

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Stony Run Enterprises, :
Inc., Notice of Apparent Violation and :
Intent to Assess Forfeiture. : Case No. 14-561-TR-CVF

**POST-HEARING BRIEF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

Few contested cases are as straightforward as this one. Stony Run Enterprises, Inc. (“Respondent”) admits almost every fact that supports Staff’s case. Staff contends that Respondent violated 49 C.F.R. 173.24(b)(1) when it released a hazardous material into the environment. Respondent admits it was transporting a hazardous material in a cargo tank,¹ admits that this hazardous material was a green liquid,² and admits that a green liquid was pooling inside the meter box below the cargo tank during the inspection.³ In addition, Respondent admits there was a liquid dripping out of this meter box onto the ground,⁴ and admits that there was a stain on the ground beneath the meter

¹ Tr. at 99, 117, and 119.

² Tr. at 117 and 154-155.

³ Tr. 107 and 117.

⁴ Tr. at 136.

box where the liquid was leaking through.⁵ These facts alone show that Respondent violated 49 C.F.R. 173.24(b)(1) by releasing a hazardous material into the environment.

But Staff's case does not end there. Two inspectors testified regarding the hazardous material leaking from the Respondent's vehicle. Both inspectors testified that they personally witnessed the green liquid leaking onto the ground.⁶ One inspector documented the violation by photographing the hazardous material pooling inside the meter box,⁷ leaking through the meter box,⁸ and dripping onto the ground.⁹ This inspector also testified that, during the inspection, the Respondent admitted that the green liquid that was pooling inside the meter box was a hazardous material.¹⁰

Despite all this evidence, Respondent maintains that it did not violate 49 C.F.R. 173.24(b)(1). Respondent may dislike the violation, but the record could not be clearer. The Respondent released a hazardous material into the environment. Thankfully, no member of the public was harmed. But the release of hazardous material into the environment is still a serious matter, and should be treated as such. The Public Utilities

⁵ Tr. at 123.

⁶ Tr. at 33-34, 52, 67, and 74.

⁷ Staff Ex. 3 (photograph); Staff Ex. 4 (photograph).

⁸ Staff Ex. 5 (photograph).

⁹ Staff Ex. 7 (photograph).

¹⁰ Tr. at 28.

Commission of Ohio (“Commission”) should assess the Respondent \$1200 for violating 49 C.F.R. 173.24(b)(1).

STATEMENT OF FACTS

On November 8, 2013, Transportation Examiner Kevin Swartz (“Inspector Swartz”)¹¹ performed a Level 1 inspection of Respondent’s vehicles at the Harrison Scales located on I-74.¹² Robert Updike was driving the Respondent’s vehicles during the inspection.¹³ The Respondent’s vehicles consisted of a tractor and trailer. Both the tractor and trailer were being operated under Respondent’s authority.¹⁴ The trailer was a cargo tank, which contained approximately 31,980 lbs. of hazardous material.¹⁵ The hazardous material Respondent was transporting was Gramoxone SL 2.0 (“Gramoxone”), which is a poisonous Class 8 Corrosive.¹⁶ Gramoxone is a bluish green liquid herbicide that can be fatal if inhaled, and can be harmful if it comes in contact with skin or eyes.¹⁷

¹¹ At the time of the inspection, Inspector Swartz was a Motor Carrier Enforcement Inspector for the Commission. He was subsequently promoted to his current position of Transportation Examiner. Tr. 8-9.

¹² Tr. at 14; Staff Ex. 1 (Driver/Vehicle Examination Report (“Inspection Report”)).

¹³ Tr. at 98; Staff Ex. 1 (Inspection Report).

¹⁴ Tr. 136; The trailer, the meter box, and the hydraulic pump inside the meter box are all owned by Larry Miller Trucking, and then leased to Respondent. Tr. 129-130. Mr. Updike admitted that he is responsible for inspecting this equipment. Tr. 121-122.

¹⁵ Tr. at 12; Staff Exhibit 1 (Inspection Report).

¹⁶ Tr. at 36 and 117; Respondents Ex. 1 (Shipping Information) at 1-6; Staff Ex. 10 (Material Safety Data Sheet (“MSDS”)) at 1.

¹⁷ Tr. at 39; Staff Ex. 10 (MSDS) at 1.

While Inspector Swartz was walking around the vehicles, he noticed a spot on the ground below the cargo tank.¹⁸ This spot was directly below the meter box, which houses the transfer pump.¹⁹ Inspector Swartz observed a green liquid dripping from the meter box onto the ground.²⁰ Inspector Doug Mowen, who was also present during the investigation, observed liquid dripping from the meter box to the ground.²¹ Inspector Swartz looked under the meter box and observed a green liquid leaking through the bottom of the meter box.²²

Inspector Swartz then opened the meter box and saw a bluish green liquid pooling inside of it.²³ Inspector Swartz took photographs of the hazardous material pooling inside of the meter box,²⁴ the bottom of the meter box where the hazardous material was leaking through,²⁵ and the spot on the ground where the green liquid was dripping.²⁶

¹⁸ Tr. at 24.

¹⁹ Mr. Updike admitted that he observed a spot on the ground below the container box. Tr. at 108.

²⁰ Tr. at 33-34, 52 and 67. Respondent witness Larry Miller admitted that a liquid was leaking out of the container box onto the ground. Tr. at 136.

²¹ Tr. at 74.

²² Tr. 32 and 123; Staff Ex. 5 (photograph).

²³ Tr. at 117; Staff Ex. 9 (photograph of container box).

²⁴ Staff Ex. 3 (photograph); and Staff Ex. 4 (photograph).

²⁵ Staff Ex. 5 (photograph).

²⁶ Staff Ex. 4 and 7 (photographs).

After observing the hazardous material pooling in the meter box and dripping onto the ground, Inspector Swartz notified Mr. Updike about the leak.²⁷ Mr. Updike exited the tractor, walked to the area where the meter box was located, and observed the bluish green liquid in the meter box.²⁸ Mr. Updike admitted that the hazardous material he was transporting was bluish green, and admitted that the liquid pooling inside the meter box was from a leak in the transfer pump.²⁹ Inspector Swartz testified that the hazardous material dripping from the meter box onto the ground constituted a release of hazardous material into the environment.³⁰ Therefore, Inspector Swartz cited the Respondent for violating 49 C.F.R. 173.24(b)(1).³¹

APPLICABLE LAW

Under Rule 4901:2-5-02(A), O.A.C., the Commission has adopted portions of the hazardous materials transportation regulations (“HMRs”) contained in 49 C.F.R. 171 to 49 C.F.R. 180 (“Subchapter C”). The Commission also adopted provisions of the motor carrier safety regulations contained in 49 C.F.R. 390 to 397, among other parts, pursuant to Rule 4901:2-5-02(A), O.A.C. Rule 4901:2-5-02(B), O.A.C. requires all motor carriers

²⁷ Tr. at 25.

²⁸ Tr. at 28.

²⁹ Tr. at 28.

³⁰ Tr. at 67.

³¹ Tr. at 25.

engaged in interstate commerce in Ohio to operate in conformity with all applicable regulations of the U.S. Department of Transportation. Violation of any such federal regulation by any motor carrier engaged in interstate commerce in Ohio constitutes a violation of the Commission's rules.

The Commission also adopted the civil forfeiture and compliance proceeding rules contained in Rules 4901:2-7-01 through 4901:2-7-22, O.A.C. During the evidentiary hearing regarding a civil forfeiture, "the staff must prove the occurrence of a violation by a preponderance of the evidence." 4901:2-7-20(A), O.A.C.³²

49 C.F.R. 171.2 (the general requirements of Subchapter C) addresses who is responsible for compliance with the HMRs. 49 C.F.R. 171.2(f) states that:

No *person* may transport a hazardous material in commerce unless the hazardous material is transported in accordance with applicable requirements of [Subchapter C]... (emphasis added).

A "person" is defined as "an individual, corporation, company ... that ... transports a hazardous material to support a commercial enterprise..." 49 C.F.R. 171.8. Because the Respondent is a "corporation" or "company" that transports hazardous materials to support a commercial enterprise, the Respondent must comply with the requirements of Subchapter C, which includes 49 C.F.R. 173.24(b)(1).

³² A "preponderance of evidence means the greater weight of evidence." *Barnett v. Hills*, 50 Ohio Law Abs. 208, 79 N.E.2d 691, 695 (2nd Dist. 1947); *Schneider v. Schneider*, 5th Dist. Holmes No. 94CA526, 1995 WL 617611, *5 (Oct. 3, 1995) ("Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it."), quoting *1 Ohio Jury Instruction*, Section 3.50, at 114-115 (1994).

Staff cited Respondent for violating 49 C.F.R. 173.24(b)(1), which states:

(b) Each package used for the shipment of hazardous materials under this subchapter shall be designed, constructed, maintained, filled, its contents so limited, and closed, so that under conditions normally incident to transportation... (1) Except as otherwise provided in this subchapter, there will be no identifiable (without the use of instruments) release of hazardous materials to the environment.

This provision applies to bulk packaging,³³ which is defined as “a packaging, other than a vessel or a barge, including a transport vehicle or freight container, in which hazardous materials are loaded with no intermediate form of containment.”³⁴ The type of bulk-packaging the Respondent was transporting was a “cargo tank.”³⁵

On November 8, 2013, Respondent was transporting a cargo tank that was releasing hazardous material into the environment.

³³ 49 C.F.R. 173.24(a)(1).

³⁴ 49 C.F.R. 171.8.

³⁵ “Cargo tank” means “a bulk packaging that: (1) Is intended primarily for the carriage of liquids or gases and includes appurtenances, reinforcements, fittings, and closures; (2) Is permanently attached to or forms a part of a motor vehicle, or is not permanently attached to a motor vehicle but which, by reason of its size, construction or attachment to a motor vehicle is loaded or unloaded without being removed from the motor vehicle; and (3) Is not fabricated under a specification for cylinders, intermediate bulk containers, multi-unit tank car tanks, portable tanks, or tank cars.” 49 C.F.R. 171.8.

ARGUMENT

1. The Respondent violated 49 C.F.R. 173.24(b)(1) by releasing hazardous material into the environment.

Respondent admitted to almost all the critical facts that support the violation.

These admissions include:

- The Respondent was transporting Gramoxone.³⁶
- Gramoxone is a hazardous material.³⁷
- Gramoxone is a liquid, which can appear light green or dark green.³⁸
- There was liquid inside the meter box, which appeared light green and dark green.³⁹
- There was a spot on the ground beneath the meter box.⁴⁰
- There was a liquid dripping from the meter box to the ground.⁴¹
- The bolts under the meter box were stained green.⁴²

³⁶ Tr. 99 and 117.

³⁷ Tr. at 119.

³⁸ Tr. at 117, 154-155.

³⁹ Tr. 107 and 117; Tr. at 154-155.

⁴⁰ Tr. at 114-115.

⁴¹ Tr. at 136.

⁴² Tr. at 123.

These uncontested facts alone prove that Respondent released hazardous material into the environment. And there is even more evidence supporting Staff's case. Inspector Swartz testified regarding what he observed during his inspection. He testified that he noticed a spot on the ground under the meter box,⁴³ observed a green liquid dripping from the meter box,⁴⁴ observed a green liquid on the bolts underneath the meter box⁴⁵ and observed pool of green liquid inside the meter box.⁴⁶ He took numerous photographs documenting the violations. Inspector Swartz photographed the spot on the ground where the hazardous material was dripping, the bolts beneath the meter box that were stained from the leaking hazardous material, and the hazardous material pooling inside the meter box.⁴⁷ In addition, Inspector Mowen confirmed that there was green liquid dripping from the meter box and pooling inside the meter box.⁴⁸

The record is clear. Respondent released hazardous material into the environment. The Commission should find that the Respondent violated 49 C.F.R. 173.24(b)(1).

⁴³ Tr. at 31.

⁴⁴ Tr. at 33-34, 52, 67, and 74.

⁴⁵ Tr. at 33-34.

⁴⁶ Tr. at 31.

⁴⁷ Staff Ex. 3 (photograph); Staff Ex. 4 (photograph); Staff 5 (photograph); and Staff Ex. 7 (photograph).

⁴⁸ Tr. at 73-74, and 76.

2. Respondent failed to rebut any of the evidence presented by Staff, and failed to explain why it should not be held liable for 49 C.F.R. 173.24(b)(1).

Respondent attempted to rebut Staff's case by presenting three witnesses. The crux of these witnesses' testimony is that the green liquid that was leaking through the meter box was "rainwater" or rainwater mixed with Gramoxone.⁴⁹ This "rainwater" defense fails for various reasons.

First, the green liquid inside the meter box does not look like rainwater. It is bluish-green. This is evident from the photographs taken by Inspector Swartz.⁵⁰ This bluish green color is consistent with the description of Gramoxone contained on the MSDS form.⁵¹ Although Respondent may claim the green liquid is rainwater mixed with Gramoxone, Mr. Updike (the only witness of the Respondent that has actual knowledge of what occurred during the inspection) admitted that he does not know this for fact and admitted that he was just speculating.⁵² Beyond mere speculation, there is no evidence that the bluish green liquid was rainwater or rainwater mixed with Gramoxone.

⁴⁹ Because of inconsistency in the testimony of Respondent's witnesses, it is unclear whether Respondent is claiming the green liquid was purely rainwater or a mixture of rainwater and Gramoxone. For example, Respondent witness Updike claimed that the green liquid was a mixture of Gramoxone and rainwater (Tr. at 117-118), while Respondent witness Larry Miller appeared to testify that the spot on the ground was purely rainwater (Tr. at 136). Staff assumes Respondent will clarify its true position in its post-hearing brief, which Staff will respond to in its reply brief.

⁵⁰ Staff Ex. 3 (photograph); and Staff Ex. 4 (photograph).

⁵¹ Staff Ex. 10 (MSDS).

⁵² Tr. at 118.

Second, assuming, *arguendo*, that the green liquid is a mixture of rainwater and Gramoxone, the Respondent still violated 49 C.F.R. 173.24(b)(1) because the green liquid still constituted a hazardous material. Simply because a hazardous material is mixed with water does not mean it is no longer a hazardous material. The Respondent's driver, Mr. Updike, was in the best position to know what material he was transporting, and whether it was a hazardous material. During the inspection, Mr. Updike, *admitted that the green liquid was a hazardous material.*⁵³ In addition, he handled the liquid as if it was hazardous material by wearing rubber gloves and safety glasses when cleaning the liquid out of the meter box.⁵⁴ Further, Mr. Updike did not mention rainwater to the inspectors during the inspection and, in fact, did not see any rainwater in the meter box during the inspection.⁵⁵ The "rainwater" defense did not occur to Mr. Updike until long after he drove away from the inspection.⁵⁶ Inspector Swartz's conclusion that the green liquid was a hazardous material was reasonable based upon the evidence. Respondent's belated rainwater defense does not change the fact that Gramoxone is, even when it is mixed with water, a poisonous, potentially lethal hazardous material.⁵⁷

⁵³ Tr. at 28.

⁵⁴ Tr. at 119 and 120.

⁵⁵ Tr. at 126.

⁵⁶ Tr. at 120.

⁵⁷ Staff Ex. 10 (MSDS).

Respondent may claim that Staff cannot prove the green liquid was a hazardous material because Inspector Swartz did not test the green liquid. This is incorrect. Inspectors are not required to test hazardous materials before citing a carrier for a violation 49 C.F.R. 173.24(b)(1), especially when there is clear evidence that the material is a hazardous material. This case is a perfect example. Because an overwhelming amount of evidence indicated that the liquid dripping from the Respondent's meter box was a hazardous material, testing the hazardous material was unnecessary. The most significant piece of evidence supporting Inspector Swartz's conclusion was an *admission by the driver that the green liquid was a hazardous material*. Inspector Swartz had no reason second-guess Mr. Updike, and had no reason to test the green liquid to determine if it was actually a hazardous material. There is more than enough evidence in the record for the Commission to conclude that the green liquid released from the Respondent's vehicle was a hazardous material.

3. Staff recommends that the Commission assess the Respondent a forfeiture of \$1200.00 for Respondent's violation of 49 C.F.R. 173.24(b)(1).

Staff issued a Notice of Preliminary Determination in this case, which recommended a forfeiture amount of \$1600.⁵⁸ During the hearing, Staff explained that this recommended forfeiture amount was incorrect.⁵⁹ When calculating the assessment, Staff inputted the incorrect weight of the hazardous material into its calculation, which

⁵⁸ Staff Ex. 11 (Notice of Preliminary Determination).

⁵⁹ Tr. at 83.

resulted in an incorrect assessment amount of \$1600. Because the amount of hazardous material the Respondent was transporting was under 35,000 lbs., the Respondent should be assessed a \$1200 forfeiture, and not a \$1600 forfeiture.⁶⁰

Staff witness Frye explained in detail how the \$1200 forfeiture amount was calculated, and explained that this process is applied uniformly in all cases involving hazmat violations.⁶¹ Therefore, Staff recommends that the Commission adopt Staff's recommended forfeiture amount of \$1200.

CONCLUSION

Staff proved that the Respondent released hazardous material into the environment. Because Staff met its burden, the Commission should find that the Respondent violated 49 C.F.R. 173.24(b)(1), and assess Respondent a forfeiture in the amount of \$1200.

Respectfully submitted,

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/s/ Devin D. Parram

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⁶⁰ Tr. at 84.

⁶¹ Tr. at 85 – 93; Staff Ex. 12 (Hazmat Assessment Worksheet); and Staff Ex. 13(Civil Forfeiture Violation Chart).

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing **Post-Hearing Brief of Staff** was served via electronic mail upon the following party on September 22, 2014.

*/s/ Devin D. Parram*_____

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Summary: Brief Initial Post Hearing Brief of Staff electronically filed by Mr. Devin D Parram on behalf of PUCO Staff