

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Mid-States Express, Inc.,)
Notice of Apparent Violation and Intent to) Case No. 03-1581-TR-CVF
Assess Forfeiture.) (3223301072C)

OPINION AND ORDER

The Commission, considering the public hearing held on December 13, 2005, issues its opinion and order in this matter.

APPEARANCES:

Harold J. Ferenczi, 1000 W. US 20, Michigan City, Indiana 46360, on behalf of Mid-States Express, Inc.

Marc Dann, Attorney General of Ohio, by Stephen A. Reilly, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

Nature of the Proceeding:

On July 18, 2002, a hazardous materials specialist on the Commission's staff (staff) was called to the scene of a hazardous materials spill in Mahoning County, Ohio. The spill involved a motor vehicle operated by Mid-States Express, Inc. (Mid-States, company), and driven by Bryant Shelton. Commission staff found various violations of the Code of Federal Regulations (C.F.R.), including the following violations relevant to this case:

49 C.F.R. Section 171.2(a) (Section 171.2(a)) – Failure to comply with HM regulations. Drum expanded resulting in (loss of) package integrity.¹

¹ At the time of the inspection in this case, 49 C.F.R. Section 171.2(a) provided, in pertinent part, that:

"No person may ... accept a hazardous material for transportation in commerce unless ... the hazardous material is properly packaged ... and in condition for shipment as required ... by applicable requirements of this subchapter"

Since the inspection, 49 C.F.R. Section 171.2 has been amended. The current regulation provides, in pertinent part, that:

(a) "Each person who performs a function covered by this subchapter must perform that function in accordance with this subchapter."

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49 C.F.R. Section 173.24 (b)(1) (Section 173.24(b)(1)) – Release of HM from package, one 55 gallon drum of class 8 material. Lost approx. 20 (gallons) into the environment.²

Mid-States was timely served a Notice of Preliminary Determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In this notice, Mid-States was notified that staff intended to assess a civil forfeiture totaling \$3,000.00 for violation of the hazardous materials transportation rules. A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement at the conference. Subsequently, a hearing was convened on December 13, 2005. Thereafter, staff filed its brief of the case on January 19, 2006. Mid-States filed no further information in the case.

Background

Mid-States received a shipment of liquid, corrosive hazardous materials in 55 gallon drums, which had been transported by another carrier from a shipper's facility in York, Pennsylvania, to Mid-States' terminal in Richfield, Ohio. At the company's terminal, the shipment was transferred to a Mid-States truck for delivery to a number of locations. The truck was loaded with only hazardous materials. Mid-States' driver made a delivery in Youngstown, Ohio, and noticed liquid leaking from the front of the trailer. The Mahoning County Fire Department and the Mahoning County Incident Patrol responded to the spill. A Commission staff member, Hazardous Materials Specialist Dennis Crook, was also dispatched to the scene. Inspector Crook investigated and found that Mid-States had been transporting four drums of corrosive, liquid hazardous materials. He observed that one of the 55-gallon drums (sodium hydroxide) had leaked (approximately 20 gallons), spilling out of the trailer and running down a driveway into a drain (Staff Ex. 1; Tr. 11). The Mahoning County authorities secured the leaking drum and contained the leaking hazardous material. Subsequently, a professional cleaning company, Sun Pro, Inc. (Sun Pro), which had been summoned by Mid-States, cleaned the trailer and the area compromised by the spill and disposed of any remaining hazardous material.

(e) "No person may ... accept a hazardous material for transportation ... unless the hazardous material is properly ... packaged ... and in condition for shipment as required ... by applicable requirements of this subchapter..."

² 49 C.F.R. Section 173.24(b)(1) provides, in pertinent part, that:

"Each package used for the shipment of hazardous materials ... shall be designed ... maintained ... and closed so that under conditions normally incident to transportation ... there will be no identifiable (without the use of instruments) release of hazardous materials to the environment."

Issue in the Case:

At issue is whether Mid-States should be held accountable for a spill of hazardous material into the environment. Both parties testified that a hazardous material spill did occur. Staff contended that, because the spill occurred when Mid-States was transporting the hazardous material, the company was in violation of the hazardous materials transportation rules. Mid-States maintained that it had no way of knowing the drum of hazardous material would leak and that it should not be held accountable.

Discussion:

Staff and Mid-States agreed that the company accepted the drums of hazardous material for transportation at its terminal. The parties further agreed that hazardous material leaked from a drum in the trailer of the Mid-States truck and spilled into the environment (Tr. 11, 13, 27-28, 71-73; Staff Ex. 1, Co. Ex. B). Both parties agreed that the spillage was due to the expansion of the drum containing the hazardous material. Inspector Crook testified that the drum expanded because of either fatigue of the drum itself and improper packaging or the heat (Tr. 22). Further, Inspector Crook noted in the driver/vehicle examination report that the drum expanded and breached. Company witness Ferenczi testified that possibly overfilling and then heat expansion caused the drum failure (Tr. 55-56). Mid-States also submitted reports from company officials (Co. Exs. C and D), which indicated that the drum was defective or overfilled, and a report from Sun Pro (Co. Ex. H), which states that Sun Pro was informed that pressure had caused the drum to deform and subsequently leak. However, no other evidence was presented at hearing to support the contention that heat buildup in the trailer, due to the temperature in July, had caused the drum's failure. Neither did the company present evidence of any precautions taken to protect its load of hazardous materials from the possible effect of the July heat.

Mid-States testified that it made every effort to clean up the spill. The company testified that the leaking drum of hazardous material failed through the seams of the drum and that the Mid-States could not have known that the structure of the drum would fail. Mid-States argued that the company did everything it could to safely transport the hazardous materials (Tr. 68-70).

Staff argued that Mid-States' assertions that the spill was not intentional and that the company was not negligent when the spill occurred are not relevant to the company's violation of Sections 171.2(a) and 173.24(b)(1) by releasing hazardous materials into the environment. Staff stated that these code sections are violated if a release occurs regardless of intent or possible negligence on the part of a carrier. Staff, however, did note that the company's arguments are belied by certain facts in the case. First, staff noted that Mid-States presented testimony, not about any preventative actions taken to guard against

the spill, but only about the company's efforts to clean up after the spill occurred. Second, staff pointed out that Mid-States did not know if the company had performed an inspection of the drums of hazardous material when it received those drums at the Mid-States' terminal, prior to shipment of the load to Youngstown on the company truck (Staff Post-Hearing Brief at 4-8; Tr. 73).

Staff also noted staff witness John Canty's testimony establishing that the company has a "4" value in its record of prior violations, the worst score on staff's civil forfeiture assessment chart; a score that Mid-States did not dispute. Staff stated it considered many factors that might mitigate the amount of the forfeiture, but found that none existed. Further, staff stated that the proposed forfeiture is consistent with the recommendations of the Commercial Vehicle Safety Alliance (Tr. 35-41, 45-46, 76; Staff Ex. 3; Staff Post-hearing Brief at 8).

The Commission believes that the record is clear regarding violations of Sections 171.2(a) and 173.24(b)(1). We observe that Section 171.2(a) (currently Section 171.2(e)) plainly provides that no person may accept hazardous material for shipment unless the hazardous material is properly packaged and in a condition for shipment that is in accordance with the hazardous materials transportation rules. In addition, Section 173.24(b)(1) clearly prohibits the release of hazardous material into the environment. As staff noted in this case, neither of the aforementioned code sections requires that a spill of hazardous material be the result of intentional conduct by the carrier or that the carrier's conduct be negligent. Mid-States accepted the hazardous materials for shipment. Therefore, the company was responsible for the load and for complying with the requirements for transportation of hazardous materials. While Mid-States' efforts to monitor and provide for the cleanup of the hazardous material spill are commendable, the company admitted that the spill did occur. No testimony or evidence was offered that refutes the staff witnesses' testimony or the inspection report. Accordingly, the Commission finds that Mid-States was in violation of Sections 171.2(a) and 173.24(b)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On July 18, 2002, a hazardous materials specialist on the Commission's staff was called to the scene of a hazardous material spill in Mahoning County, Ohio. The spill involved a motor vehicle operated by Mid-States Express, Inc. Commission staff found various violations of the Code of Federal Regulations (C.F.R.), including the following violations relevant to this case:

49 C.F.R. Section 171.2(a) – Failure to comply with HM regulations. Drum expanded resulting in (loss of) package integrity.

49 C.F.R. Section 173.24 (b)(1) – Release of HM from package, one 55 gallon drum of class 8 material. Lost approx. 20 (gallons) into the environment.

- (2) Mid-States was timely served with a Notice of Preliminary Determination in this case.
- (3) A hearing in this matter was convened on December 13, 2005.
- (4) Staff demonstrated at hearing, by a preponderance of the evidence, that Mid-States violated Sections 171.2(a) and 173.24(b)(1). Further, the proposed forfeiture is consistent with the recommendations of the Commercial Vehicle Safety Alliance.
- (5) Mid-States' arguments at hearing were not sufficient to demonstrate that the company should not be held liable for the civil forfeiture assessed for violation of Sections 171.2(a) and 173.24(b)(1).
- (6) Pursuant to Section 4905.83, Revised Code, Mid-States must pay the State of Ohio the civil forfeiture assessed for violation of Sections 171.2(a) and 173.24(b)(1). The company shall have 30 days from the date of this entry to pay the assessed forfeiture of \$3,000.00.
- (7) Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793.

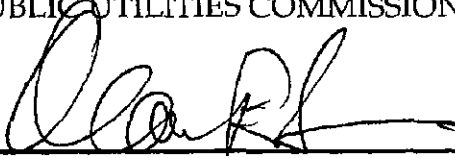
It is, therefore,


ORDERED, That Mid-States pay the assessed amount for the violation of 49 C.F.R. Sections 171.2(a) and 173.24(b)(1) within 30 days to the State of Ohio, as set forth in Findings of Fact and Conclusions of Law (6) and (7). It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,

ORDERED, That a copy of this opinion and order be served upon each party of record.

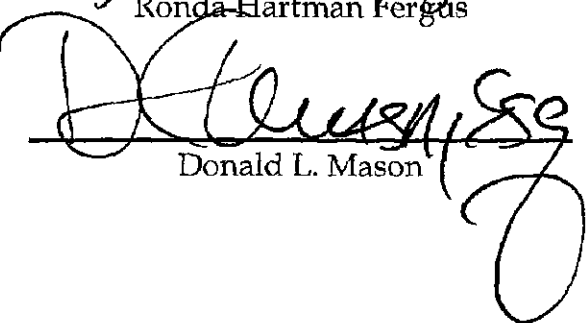
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


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Ronda Hartman Fergus

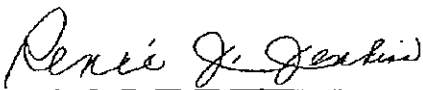

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AUG 29 2007



Renee J. Jenkins
Secretary