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

REPLY BRIEF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

Stony Run Enterprises, Inc. (Respondent) presented two arguments in its post-hearing brief. One argument relates to the law. The other relates to the facts. Neither argument has merit, as explained below.

ARGUMENT

1. The Staff properly cited Respondent under 49 C.F.R. 173.24(b)(1) for releasing hazardous material into the environment.

a. The language of the Hazardous Material Regulations (HMRs) show that the Respondent can be held liable for violations of 49 C.F.R. 173.24(b)(1).

Respondent claims it cannot be cited under 49 C.F.R. 173.24(b)(1) because it believes the meter box[1] affixed to the cargo tank does not meet the definition of a

[1] In its post-hearing brief, Respondent refers to a "storage box." Staff calls this equipment the "meter box" in its initial brief, and will continue to do so here for the sake of consistency.

"package."[2] Respondent is wrong. The definitions in the HMRs and the facts of this case show that the Respondent violated 49 C.F.R. 173.24(b)(1) when hazardous material leaked out of Respondent's meter box.

The HMRs define a "package" as "a *packaging* plus its contents."[3] One particular kind of packaging is "bulk-packaging"[4], which includes "cargo tanks."[5] A "cargo tank" is a "bulk packaging that ... [i]s …intended primarily for the carriage of liquids or gases and *includes appurtenances*, reinforcements, fittings, and closures."[6] An "appurtenance" is defined as "*any attachment to a cargo tank* that has no lading retention or containment function and provides no structural support to the cargo tank."[7]

The meter box, which is attached to the cargo tank, is an appurtenance. It has no lading retention, does not hold the hazardous material inside the cargo tank, and provides

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2 Respondent's Post-Hearing Brief at 12.

3 49 C.F.R. 171.8 (definition of "package")(emphasis added). Packaging is defined as "a receptacle and any other components or materials necessary for the receptacle to perform its containment function in conformance with the minimum packing requirements of this subchapter." 49 C.F.R. 171.8 (definition of packaging).

4 "Bulk packaging *means 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." 49 C.F.R. 171.8 (definition of "bulk-packaging")(emphasis added). 49 C.F.R. 173.24 specifically states that the provision applies to bulk packaging. 49 C.F.R. 173.24(a)(1).

5 "Cargo tank means *a bulk packaging*…". 49 C.F.R. 171.8 (definition of "cargo tank")(emphasis added).

6 49 C.F.R. 171.8 (definition of "cargo tank")(emphasis added).

7 49 C.F.R. 178.320(a) (emphasis added).

no structural support for the cargo tank. This means the meter box is part of the bulk-packaging (the cargo tank) that the Respondent was transporting. Because the cargo tank, and equipment attached to it, is owned and inspected by the Respondent,[8] the Respondent must ensure that this equipment is adequately maintained and repaired to prevent the release of hazardous materials.[9] The Respondent failed to do this, which resulted in Gramoxone leaking out of the meter box.

While Respondent denies that it violated 49 C.F.R. 173.24(b)(1), the record shows that it could have prevented this violation from occurring. Mr. Updike, Respondent's driver, admitted that he is responsible for inspecting nearly all of the equipment affixed to the cargo tank.[10] He testified that after Respondent was cited for violating 49 C.F.R. 173.24(b)(1), he disassembled the meter box, applied silicone to the bolts, and tightened the bolts so that no further leaks would occur.[11] Respondent could have made these repairs before transporting the Gramoxone but did not. This resulted in a failure in the bulk-packaging that Respondent owns, operates, and inspects, which caused the release of hazardous material into the environment. This is a textbook violation of 49 C.F.R.

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8 Tr. at 121-122.

9 49 C.F.R. 173.1(a)(3) states that Part 173 applies to persons that maintain and repair containers used in the transportation of hazardous material.

10 Tr. at 121-122.

11 Tr. 113 and 125.

173.24(b)(1). The Commission should not allow Respondent to escape responsibility based upon Respondent's misreading of the HMRs.

b. Commission precedent shows that carriers can be held liable for violations of 49 C.F.R. 173.24(b)(1).

Commission precedent contradicts Respondent's claim that it cannot be held liable for violating 49 C.F.R. 173.24(b)(1). In *Mid-States Express*, Case No. 03-1581-TR-CVF, the Commission found that a carrier, Mid-States, violated 49 C.F.R. 173.24(b)(1) when a drum Mid-States was transporting spilled hazardous material into the environment.[12] Mid-States contended that it should not be held responsible because it did not know the drum would leak.[13] Mid-States even presented evidence that the drum, which it did not own, was defective. This defect caused the structure of the drum to fail and leak.[14] Despite this evidence, the Commission found that Mid-States violated 49 C.F.R. 173.24(b)(1). The Commission based its decision on the language of the HMRs, stating:

> We observe that Section 171.2(a) (currently Section 171.2(e))[15] plainly provides that no person may accept

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12 *In the Matter of Mid-States Express, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 03-1581-TR-CVF (*Mid-States*)(Opinion and Order)(August 29, 2007).

13 *Mid-States* at 3.

14 *Id.*

15 49 C.F.R. 171.2(e) states that "[n]o 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..." This provision applies to Respondent, as well as 49 C.F.R. 171.2(f), which states that "[n]o person may *transport a hazardous material* in commerce unless the hazardous

> 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.[16]

Because Mid-States "accepted the hazardous material for shipment," the Commission determined that it "was responsible for the load and for complying with the requirements for transportation of hazardous material", including 49 C.F.R. 173.24(b)(1).[17] Therefore, Mid-States violated 49 C.F.R. 173.24(b)(1) because there was a release of hazardous material from the package it accepted and transported.

Based on the *Mid-States* decision, Respondent's actions clearly justify a citation for 49 C.F.R. 173.24(b)(1). Respondent owns, controls, and inspects the equipment that resulted in Gramoxone leaking into the environment.[18] Respondent cannot blame the shipper for a defective package or negligent loading. Even if Respondent could blame the shipper somehow, *Mid-States* shows that a carrier can still be held responsible for the release of a hazardous material under 49 C.F.R. 173.24(b)(1) once it accepts the hazardous material for transportation. In *Mid-States*, the Commission found the carrier

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material is transported in accordance with applicable requirements of this subchapter[.]" (emphasis added).

16 *Mid-States* at 4.

17 *Id.*

18 49 C.F.R. 173.1(a)(3) states that Part 173 applies to persons that maintain and repair containers used in the transportation of hazardous material.

liable even though there was no evidence that the carrier was negligent, the carrier did not own the leaking drum, and there was evidence that a defect caused the leak.[19]

The Commission should follow its own precedent[20] and find that Respondent violated 49 C.F.R. 173.24(b)(1).

c. Respondent's argument regarding citations under Part 177 are irrelevant because the HMRs indicate that carriers can be cited under both Part 177 and Part 173.

Respondent claims that an "alleged leak of hazardous material from a tank trailer would be proper under Part 177 of the HMR", but not Part 173.[21] Respondent cites 49 C.F.R. 177.800(a) to support its argument.[22] Respondent, however, conspicuously removes key language from its citation. 49 C.F.R. 177.800(a) states:

> This part prescribes requirements, **in addition to those contained in parts 171, 172, 173, 178 and 180 of this subchapter**, that are applicable to the acceptance and transportation of hazardous materials by private, common, or contract carriers by motor vehicle. (emphasis added)

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19 *Mid-States* at 3-4.

20 Staff acknowledges that the Commission is not necessarily bound by its own precedent. *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm'n of Ohio*, 42 Ohio St. 2d 403, 431, 330 N.E.2d 1, 19-20 (1975). The Supreme Court has stated, however, that the Commission "should… respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law." *Id.*

21 Respondent's Post-Hearing Brief at 12.

22 *Id.*

This provision shows that Respondent has obligations under both Part 177 and 173, and that Respondent can be cited under either. The fact Staff *could have* cited Respondent under Part 177 does not mean a citation under Part 173 is incorrect.

d. The Federal Motor Carrier Safety Regulations (FMCSRs) indicate that carriers can be held liable for violations of 49 C.F.R 173.24(b)(1).

The FMCSRs specifically indicate that 49 C.F.R. 173.24(b)(1) can be considered a carrier violation. The Federal Motor Carrier Safety Administration (FMCSA) established procedures for determining safety ratings for motor carriers. 49 C.F.R. 385.1(a). The FMCSA considers the "frequency and severity of regulatory violations" when determining appropriate safety ratings for carriers. One violation the FMCSA considers is violations of 49 C.F.R. 173.24(b)(1).[23] Not only are violations of 49 C.F.R. 173.24(b)(1) taken into account when determining safety ratings, but these violations are also considered more severe. The FMCSA designated 49 C.F.R. 173.24(b)(1) as an "acute" regulation. 49 C.F.R. 385 Appendix B, Section II(b), states that "[a]cute regulations are those identified as such where *noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall safety posture of the motor carrier*." (emphasis added).

Although Respondent does not believe carriers can be held responsible for violations of 49 C.F.R. 173.24(b)(1), the FMCSA most assuredly does. Staff's decision

[23] 49 C.F.R. 385, Appendix B.

to cite Respondent under 49 C.F.R. 173.24(b)(1) is consistent with the FMCSRs and the FMCSA's safety rating process.

2. The evidence shows that Respondent released hazardous material into the environment.

Respondent asks the Commission to ignore all the evidence that shows that the green liquid leaking out of the meter box was Gramoxone. Respondent would rather the Commission adopt a bright-line test that requires all inspectors to test hazardous materials before citing carriers for HMRs violations, *even when the driver admits the material is a hazardous material*.[24] This heighted burden of proof is not required by the law. Staff is required to prove its case by the preponderance of the evidence. 4901:2-7-20(A), O.A.C. Preponderance of the evidence means "more likely than not", *Ostmann v. Ostmann*, 168 Ohio App. 3d 59, 2006-Ohio-3617, 858 N.E.2d 831 ¶ 23 (9th Dist.) and Staff meets this burden if it produces the "greater weight of the evidence." *Dawson v. Anderson*, 121 Ohio App. 3d 9, 13, 698 N.E.2d 1014 (10th Dist. 1997). Staff thoroughly discussed the evidence that supports its case in its initial brief.[25] Based on this evidence, Staff met its burden.

In its post-hearing brief, Respondent raised only one factual argument to rebut Staff's case. Respondent claims the green liquid is rainwater mixed with green dye, and

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[24] Mr. Updike admitted to Inspector Swartz that the liquid pooling in the meter box was a hazardous material and admitted that it was caused by a leak in the transfer pump. Tr. at 28

[25] Staff's Post-Hearing Brief at 3-5, and 8-12.

not a hazardous material. Respondent called three witnesses to support its theory, but their testimony was purely speculative and not based upon personal knowledge.[26] Take Mr. Updike for example. Although Mr. Updike inspected the vehicles before loading and transporting the Gramoxone,[27] he did not observe any rainwater in the meter box. He admits that it did not rain on the day of the inspection.[28] He testified that it was a "bright, sunny day."[29] He theorizes about rainwater entering the meter box on tubes, but he admits he did not see any rainwater on the tubes during the inspection.[30] In fact, Mr. Updike admitted that he never even thought about the rainwater theory until he returned the vehicles to the terminal and talked to another driver about this potential theory.[31] This was long after the inspection was complete. In short, Mr. Updike's rainwater theory is just guesswork that was developed after the inspection.

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26 Ohio Evid. R. 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *Pangle v. Joyce*, 76 Ohio St. 3d 389, 394, 667 N.E.2d 1202 (1996) ("In order for evidence on a particular issue to be proper for jury consideration, it must be relevant and based on first-hand knowledge."). Staff acknowledges that Ohio Evid.R. 602 is not binding on the Commission, especially since the testimony has already been admitted into evidence. Staff submits, however, that it appropriate for the Commission to consider these witnesses' lack of personal knowledge when weighing all the evidence.

27 Tr. at 99.

28 Tr. at 126.

29 Tr. at 126.

30 *Id.*

31 Tr. at 112.

Although Mr. and Mrs. Miller testified in support of the rainwater theory, these witnesses were not present during the inspection, and have no personal knowledge regarding any of the pertinent facts of this case. This makes their testimony even less reliable than Mr. Updike's. While Mrs. Miller presented weather reports that purportedly show that the vehicles traveled through rain prior to the inspection, these documents do not prove (1) the vehicles actually traveled in the rain, (2) the rain entered the meter box, or (3) the green liquid was rainwater as opposed to Gramoxone. Respondent asks the Commission accept speculative, unverified theories as opposed to the hard evidence presented by Staff, such as photographs of a hazardous material leaking from a vehicle[32] and the testimony of two inspectors that personally observed this hazardous material leaking out of the meter box.[33]

There is no need to speculate. The record is clear. Respondent admitted that it was transporting a green hazardous material. [34] Respondent admitted to Inspector Swartz that the green liquid pooling in the meter box was the hazardous material Respondent was

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[32] Staff Ex. 3 (photograph); Staff Ex. 4 (photograph); Staff 5 (photograph); and Staff Ex. 7 (photograph).

[33] Staff's Post-Hearing Brief at 3-5 (discussion of the testimony of Inspector Swartz and Inspector Mowen).

[34] Tr. at 99, 117, 119, 154-155.

transporting.[35] The green liquid Respondent was transporting was leaking out of meter box.[36] This constitutes a violation of 49 C.F.R. 173.24(b)(1).

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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35 Tr. at 28.

36 Staff Ex. 3 (photograph); Staff Ex. 4 (photograph); Staff Ex. 5 (photograph); and Staff Ex. 7 (photograph). Tr. at 33-34, 52, 74, and 136.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing **Reply Brief of Staff** was served via electronic mail upon the following party on October 6, 2014.

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