stated he would cease selling gasoline from the unleaded pump. Samples of the gasoline prepared by Hebert were taken that day by Dunlap to United Parcel Service for shipment to the laboratory of the Division of Weights and Measurements in Sacramento, California and to the laboratory of the Environmental Protection Agency in North Carolina.

Dunlap stated that he also phoned Art Turner, lead maintenance dispatcher for Chevron, and informed him of the contamination; Turner indicated he would have a sample taken from the unleaded tank. On November 28th Dunlap returned to the station and took another sample from the unleaded pump. There had been no delivery of gasoline between the taking of the first and second samples. The second sample also showed excess lead content. A third sample was taken by Dunlap, on December 4th, after he was notified that the product had been pumped out, the lines purged, and new product received. That sample tested within legal limits.

On cross-examination Dunlap stated that there he had not doubted that the unleaded gasoline pump dispensed unleaded gasoline, nor that the supreme gasoline pump dispensed leaded gasoline. The labels on both pumps had been corrected at the pump bases prior to his inspection on November 28th.

Roy Wayne Peters, laboratory specialist at the Department of Weights and Measures laboratory in Downey, California testified that he had logged the sample delivered by Dunlap on November 26th. It was sealed in a one-half gallon can which he gave to Hebert.

Albert Bernard Hebert, petroleum products chemist at the Department of Weights and Measurements laboratory in Downey, stated that he had tested the sample taken by Dunlap using the atomic absorption test prescribed in 40 CFR section 80.3, Appendix B. The test result was 0.120 gram of lead per gallon. Hebert prepared two samples of the gasoline for shipment as described by Dunlap. An affidavit by Jack Hein, physical science technician at the Environmental Protection Laboratory, stated that the sample he received from Hebert showed a lead content of 0.130 per gallon using the prescribed atomic absorption test method. Hebert also tested the sample taken by Dunlap on November 28th and it showed a lead content of 0.118 gram per gallon; a test of the sample taken on December 4th showed only 0.015 gram per gallon. On cross-examination Hebert stated that a difference of 0.01 gram, which was the difference between the tests run

by him and Hein, was within acceptable limits of reproductability.

Ed Young, supervising chemist at the Department of Weights and Measurements laboratory in Scaramento, testified that he used the atomic absorption method to test the sample of unleaded gasoline taken by Dunlap on November 21st and the result showed 0.125 gram of lead per gallon. On cross-examination he stated that he also tested the sample of unleaded gasoline taken by Dunlap on November 28th and the test result was 0.135 gram of lead per gallon.

Howard Dickerson, owner of the subject gasoline station, stated that he had operated it for thirty years. Chevron U.S.A. has always been his supplier and it is in charge of deliveries. On November 16, 1979, he received 4,000 gallons of regular gasoline, 2,800 gallons of unleaded gasoline, and 1,700 gallons of ethyl gasoline. The delivery was made by Energy Carriers, Inc., and this was the first time that carrier had served his station. His receiving tanks are each labeled as to type of gasoline. Dickerson was reimbursed by Chevron U.S.A. for loss of business caused by closing down his unleaded gasoline pump prior to purging the tank after the contamination was discovered.

The alleged mislabeling of the pumps was explained as having occurred in 1978. Sales of unleaded gasoline were rising and sales of ethyl gasoline were falling, whereas the storage tank for unleaded was smaller than that for ethyl. In transposing use of the tanks the nozzles on the pumps were exchanged, and the 2.5 inches by 18 inches red-lettered labels at the top of the tanks showing types of gasoline were exchanged, but forgotten were the three-quarter inch by 5 inches black-lettered labels which were about two inches from the bottoms of the pumps. Dickerson stated that his net income from his station is about $10,000 a year. On cross-examination he stated he did not know how the contamination occurred, and that there were no connecting pipes between his storage tanks.

Melvin R. Bryant, Executive Vice President, Energy Carriers, Inc., testified that the company is a common carrier and had agreed to exclusive use of

certain vehicles by Chevron for thirty days from October 23, 1979. ECS Trucking was hired to supply a tractor and driver to haul trailers owned by Energy Carriers, Inc. The driver was responsible for the loading and unloading of petroleum products. The first delivery to the subject retail outlet was made on November 16, 1979.

Gordon R. Deits, Division Engineer, Chevron U.S.A., Southwest Division, testified that most petroleum products sold in that area come from the Chevron refinery at El Segundo, California. The products are moved by pipelines to nine terminals and thence by truck service to gasoline service stations. Faber Laboratories has been hired to test unleaded gasoline at Chevron stations in the area at least once a year on a random schedule. If contamination is found the gasoline is retested by Chevron and upon confirmation of contamination the dealer is shut down immediately. In October, 1979 Chevron low lead regular gasoline was tested at 0.92 gram of lead per gallon, and supreme gasoline at 1.27 grams per gallon.

Roy Dixon, Maintenance Supervisor, Chevron U.S.A., testified that he kept a record of reports received from Faber Laboratories concerning tests made of gasoline sampled at terminals and gasoline service stations. There are 1,000 Chevron stations in the area and in 1979 Faber Laboratories took 1,440 samples. In the quarter ended June, 1979 there were three samples of unleaded gasoline which tested in excess of 0.05 gram per gallon, and two samples tested in excess during the next quarter. None of the Chevron terminals showed excess lead content in 1979. A test of a sample of unleaded gasoline taken at the subject gasoline station on October 31, 1979 showed only 0.005 gram of lead per gallon. Such reading is the lowest possible on the instrument used at Faber Laboratories.

When informed on November 25th of the contamination found in the sample taken by Dunlap on November 21st a Chevron repairman was sent to secure a sample from the unleaded storage tank. He took the sample from the top of the tank and upon testing at Chevron's laboratory in El Segundo it showed a lead content of only 0.018 per gallon. The Department of Weights and Measurements was notified

of such result and Dunlap took a second sample which was shared with Chevron. This sample was tested at Faber Laboratories and at the Chevron laboratory and proved to be contaminated by excess lead content. The contaminated gasoline at the retail outlet was pumped out on December 1, 1979.

Daryl L. Hagler, superintendent of the Chevron terminal at Colton, California stated that there is a tank for each petroleum product and that there are no connecting pipes between tanks. The equipment tendered by Energy Carriers, Inc. was visually inspected but environmental laws prevented inspection of interiors of trailers. The drivers load the trailers and are instructed to take a dip stick measurement of storage tanks at gasoline service stations prior to unloading to insure that such tanks will hold the volume of product being delivered.

Larry Blaesi, a retail representative for Chevron U.S.A., stated that he examined the daily books kept at the subject retail outlet and no large variance in volume was noted which would indicate a product mixture. Dickerson was reimbursed four cents per gallon, which was the difference between the price per gallon for unleaded and leaded gasoline, for the volume of unleaded gasoline pumped from the unleaded tank to the regular gasoline tank. He was also paid $75 per day for four of the nine days he lost business by not having unleaded gasoline available for sale.

Walter L. Mason, a gasoline service station maintenance mechanic for Chevron, stated that he was instructed on November 26, 1979 to obtain a sample of unleaded gasoline at the subject gasoline station. He did so that day by lowering a bottle into the unleaded storage tank; he took the sample to the Chevron laboratory in El Segundo the following day.

Barry T. Faber, owner of Faber Laboratories stated that he had a contract with Chevron U.S.A. in force since 1974 to test unleaded gasoline on sale at Chevron stations in the Southwest Division area. An attempt is made to sample each station at least once a year. Stations are not notified in advance that

a sample is to be taken. The gasoline is tested by the atomic absorption method. A sample taken at the subject station on October 24, 1979 tested 0.005 gram per gallon, the lowest possible reading. Test of the sample taken by Dunlap on November 28th showed a lead content of 0.13 gram per gallon.

Gary Sampson, a chemist at the Chevron laboratory in El Segundo, stated that unleaded gasoline distributed from the Colton terminal tested 0.001 on November 5, 1979.

Toan Cao, a technician at the Chevron laboratory in El Segundo, testified that samples of unleaded gasoline taken at the subject station on November 27th and November 30th, showed lead content of 0.019 and 0.019 gram per gallon, respectively. He did not know if the samples had been taken through the pump nozzle or directly from the unleaded gasoline storage tank.

David Foley, a driver for Energy Carriers, Inc., testified that in accordance with instructions on a bill of lading he loaded 1,700 gallons of supreme gasoline, 4,000 gallons of regular gasoline, and 2,800 gallons of unleaded gasoline at the Chevron terminal in Colton for delivery to the subject station in Westmoreland. This was the first time he had made a delivery to that station. Loading stems at the terminal are color coded to show the type of gasoline. Foley tagged the compartments on his truck and trailer for the type of gasoline to be loaded into each; this is done to insure proper loading. At the station the storage tanks are also color coded by type of gasoline. In addition to such stationary precautions, the hose used in gravity unloading from the compartments has a sight glass in the discharge valve so that the color of the product being dumped can be observed. Foley measured the storage tanks at the subject station prior to unloading to assure that there was room for the amounts ordered, observed the sight glass during unloading to see that the proper product was being unloaded into each tank, and again measured the tanks to assure that the amounts unloaded coincided with the amounts ordered. No discrepancies were noted. Dickerson was

not present during the actual unloading although he had instructed Foley upon arrival as to the method used by other drivers in positioning their vehicles for unloading; he signed the bill of lading presented by Foley upon completion of unloading.

DISCUSSION

The alleged labeling violation was admitted and the alleged excess lead content in the unleaded gasoline offered for sale on November 21, 1979 was shown by a preponderance of the evidence. The contamination of the gasoline in the unleaded gasoline storage tank was admitted by Chevron U.S.A. by the fact that such tank was purged by emptying the tank after it had tested the sample taken on November 28th.

In oral argument counsel for Dickerson and Chevron U.S.A. stated that the refiner has a test program at its terminals and branded gasoline stations, and that all the evidence it has been able to develop indicates that the product was not contaminated by its employees nor by Dickerson. In this connection it is to be noted that despite all precautionary measures Faber Laboratories found five instances of excess lead content in unleaded gasoline at Chevron stations in the six months prior to November, 1979. On behalf of Energy Carriers, Inc., its counsel argued that the carrier was merely an unwitting conduit for the transportation of gasoline from one location to another in vehicles made available for the refiner's exclusive use.

Complainant has established a prima facie case in proving by a preponderance of the evidence that the violations alleged in the complaints occurred. It is not necessary to prove that all or any particular one of the respondents was responsible for the contamination of the unleaded gasoline. In the absence of evidence to show that any one of the respondents caused the contamination, all respondents are liable.

The labeling violations by Dickerson were inadvertent and unlikely to cause

any harm. With respect to the leaded pump the size of the nozzle would prevent introduction of gasoline into an automobile designed for use of unleaded gasoline only. As to someone wanting to purchase leaded gasoline it is unreasonable to assume that the small black letters two inches from the bottom of the unleaded pump would be read and the large red letters at eyelevel would be ignored. The inspector, Dunlap, had no problem identifying the unleaded pump from the red letters and took a sample therefrom even though as part of his job he also noted the mislabeling at the bottom of the pump. From a strict point of view, under the governing regulations, Dickerson is responsible along with the other respondents. Nevertheless, the evidence shows that he was least likely to have caused the contamination. The refiner regarded him as blameless and in fact compensated him for loss of business and the excess price of the unlead gasoline which was purged. Notice is taken of the fact that Westmoreland is a small farming community, population 1,600, in the Imperial Valley. The location of the station, the small income derived from the business, and the other facts of record set forth hereinbefore provide special circumstances and reason to mitigate the proposed penalty to $100.

The refiner took immediate action to halt the sale of the contaminated product and upon adequate showing that such contamination did in fact exist, the unleaded gasoline tank was purged. The contamination was not known to either of these respondents and occurred despite reasonably adequate precautions against such an occurrence. In the circumstances a mitigation in the proposed penalties to sixty percent thereof is warranted.

FINDINGS AND CONCLUSIONS

Howard Dickerson d/b/a/ Howard Dickersons Chevron Service is found to have violated the Clean Air Act and regulations 40 CFR sections 80.22(a) and 80.22(e) promulgated thereunder. A penalty of $100 is proposed.

Energy Carriers, Inc. is found to have violated the Clean Air Act and regu-

lation 40 CFR section 80.21(a) promulgated thereunder. A penalty of $3,060 is proposed.

Chevron U.S.A., Inc. is found to have violated the Clean Air Act and regulation 40 CFR section 80.22(a) promulgated thereunder. A penalty of $3,660 is proposed.

PROPOSED ORDER

The violations of the Clean Air Act section 211 (42 U.S.C. 7545), and 40 CFR sections 80.21(a), 80.22(a) and 80.22(e) having been established as alleged in the respective complaints consolidated for hearing and decision, a penalty of $100 is assessed against respondent Howard Dickerson d/b/a/ Howard Dickersons Chevron Service, a penalty of $3,060 is assessed against respondent Energy Carriers, Inc., and a penalty of $3,660 is assessed against respondent Chevron U.S.A., Inc., in accordance with the Clean Air Act section 211 (42 U.S.C. 7545) and 40 CFR sections 80.5, 80.21(a), 80.22(a), 80.22(e) and 80.23(a) (2).

This Order shall be the Final Order of the Administrator thirty (30) days after transmission of the Initial Decision to the Hearing Clerk without further proceedings, unless, pursuant to 40 CFR section 22.30, an appeal from it is taken to the Administrator by a party to the proceedings or the Administrator elects, sua sponte, to review the Initial Decision. Except as otherwise provided by 40 CFR section 22.31(b), payment of the full amounts of the civil penalties shall be made by the respective respondents within sixty (60) days of service of the Final Order on respondents by forwarding to the Hearing Clerk a cashier's check or a certified check made payable to the Treasurer, United States of America, in the respective amounts stated above.

Dated: May 27, 1981

William J. Sweeney

WILLIAM J. SWEENEY
Administrative Law Judge (Ret.)

Certificate of Service

I hereby certify that copies of the foregoing Initial Decision were sent this date by certified mail, return receipt requested, to the following:

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Dated: May 27, 1981

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