

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Stony Run Enterprises, Inc.,) Case No. 14-561-TR-CV
Notice of Apparent Violation and Intent to) (OH3280005035C
Assess Forfeiture.)

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RESPONDENT'S REPLY BRIEF

Comes now, Stony Run Enterprises, Inc. ("Respondent"), by counsel, and respectfully submits its Reply Brief to Staff's Post-Hearing Brief filed herein on September 22, 2014.

I. REPLY

Staff's Post Hearing Brief begins: "Few contested cases are as straight forward as this one" (SB-1)¹. Respondent would agree. Where, as here, Staff has failed to demonstrate, by a preponderance of all credible evidence, that a violation has occurred, the Commission will not assess a forfeiture. Speculation is not an acceptable substitute for established facts. Respondent would submit that the Commission is unwilling to decide that a violation has occurred on the basis of mere conjecture.

Staff claims that Respondent "admits almost every fact" that would support Staff's case (SB-1). Here again, to a point, Respondent would agree. It is that the facts that are not admitted and the sum of all other evidence adduced at the hearing, most of which Staff either conveniently overlooks and/or simply mischaracterizes, which demonstrates that Staff has failed to sustain its required burden of proof.

As Staff notes, Respondent does not dispute the following facts:

1. The tractor-tank trailer unit inspected on November 8, 2013 was carrying a bulk shipment of Gramoxone SL 2.0;

¹ "SB" refers to the Post-Hearing Brief of the Staff of the Public Utilities Commission of Ohio and is followed by the page number(s).

2. Gramoxone is a Class 8 (Corrosive Liquid, N.O.S.) hazardous material.
3. Inspector Swartz, Inspector Mowen and Driver Updike all observed an accumulation of liquid pooled in the bottom of a stainless steel storage box affixed to the underside of the tank trailer;
4. The liquid discovered in the box had a bluish green color; pure Gramoxone is bluish green in color, but markedly darker than the liquid in the box; and
5. Inspector Swartz, Inspector Mowen and Driver Updike all observed a "spot" on the pavement immediately below the box.

Again, Respondent does not dispute any of the above. The case, however, cannot be decided on the basis of these uncontested facts. Rather, the determinative issue is whether the liquid discovered in the box by Inspector Swartz in the box was, in fact, a hazardous material. At pages 7-10 of its Post-Hearing Brief Respondent addresses at length the testimony and exhibits which collectively reveal that the liquid was not a hazardous material but more likely an accumulation of rainwater. Respondent will not repeat the entirety of that argument here, but is compelled to note the evidence which Staff, whether by design or oversight, has failed to acknowledge:

1. According to the Material Safety Data Sheet (Staff Exhibit 10), Gramoxone has a "characteristic, strong odor" which Driver Updike described as being "very strong, pungent odor that I do not like" (TR 104). Neither Inspector Swartz nor Driver Updike detected any unusual or distinct odor emitting from the liquid in the box (TR 63-65, 104). A jar of water may look like vinegar, but unless it smells like vinegar, it is not.
2. Inspector Swartz made no effort to determine the source or origin of the liquid in the box (TR 69-70). Inspector Swartz and Driver Updike independently confirmed there

was no leakage from either the tank trailer or the pump apparatus (TR 49, 54-56, 70, 113). After Driver Updike absorbed the liquid using pads, there was no further accumulation (TR 55-56, 109-111). The source or origin of the mysterious liquid is not known, but there is no disputing the fact that the origin was neither the tank trailer nor pump apparatus. The "rainwater defense" (to borrow from Staff's characterization of Defendant's position) is the most logical explanation.

3. The tank trailer had just completed a dispatch covering some 1,500 miles where rain conditions were encountered throughout the route of travel (Respondent's Exhibits 1 and 2; TR 138-144). Further testimony demonstrates that the box is not water tight allowing for rainwater to enter and be retained (TR 112-113, 125-128).
4. Inspector Swartz did no independent testing of the liquid to determine whether it was a hazardous material; he only "assumed" so based on the driver's statement that he was transporting Gramoxone and what was stated on the bill of lading (TR 66).
5. Respondent's tank trailer was a rubber lined, stainless steel unit. The uncontroverted testimony is that the lining is required to protect the Gramoxone from turning a "brilliant, bright purple" upon direct contact with stainless steel (TR 124-125). The liquid in the box (which was made of stainless steel) displayed no signs of transitioning to a shade of purple. (TR 127-128)

Staff's silence of this critical evidence does not mean that it ceases to exist. Considering the whole of the evidence, which the Commission will do its deliberations, leads only to the conclusion that the liquid in the box was, as Respondent has maintained, an accumulation of rainwater from a prior dispatch which was tinted bluish green as a result of contact with existing staining in the box.

Respondent is compelled to respond to several statements found in Staff's Post-Hearing Brief which simply mischaracterize the testimony of a witness. Arguing a party's position on the basis of established facts is acceptable jurisprudence; use of selective, incomplete references to the testimony to fashion an argument is not.

First, at page 2 Staff asserts "Respondent admitted that the green liquid that was pooling inside the meter box was a hazardous material". Similarly, at page 11 Staff states, "During the inspection, Mr. Updike, *admitted that the green liquid was a hazardous material*", and, at page 12, "The most significant piece of evidence supporting Inspector's Swartz's conclusion was an *admission by the driver that the green liquid was a hazardous material*" (Staff emphasis). Staff's transcript references are selective and taken out of context. Driver Updike only acknowledged that he was transporting Gramoxone (a fact confirmed by the bill of lading) and that Gramoxone is a hazardous material which is bluish green in color. He never testified that the liquid in the box was a hazardous material, nor did he state that the liquid was from a leak in the transfer pump. Rather his testimony was that he did not know the origin of the liquid and, at first, speculated that it might be the pump. Driver Updike, as did Inspector Swartz, subsequently confirmed that there was no leakage from the tank trailer or the pump apparatus, so he was at a loss to explain the origin. The record shows that Driver Updike is also Respondent's Safety Director with extensive training and credentials in the proper handling of hazardous materials (TR 115-116). Uncertain of the nature of the liquid in the box, Driver Updike correctly elected to err on the side of caution when he used gloves and goggles in absorbing the material.

Additionally, at page 11 Staff represents that, "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. The rainwater defense did not occur to Mr. Updike until long after he drove away from

the inspection.” As an accurate review of the transcript will confirm, Driver Updike was not aware of the prior dispatch until he returned to the terminal (a distance of less than 30 miles) and then immediately investigated the incident along with Respondent’s management. A terminal inspection again confirmed that there was no leakage from the tank trailer or pump. The only logical explanation was a rainwater accumulation which was confirmed by the driver on the prior dispatch who indicated that he had encountered rain conditions in both directions (TR 114-120). The so-called “rainwater defense” was known by Respondent almost immediately following the inspection; not “long after” as Staff states.

All of the above becomes an academic exercise should the Commission decide that Respondent was improperly charged. Respondent’s position on this issue is found on pages 11-13 of its Post-Hearing Brief and will not be repeated here. Suffice it to state that Staff has elected to pursue a violation under a part of the Hazardous Material Regulations (“HMR”) which is directed to shippers and recites the requirements that are to be observed in preparing hazardous material for shipment (49 CFR 173). Where, as here, the action relates to the alleged leakage of a hazardous material from a cargo tank trailer operated by a commercial motor carrier, the proper citation is under a separate part of the HMR specifically applicable to the acceptance and transportation of hazardous materials over the public highways (49 CFR 177). If properly represented, a motorist operating over the public highway who is stopped and cited for jay-walking will never be convicted.

II. CONCLUSION.

Staff has chosen to ignore and/or mischaracterize critical testimony and documentary evidence presented in this proceeding. Respondent is confident that the Commission will not so limit its consideration. When accurately reviewed and analyzed, the totality of the evidence presented clearly demonstrates that Staff has failed to meet its burden to show, by a preponderance

of the evidence, the occurrence of a violation. The affirmative burden is on Staff to prove the occurrence of a violation; until that burden is met, a respondent is under no obligation to prove that there was a violation. Respondent has a twenty year history as a hazardous materials carrier without a single incident of a spill (TR 131-133). That history is in jeopardy here where Staff would have the Commission find a violation based on mere speculation.

WHEREFORE, Stony Enterprises, Inc. respectfully urges the Public Utilities Commission of Ohio to enter its decision finding that no civil forfeiture should be assessed and directing removal of the alleged violation from Respondent's safety-net record and history of operations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David A. Turano", with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the parties listed below by first class U.S. mail, postage prepaid, this 6th day of October, 2014:

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The Public Utilities Commission of Ohio

A handwritten signature in black ink, appearing to read "David A. Turano", with a long horizontal flourish extending to the right.

David A. Turano (0025819)