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PUCO

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January 29, 2010

Docketing Division
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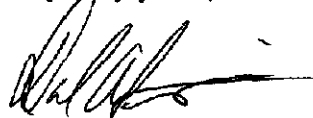
Re: Sweeney Services, Inc.
PUCO Case No. 09-607-TR-CVF

Dear Sir or Madam:

Enclosed please find the original and three (3) copies of Respondent's Post-Hearing Brief in the above-captioned case, which has already been filed with the Commission via facsimile.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions or concerns regarding the same.

Very truly yours,



David A. Ferris

DAF/baf
Enclosure

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Request for
Administrative Hearing by
Sweeney Services, Inc.

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Case No. 09-607-TR-CVF

PUCO

POST-HEARING BRIEF

INTRODUCTION

This case involves a Notice of Apparent Violation and proposed civil forfeiture issued by the Public Utilities Commission of Ohio (the "Commission") to the respondent, Sweeney Services, Inc. (the "Respondent"). The Notice alleges a single violation arising from the driver's lack of tank vehicle endorsement. A driver of any vehicle with portable tanks having a rated capacity under 1,000 gallons, however, is not required to carry a tank vehicle endorsement on his or her CDL. All parties agree that the tank at issue had a rated capacity of 600 gallons. In order to establish that a violation occurred, therefore, the Staff was obligated to prove, among other things, that the tank at issue was not a portable tank and that the citation itself was warranted. Staff failed in both respects in that, among other things, the only witness with personal knowledge of the events surrounding issuance of the underlying citation was, by his own admission, unable to determine whether a violation actually occurred, and that witness had no personal knowledge of specific facts to prove that the violation actually occurred – in particular the means by which the tank was secured to the vehicle. For these reasons, as well as others discussed during the hearing and throughout this Brief, the Respondent renews its Motion to Dismiss and objects to the Commission's determination, at the time of hearing, overruling its oral motion to dismiss.

STATEMENT OF FACTS

On or about May 20, 2009, Respondent's vehicle and driver were subjected to an inspection by Tom Forbes, Inspector for the Public Utilities Commission of Ohio. *Staff Exhibit 1*. The only reason given for the inspection was the visibility of hazardous materials placards on the side of Respondent's vehicle. *Transcript at p. 8*. Following the inspection, Mr. Forbes issued a citation to Respondent's driver for the alleged violation of 49 C.F.R. 383.93(b)(3), with the description "No tank vehicle endorsement on CDL – Driver only has Haz endorsement."

Staff Exhibit 1. Respondent timely requested a conference with the Commission and subsequently an administrative hearing, during which Respondent denied that the alleged violation occurred. A hearing was held, at which time Staff produced Mr. Forbes and John Canty as its only witnesses. Mr. Forbes testified as to the inspection and issuance of the citation, and Mr. Canty testified as to how the corresponding, proposed civil forfeiture was calculated. At the conclusion of Staff's case, Respondent moved for a dismissal of the violation, based on Staff's failure to satisfy its burden of proof and present through testimony all elements necessary to establish the existence of the alleged violation. More specifically, Staff's only witness with personal knowledge of the inspection admitted that he could not determine whether the alleged violation actually occurred and purportedly relied on the opinion of others for this determination. *Transcript at p. 10*. In spite of the fact that someone other than Mr. Forbes is alleged to have made the determination as to whether or not to issue the citation, Staff failed to produce and present testimony from that individual. In addition, Staff failed to produce or present testimony from any witness with personal knowledge as to how the cargo tank at issue was secured to Respondent's vehicle.

ARGUMENT OF LAW

During the hearing, a respondent must be afforded due process, which requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under scrutiny. *Id. at 270*. In the case of *Greene v. McElroy*, 360 U.S. 474 (1959), the Supreme Court of the United States held:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. ... This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases...but also in all types of cases where administrative and regulatory actions were under scrutiny.

Id. at 496-497. Clearly, therefore, a respondent is only afforded due process where *all* of his accusers are present at the hearing and available for confrontation and cross-examination.

In the instant case, the officer alleged by Staff's own witness to have made the determination as to whether or not the violation actually occurred, was not present or available to Respondent for confrontation or cross-examination, all in violation of Respondent's right to due process. Specifically, Staff's only witness with respect to the alleged violation testified:

Q. What happened after that?

A. I finished the vehicle inspection, and other than the tank endorsement issue there were no other defects noted on the inspection...Mr. Sweeney felt that they did not need a tank endorsement. I told Mr. Sweeney that I felt they did, but what I would do is I would contact the lieutenant over commercial driver's licenses with the highway patrol and if he said they did not need a tank endorsement, I would finish the inspection and send their driver down the road.

However, if he said they did need a tank endorsement, a violation would be listed and we were going to have to figure out how to proceed.

Transcript at pp. 10-11. Mr. Forbes went on to explain that he had contacted Lieutenant Regal to inquire whether the alleged violation actually occurred. *Id. at p. 11.* Despite this admission by Staff's witness that he did not rely on his own determination on whether or not a violation actually occurred, Staff failed to produce Lieutenant Regal at the hearing or make him available for confrontation and cross-examination by Respondent. In addition, the violation alleged was apparently based on the determination of someone who was not present at the inspection and had no personal knowledge whatsoever of the underlying facts. Given the foregoing, Respondent was not afforded its rights to due process, and the alleged violation and charging document should be dismissed.

Even if it is determined by the Commission that Respondent was afforded its due process rights, Staff failed to satisfy its burden of proof with respect to the violation alleged. In order to prove that a violation occurred, Staff must prove, during an evidentiary hearing, the occurrence of a violation by a preponderance of the evidence. *O.A.C. 4901:2-7-20.* As acknowledged by Mr. Forbes during the hearing, Respondent advised him that the tank vehicle endorsement was not necessary, because the tank at issue had a rated capacity of less than 1,000 gallons, thereby placing it outside the definition of "tank vehicle," as defined at *49 C.F.R. 383.5. Transcript at p. 12.* *49 C.F.R. 383.93(b)(3)* requires an endorsement on a driver's CDL when operating tank vehicles. A "tank vehicle" is defined to mean:

...any commercial motor vehicle that is designed to transport any liquid or gaseous materials within a tank ***that is either permanently or temporarily attached to the vehicle or the chassis.*** Such vehicles include, but are not limited to, cargo tanks and portable tanks, as defined in part 171 of this title. However, this definition

does not include portable tanks having a rated capacity under 1,000 gallons.

49 C.F.R. 383.5 (emphasis added). In order to prove that a vehicle falls within the definition of “tank vehicle,” Staff must show the means by which it is attached to the vehicle or the chassis, as well as the inapplicability of the exclusion of portable tanks having a rated capacity under 1,000 gallons from the definition.

Consideration of a violation alleged under 49 C.F.R. 383.93(b)(3) appears to be a case of first impression for the Commission. The Opinion and Order *In the Matter of the Request of Hanko Farms, Inc., for an Administrative Hearing, PUCO Case No. 05-153-TR-CVF (2007)*, however, speaks to Staff’s failure to satisfy its burden of proof regarding how equipment was secured to a vehicle. Although the *Hanko Farms* case dealt with securing heavy equipment, it is analogous to the instant case, in that the method of securing the tank at issue has not been established by Staff. In *Hanko Farms*, the Commission held:

...[W]ith respect to [the] alleged violation, the Staff has failed to meet its burden of proof and the violation should be dismissed. At the hearing, the Staff’s witness could not recall how many chains were used to secure the machinery to the vehicle at the time of the inspection. Further, the Commission notes that the Staff did not introduce any photographs at the hearing, or any other evidence which depict, in detail, the number or location of the chains or other tiedowns used to secure the machinery to the vehicle.

Id. at p. 2. In the instant case, Staff also failed to meet its burden of proof, as its sole witness from the inspection, Mr. Forbes, had no idea how the tank was attached to the vehicle. The photographs presented by Staff also did not show the manner in which the tank was attached.

Staff’s only witness with personal knowledge of the vehicle, Mr. Forbes, did not know the manner in which the tank was attached to the vehicle or chassis. During the hearing, Mr. Forbes testified that the tank at issue would have to be “greater than 119 gallons that’s

permanently or temporarily attached to the vehicle.” Mr. Forbes did not, however, know how the tank was attached and testified:

Q. Mr. Forbes, how was this tank attached to the vehicle?

A. I don’t know on this particular tank. I don’t recall how it was attached to the vehicle.

Transcript at p. 13.

Q. Thank you. Mr. Forbes, do you recall if this tank was bolted to the truck?

A. I do not.

Q. Thank you. What caused you to make the conclusion that this was a cargo tank and, therefore, the driver was required to have a tank vehicle endorsement?

A. A combination of the specification plates that are shown in photographs 2D, 2E...A combination of the specification plates and I also reviewed the hazardous materials table to verify that this material was being transported was allowed in that package, and a DOT 406 tanker is an acceptable package for this material.

Transcript at pp. 22-23.

Clearly, Mr. Forbes had no idea of the manner in which the tank was attached to the vehicle or whether it was considered a portable tank. This testimony is consistent with the fact that Mr. Forbes did not determine whether a violation occurred, but, instead, is said to have made inquiry of Lieutenant Regal, who was not present at the hearing. Notwithstanding the foregoing, when asked, over the objection of Respondent, what caused him to determine that a tank vehicle endorsement was required, Mr. Forbes testified that it was a combination of the “specification plates” and verification that the material being transported was permitted in the tank at issue. With respect to the latter, Mr. Forbes admitted that the tank utilized was the proper tank for transporting the hazardous materials at issue. With respect to the specification plates, Mr.

Forbes never testified whether they pertained to portable tanks or not and, in fact, testified that portable tanks are regularly identified as "cargo tanks." Specifically, Mr. Forbes testified that when specifying a portable tank, he merely completes his inspection form with "cargo tank: other." *Transcript at p. 26.*

The non-existence of the alleged violation in this case is also supported by the Ohio Bureau of Motor Vehicles. In its publication, *Ohio Commercial Drive License Handbook*, it provides the following guidance:

This section includes information needed to pass the CDL knowledge test for driving a tank vehicle...A tank endorsement is only required if your vehicle needs a Class A or B CDL and you want to haul a liquid or liquid gas in a permanently mounted cargo tank rated at 119 gallons or more or a portable tank rated at 1,000 gallons or more.

*Ohio Commercial Driver License Handbook at p. 8-1.*¹ As stated previously, Staff failed to present any witnesses to testify that the tank at issue was "a *permanently mounted* cargo tank rated at 119 gallons or more." Further, Staff failed to establish that the tank at issue, which had a rated capacity of *less than* 1,000 gallons, was not a portable tank. The foregoing is further evidence yet that Staff failed to satisfy its own burden of proof in this case.

Finally, the violation at issue should be dismissed, because the stop was admittedly without just cause, and the Commission failed to take into consideration Respondent's ability to pay in issuing the proposed forfeiture. Specifically, Staff's witness on calculation of the forfeiture testified:

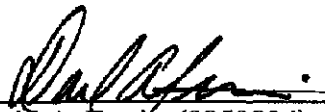
Q. Mr. Canty, on Staff Exhibit 3, does the Commission anywhere on that exhibit assess the Respondent's ability to pay any forfeiture assessed?

¹ Books, pamphlets, and other publications purporting to be issued by public authority are self-authenticating [Evid.R. 902(5)] and excepted from hearsay [Evid.R. 803(8)].

A. No. That's something that we cannot take into consideration during the initial assessment since we have nothing in our possession to argue either way. ...

Transcript at p. 48. With respect to the reason for the stop, Mr. Forbes testified that the only reason he stopped the vehicle was because it was carrying hazardous materials (*Transcript at p. 8*), and he observed no violations with respect to the vehicle (*Transcript at p. 27*).

Respectfully submitted,




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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Post-Hearing Brief has been served this 29th day of January, 2010, via First Class U.S. Mail, postage prepaid, upon the following parties:

Stephen Reilly
Attorney General Section
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Thomas Lindgren
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David A. Ferris

Ohio

Commercial Driver License Handbook



CDL Testing Model

Section 8: TANK VEHICLES

This section covers:

- Inspecting tank vehicles
- Driving tank vehicles
- Safe driving rules

This section includes information needed to pass the CDL knowledge test for driving a tank vehicle. (You should also study Sections 2, 5, and 6). A tank endorsement is required for certain vehicles that transport liquids or gases. The liquid or gas does not have to be a hazardous material. A tank endorsement is only required if your vehicle needs a Class A or B CDL and you want to haul a liquid or liquid gas in a permanently mounted cargo tank rated at 119 gallons or more or a portable tank rated at 1,000 gallons or more.

Before loading, unloading or driving a tanker, inspect the vehicle. This ensures that the vehicle is safe to carry the liquid or gas and is safe to drive.

8.1 – Inspecting Tank Vehicles

Tank vehicles have special items that you need to check. Tank vehicles come in many types and sizes. You need to check the vehicle's operator manual to make sure you know how to inspect your tank vehicle.

8.1.1 – Leaks

On all tank vehicles, the most important item to check for is leaks. Check under and around the vehicle for signs of any leaking. Don't carry liquids or gases in a leaking tank. To do so is a crime. You will be cited and prevented from driving further. You may also be liable for the clean up of any spill. In general, check the following:

- Check the tank's body or shell for dents or leaks.
- Check the intake, discharge and cut-off valves. Make sure the valves are in the correct position before loading, unloading, or moving the vehicle.
- Check pipes, connections and hoses for leaks, especially around joints.
- Check manhole covers and vents. Make sure the covers have gaskets and they close correctly. Keep the vents clear so they work correctly.

8.1.2 – Check Special Purpose Equipment

If your vehicle has any of the following equipment, make sure it works:

- Vapor recovery kits
- Grounding and bonding cables
- Emergency shut-off systems
- Built-in fire extinguisher

Never drive a tank vehicle with open valves or manhole covers.

8.1.3 – Special Equipment

Check the emergency equipment required for your vehicle. Find out what equipment you're required to carry and make sure you have it (and it works).

8.2 – Driving Tank Vehicles

Hauling liquids in tanks requires special skills because of the high center of gravity and liquid movement. See Figure 8.1.

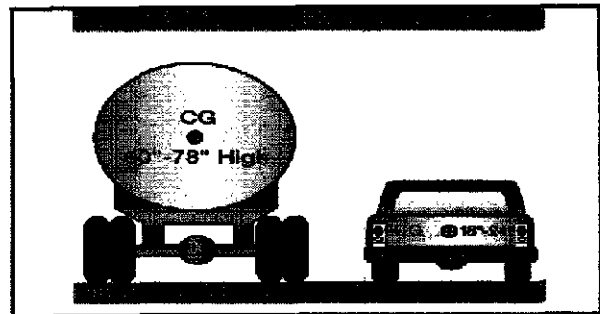


Figure 8.1

8.2.1 – High Center of Gravity

High center of gravity means that much of the load's weight is carried high above the road. This makes the vehicle top-heavy and easy to roll over. Liquid tankers are especially easy to roll over. Tests have shown that tankers can turn over at the speed limits posted for curves. Take highway curves and on-ramp/off-ramp curves well below the posted speeds.

8.2.2 – Danger of Surge

Liquid surge results from movement of the liquid in partially filled tanks. This movement can have negative effects on handling. For example, when coming to a stop, the liquid will surge back and forth. When the wave hits the end of the tank, it tends to push the truck in the direction the wave is moving. If the truck is on a slippery surface such as ice, the wave can shove a stopped truck out into an intersection. The driver of a liquid tanker must be very familiar with the handling of the vehicle.

8.2.3 – Bulkheads

Some liquid tanks are divided into several smaller tanks by bulkheads. When loading and unloading the smaller tanks, the driver must pay attention to weight distribution. Don't put too much weight on the front or rear of the vehicle.