

6/18/96
JUL 18 11:54

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
COMMERCIAL CARTAGE COMPANY,) DOCKET NO. CAA-93-H-002
)
)
RESPONDENT)

ORDER DENYING MOTION FOR PARTIAL
ACCELERATED DECISION

Notwithstanding the lengthy procedural history of this proceeding under section 205(c) of the Clean Air Act (42 U.S.C. § 7524(c)), Complainant, concomitant with the filing of its prehearing exchange on April 26, 1996, filed a motion for a partial accelerated decision as to liability, alleging that there was no dispute of material fact and that it was entitled to judgment as a matter of law.^{1/} The regulation at issue here (40 CFR § 80.27(a)(2)) prohibits, inter alia, the sale, dispensing or

^{1/} The complaint, issued on June 2, 1993, was dismissed on CCC's motion (Order, dated September 23, 1993), because of Complainant's adamant refusal to acknowledge that it simply did not state a cause of action. After the EAB ruled (Remand Order, February 23, 1994) that Complainant must be given a further opportunity to amend the complaint, Complainant filed an amended complaint on March 21, 1994. CCC's motion to dismiss the amended complaint was denied by an Order, dated October 11, 1995. By a status report, dated February 7, 1996, Complainant informed the ALJ that settlement of this matter was unlikely and moved for discovery as to CCC's continued existence and viability. Documents requested in Complainant's motion for discovery were included in prehearing information the parties were directed to submit (Order, dated April 2, 1996). Complainant has complied with the order and CCC has complied with the order in part, alleging that its records are in storage and cannot be readily accessed, and that it has obtained extensions and not yet filed its income tax returns for the years 1994 and 1995.

transport of gasoline having a RVP in excess of 7.8 psi in non-attainment areas during the "high ozone season", June 1, 1992, through September 15, 1992. Complainant points out that the amended complaint alleges, and CCC has admitted, that between June 5 and August 31, 1992, it transported nine loads of regular and premium unleaded gasoline from Hartford Wood River Terminal (HWRT) in Hartford, Illinois, to Union W 70, a branded retail outlet located in Foristell, Missouri. Foristell, Missouri, is in the St. Louis "non-attainment area" (40 CFR § 81.326), and thus in a 7.8 RVP control area.

The first claim for relief in the amended complaint alleges that, based on recited inspections of HWRT, CCC and Union W 70, each of the mentioned nine loads of regular and premium unleaded gasoline delivered to Union W 70 by CCC exceeded the applicable RVP standard. It was further alleged that violations of the 7.8 RVP standard were detected "at the carrier's facility" within the meaning of 40 CFR § 80.28(b) and thus CCC, as the carrier, is liable for the violations. CCC's conduct in transporting non-complying gasoline to Union W 70, a branded retail outlet, was alleged to be either intentional or negligent.

The second claim for relief referred to the fact that samples of regular and premium unleaded gasoline, drawn from the pumps at the time of an inspection of Union W 70 on September 4, 1992, when tested, showed an RVP in excess of 7.8, and to the alleged facts that CCC made the most recent delivery of gasoline to Union W 70, prior to the inspection, on August 31, 1992, and that

no other carrier delivered gasoline to the mentioned retail outlet. By delivering gasoline specifically designated as "not marketable in a 7.8 RVP control area", CCC allegedly "caused the gasoline to violate the applicable standard" and was liable therefor in accordance with § 80.28(e). The third claim for relief alleged that each of the referenced nine deliveries of gasoline to Union W 70 resulted in violations of the RVP standard, that CCC caused these violations by either negligently or intentionally delivering high RVP gasoline to the retail outlet and was liable therefor in accordance with § 80.28(e).

Answering, CCC admitted the deliveries of gasoline alleged in the complaint, denied that EPA inspected its facility [for the reason that no samples were drawn or tests conducted], denied that EPA detected violations of the RVP standard [at its facility], and denied knowledge of, or responsibility for, the alleged violations. CCC denied that the proposed penalty was appropriately calculated and requested a hearing.

Bills of lading for the mentioned shipments reflect that CCC "picked up" the gasoline at HWRT and that each bill of lading contained the following statement: "Gasoline Not Marketable In 7.8 RVP Control Areas." A preprinted portion of the bills of lading stated "Gasoline Meets Federal R.V.P. Regulations." A representative of EPA inspected HWRT, CCC, and Union W 70 on September 3 and 4, 1992. An affidavit by the inspector, Mr. William Simkins, states that, as a result of his inspection of HWRT, he determined that HWRT samples and tests, in accordance with

the methodologies specified in § 80.27(b), all incoming shipments of gasoline to verify its compliance with RVP requirements. An attached log, which summarizes HWRT test results, including those for RVP, was copied during the inspection. The affidavit of Mr. Frank Weber, Terminal Manager for HWRT, dated April 28, 1995, states that all incoming shipments are sampled and tested to determine compliance with specifications, including RVP, and that testing in accordance with methodologies specified in section 80.27(b) establish that the RVP for premium and regular unleaded gasoline supplied CCC on the dates indicated in the bills of lading at issue here ranged from 8.2 to 8.5 psi.

During the inspection of CCC, Mr. Simpkins examined and copied bills of lading and interviewed personnel (affidavit, dated June 29, 1995). He determined that during the period June through August 1992 CCC picked up from HWRT nine loads of premium and unleaded gasoline, which had been sampled and tested by HWRT, that each of these loads had a RVP in excess of 7.8 psi, that the bills of lading bore the notation "gasoline not marketable in 7.8 RVP areas", and that CCC delivered each of these nine loads to Union W 70, a branded retail outlet, located in Foristell, Missouri, a 7.8 RVP control area.

During the inspection of Union W 70 on September 4, 1992, Mr. Simpkins drew samples of gasoline from the pumps, interviewed personnel and examined bills of lading. An affidavit by Mr. Mark R. Kaiser, dated May 3, 1995, states that he operates a Unocal Truckstop, known as "Union W 70", that he has been the operator of

the mentioned retail outlet since 1978, that during the 1992 volatility season, June 1 through September 15, 1992, all unleaded gasoline sold at Union W 70 was delivered by CCC and that the most recent delivery of unleaded gasoline, prior to the EPA inspection on September 4, 1992, was made by CCC on August 31, 1992. Results of tests on the samples drawn by Mr. Simpkins by the National Vehicle and Fuel Testing Laboratory show that one of the samples had a RVP of 8.82 psi and that the other sample has a RVP of 8.65 psi (affidavit of Carl A. Scarbro, chemical engineering technician).

Based upon the foregoing evidence, Complainant moves for the entry of an order finding CCC liable for the violations alleged in the complaint.

CCC's OPPOSITION

Responding to the motion (Opposition), CCC points out that a motion for accelerated decision is like a judicial motion for summary judgment^{2/} and that the moving party must demonstrate that, in the light of the undisputed facts, it is entitled to judgment as a matter of law. CCC says that with one exception, that of its current address, it does not dispute the facts [summarized above] set forth on pages 2-9 of Complainant's motion. CCC argues, however, that a violation [within the meaning of §

^{2/} Opposition at 1, 2. CCC cites Alm v U.S. Environmental Protection Agency, 974 F.2d 380, 382 (3rd Cir. 1992), cert. denied, 113 S.Ct. 1412 (1993).

80.27(b)] may only be detected at its facility by sampling and testing and that Complainant has not demonstrated that it is entitled to an accelerated decision as a matter of law. Recognizing that the ALJ has ruled (Order, dated October 11, 1995) that non-compliance may be detected [at a carrier's facility] by means other than sampling and testing, CCC incorporates the arguments and authorities set forth in its motion to dismiss, filed April 18, 1994. In that motion, CCC, inter alia, quoted language in the preamble to the proposed rule, 52 Fed. Reg. 31306-07 (August 19, 1987), which equated detection with sampling and testing.

The second and third claims for relief are based upon § 80.28(e), providing essentially that where a violation of the standard at § 80.27(b) is detected at a branded retail outlet, the carrier is liable only if it "caused" the gasoline to violate the applicable standard. CCC emphasizes that § 80.28(e) is not a strict liability regulation and argues that a finding the carrier caused a violation requires more than proof the carrier delivered non-compliant gasoline (Opposition at 3). CCC cites the preamble to the final regulation, 54 Fed. Reg. 11858, 11875 (March 22, 1989), to the effect that a carrier may be found to have caused the gasoline to violate the applicable standard by negligently commingling gasoline with different RVP levels in the carrier's tanks, or by negligently or intentionally mis-routing gasoline intended for delivery in one RVP area to a different RVP area. CCC also quotes from the Remand Order (EAB, February 23, 1994) at 7 "...the complaint must allege that the carrier either intentionally

or negligently brought gasoline above the RVP standard to an area subject to the standard." CCC argues that the carrier's intentions or negligence are crucial factors in determining whether the carrier caused the gasoline to violate the applicable standard and that matters of intention and negligence are particularly unsuited to determination on accelerated decision (Opposition at 4).

Elaborating on the above contentions, CCC avers that matters of intent extend not only to having in mind a purpose to bring about given consequences, but also to having a belief (or knowledge) that given consequences are substantially certain to result from the act, citing Prosser and Keeton on Torts, § 8 p. 36 (1984). CCC contends that it is EPA's burden to prove that CCC had the purpose of violating the RVP standard and that CCC knew that the delivery to Union W 70 would violate the RVP standard (Opposition at 4,5).

As to negligence, CCC asserts that the finder of fact must determine whether, under the particular circumstances, the actor's conduct was reasonable. Restatement (Second) of Torts, § 283. CCC emphasizes that it delivered the gasoline exactly as it contracted to do with the owner and consignee of the gasoline and argues that whether it was reasonable under the circumstances for CCC to rely on the instructions of the owner and consignee can only be determined after a full exposition of the evidence, citing Prosser and Keeton, supra, § 32, pp 203-205. According to CCC, circumstances that must be considered, include a common carrier's duty to receive and transport property tendered to it. 49 U.S.C.

§ 11101(a). CCC alleges that the evidence provided by Complainant does not illuminate all of the relevant circumstances and does not answer the question of what a reasonable carrier would do under similar circumstances (Opposition at 6).

Finally, CCC reiterates an argument made in its motion to dismiss the amended complaint, namely, that the language of § 80.28(e)(3) providing that the carrier is liable only if it "caused the gasoline to violate the applicable standard" implies that in order to be held liable, the carrier must have altered or mixed the gasoline so that it exceeds the applicable standard. CCC points out that the definition of a carrier in § 80.2(t) includes the phrase "and without altering the quality or quantity of the gasoline or diesel fuel."^{3/} Because there is no evidence that it altered the gasoline in any manner, CCC argues that Complainant has not shown that it "caused the gasoline to violate the applicable standard."

CCC asserts that Complainant has not demonstrated entitlement to an accelerated decision and that Complainant's motion therefor should be denied.

^{3/} Section 80.2(t) provides:

(t) Carrier means any distributor who transports or stores or causes the transportation or storage of gasoline or diesel fuel without taking title to or otherwise having any ownership of the gasoline or diesel fuel, and without altering either the quality or quantity of the gasoline or diesel fuel.

DISCUSSION

The October 11 order does hold that "a violation of the applicable standard" may be "detected at a carrier's facility" within the meaning of § 80.28(b) by means other than sampling and testing (Id. 9). The order, however, specifically reserved ruling on the question of whether the evidence in the record was sufficient to establish that the violation "was detected" at CCC's facility. The conclusion that determination of this issue should await development of a full evidentiary record is affirmed and the motion for an accelerated decision insofar as the first claim for relief is concerned will be denied.

The second and third claims for relief are based upon the contention that by delivering non-compliant gasoline to Union W 70, a branded retail outlet located in a RVP control area, CCC "caused the gasoline to violate the applicable standard" within the meaning of § 80.28(e)(3), and, accordingly, is liable for the violations. If mere delivery is sufficient to cause the gasoline to violate the applicable standard within the meaning of the cited rule, it makes no difference, save perhaps for penalty considerations, whether the delivery was negligent or intentional. In this regard, CCC's contention that the intent required here is a purpose to violate the RVP standard, i.e., EPA must show that CCC knew that the delivery to Union W 70 would violate the standard, confuses intent to make the delivery at that location with intent to violate the standard. No showing of intent to violate the rule is necessary.

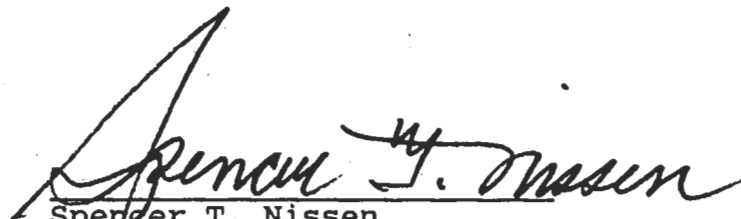
The October 11 order pointed out, and CCC acknowledges, that a carrier may be found to have caused the gasoline to violate the applicable standard by negligently commingling gasoline with different RVP levels in its tanks, or by negligently or intentionally mis-routing gasoline intended for delivery in one RVP area to a different RVP area (Opposition at 3, 4). The October 11 order noted that it would be anomalous indeed, if intentionally or negligently delivering non-complying gasoline to a branded retail outlet in a RVP control area would not have the same effect (Id. 16). Be that as it may, the same evidence will be relevant to the determination of the penalty and Complainant's motion for an accelerated decision on its second and third claims for relief will be denied.^{4/}

^{4/} As noted in the order, dated April 2, 1996, directing the submission of prehearing exchanges, all prior proceedings in this matter have been by motion. Although Complainant's motion is technically timely, because no hearing date has been set, there comes a time when the filing of motions, other than perhaps for subpoenas, should cease. It is concluded that this proceeding has reached that stage and it is my intention to schedule this matter for hearing, which will be held at EPA Headquarters in Washington, D.C. at the earliest opportunity. At any such hearing Complainant must be prepared to make the showing required by In re New Waterbury, Ltd, TSCA Appeal No. 93-2 (EAB, October 20, 1994) concerning CCC's "ability to pay".

Order

Complainant's motion for a Partial Accelerated Decision
as to liability is denied.

Dated this 18th day of June 1996.


Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing **Order Denying Motion For Partial Accelerated Decision** was filed in re Commercial Cartage Company, Inc; Docket No. CAA-93-H-002 and that exact copies of the same were mailed to the following:

(Interoffice)

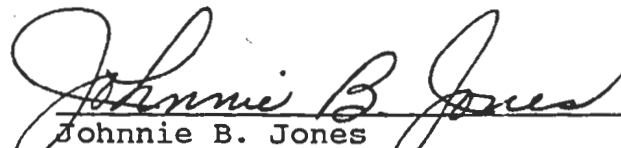
Jocelyn L. Adair, Esq.
Mobil Source Enforcement Branch
Air Enforcement Division (2242-A)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

(1st Class Mail)

Gary R. Letcher, Esq.
Coleen M. Morgan, Esq.
The Harker Firm
5301 Wisconsin Avenue, N.W.
Suite 740
Washington, D.C. 20015

(1st Class Mail)

Mr. Larry Lewis
President
Commercial Cartage Company
P.O. Box 1829
301 East Marceau Street
St. Louis, MO 63118-0829



Johnnie B. Jones
Office of The Hearing Clerk (1900)
U.S. Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

Dated: June 18, 1996