

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of D&J Transport Co., Inc.,)
Notice of Apparent Violation and Intent to) Case No. 10-2968-TR-CVF
Assess Forfeiture.) (3212300206C)

OPINION AND ORDER

The Commission, considering the public hearing held on April 21, 2011, issues its opinion and order in this matter.

APPEARANCES:

James Thacker, 16586 U.S. Route 68, Mt. Orab, Ohio 45154, on behalf of D&J Transport Co., Inc.

Mike DeWine, Attorney General of Ohio, by Werner L. Margard, III and Devin Parram, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

NATURE OF THE PROCEEDING:

On September 3, 2010, Inspector Tad Rumas of the Commission's transportation staff inspected a motor vehicle operated by D&J Transport Co., Inc. (D&J Transport, company), and driven by Roy F. Morgan, in the state of Ohio. Inspector Rumas found the following violation of the Code of Federal Regulations (C.F.R.):

49 C.F.R. Section 177.817(e) - Shipping paper accessibility - shipping paper was inside of a plastic folder in between other delivery paperwork.¹

¹ 49 C.F.R. Section 177.817(e) provides, in part, that: A driver of a motor vehicle containing hazardous material, and each carrier using such a vehicle, shall ensure that the shipping paper required by this section is readily available to, and recognizable by, authorities in the event of accident or inspection. Specifically, the driver and the carrier shall: (1) Clearly distinguish the shipping paper, if it is carried with other shipping papers or other papers of any kind, by either distinctively tabbing it or by having it appear first; and (2) Store the shipping paper as follows:

(i) When the driver is at the vehicle's controls, the shipping paper shall be: (A) Within his immediate reach while he is restrained by the lap belt; and (B) either readily visible to a person entering the driver's compartment or in a holder which is mounted to the inside of the door on the driver's side of the vehicle.

D&J Transport 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, the company was notified that staff intended to assess a civil monetary forfeiture totaling \$600.00 for violation of 49 C.F.R. Section 177.817(e) (Section 177.817(e)). A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement during the conference. Subsequently, a hearing was convened on April 21, 2011.

Background:

The inspection in this case took place at the Marathon facility on Fisher Road in Columbus, Ohio. At the time of the inspection, the truck operated by D&J Transport was listed as containing a residue of Class 3 combustible liquid (gasoline) (Staff Exhibit 1). After the inspection, respondent was cited for improper shipping paper accessibility, a violation of Section 177.817(e).

Issue in the Case:

Staff argued that Inspector Rumas observed D&J Transport's driver with a shipping paper, the company's bill of lading, that was not either tabbed or clearly visible on top of other papers in the company's truck, and thus was not properly accessible, as required by Section 177.817(e). D&J Transport maintained that there was no violation.

DISCUSSION:

Inspector Rumas testified that D&J Transport's shipping paper, its bill of lading (Staff Exhibit 4), was not tabbed and that it was under the company's delivery bill (Staff Exhibit 3) inside a plastic folder (Staff Exhibit 2)², which was on the passenger seat in the cab of D&J Transport's truck. (Tr. at 12-18, 31-34; Staff Exhibit 1.) Inspector Rumas testified that placing the shipping paper in an envelope marked as containing hazardous material shipping papers does not meet the definition of being tabbed or on top of other paperwork under Section 177.817(e). He noted that it does not matter if an envelope with shipping papers inside is marked "HM" or is left blank, or if the envelope itself is clear or opaque. If the shipping paper is not tabbed, or on top of other paperwork and clearly accessible, then there would be a violation. (Tr. at 29, 33.)

² Staff Exhibit 2 was among the exhibits provided to staff by Mr. Thacker at the hearing. The plastic folder that comprises the exhibit is labeled with the words "MH Shipping Papers" in black hand-printed letters on the outside. Mr. Thacker testified that he places plastic folders, with the "MH Shipping Papers" label, in D&J Transport's trucks (Tr. at 55, 58). Inspector Rumas testified that he did not recall the folder being so marked when he saw it during the inspection (Tr. at 13, 23).

Mr. John Canty, Assistant Chief of the Commission's Motor Carrier Compliance Division, testified that the monetary value of the fine for D&J Transport's violation was determined by using a civil forfeiture violations chart (Staff Exhibit 5) and that the violation listed in this case is indicated by a violation group number on the chart that refers to the amount of the fine (Staff Exhibit 6). He testified that the notices (Staff Exhibits 7 and 8) sent to the respondent set forth the \$600.00 forfeiture for shipping paper accessibility. Mr. Canty further testified that the dollar amount of fines and the procedure used in determining fines in the fine schedule are reasonable and consistent with the standards set by the Commercial Vehicle Safety Alliance. (Tr. at 37-46.)

Mr. Thacker, on behalf of D&J Transport, argued that the company's delivery bill and its bill of lading contained essentially the same information (Tr. at 25-27). He indicated that, because the hazardous materials papers in his company's truck were in a folder that was clearly visible to anyone entering the truck, and marked with the words "HM Shipping Papers," the company was not in violation of the hazardous materials regulation. Mr. Thacker stated that the reason for using a marked, plastic folder is to protect the paperwork and to enable the paperwork to be easily found in case of an accident. Mr. Thacker, however, noted that the inspecting officer was correct with regard to the bill of lading, which was underneath the delivery bill. (Tr. at 23, 24, 30, 56, 58.)

In addition, after the hearing, staff filed a letter on April 25, 2011, in this docket stating that certain matters regarding the evidence submitted at hearing were overlooked previously. In the letter, staff stated that the delivery bill (Staff Exhibit 3) and the bill of lading (Staff Exhibit 4) were given to staff by Mr. Thacker as mitigation for the alleged violation. Staff stated that neither document would have been in the driver's possession at the time of the inspection. Staff stated that the inspection report (Staff Exhibit 1) clearly shows that the inspection began at 9:25 a.m., and ended at 10:09 a.m. The bill of lading, however, has a time stamp at the top indicating that loading began at 10:27 a.m. and was finished by 10:48 a.m., indicating that this document was prepared after the inspection was completed. Further, the delivery bill indicates that the fuel was unloaded from 12:00 noon to 12:45 p.m.

The Commission notes that, while staff's post-hearing letter does serve to clarify exhibits that were presented at hearing, it does not change the positions of the parties at hearing, nor does it impact our decision in this matter. The record is clear in this case concerning a violation of Section 177.817(e). Section 177.817(e) requires that a hazardous material shipping paper must be either tabbed or clearly visible on top of other papers. Staff presented the testimony and inspection report of Inspector Rumas demonstrating that the violation did occur. Although it is apparent from the evidence presented at hearing, and from staff's post-hearing letter, that the versions of D&J Transport's bill of lading and delivery bill that were presented as exhibits at hearing could not have been as complete at the time of the inspection as they were in the hearing room, listing loading

and unloading times that occurred after the inspection took place, the Commission believes that Inspector Rumas did observe less complete versions of the delivery paperwork during the inspection, versions of the paperwork in which the bill of lading was not properly accessible. Quite obviously, D&J Transport's truck contained a residue of fuel at the time of the inspection (Staff Exhibit 1), with the vehicle loaded with the bulk of its fuel, the load delivered, and the delivery paperwork (Staff Exhibits 3 and 4) completed, after the inspection. Mr. Thacker, representing D&J Transport, presented no argument or other evidence at hearing to rebut Inspector Rumas' testimony or his inspection report. Mr. Thacker, in fact, verified at hearing that the inspecting officer was correct when he testified that the company's shipping paper was not tabbed or clearly visible and placed on top of other paperwork in the truck (Tr. at 56). Also, we note that there was some question at hearing as to whether the plastic folder containing the delivery paperwork was actually marked "HM Shipping Papers" on the outside at the time of the inspection. While Mr. Thacker indicated that he places plastic folders marked "HM Shipping Papers" in D&J Transport's trucks, the inspecting officer testified that he did not recall whether there was any HM marking on the folder when he saw it during the inspection (Tr. 13, 23).

After reviewing all of the evidence of record, the Commission finds that the respondent was in violation of Section 177.817(e). However, we find that the facts of this case warrant a reduction in the forfeiture based on the extent of the violation. The evidence shows that D&J Transport did maintain a hazardous material shipping paper onboard its truck and that the driver was able to present it to the inspector, under one other piece of delivery paperwork, at the time of the inspection. Thus, in this case, we believe that the civil forfeiture should be reduced to \$300.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On September 3, 2010, the Commission's transportation staff inspected a motor vehicle operated by D&J Transport in the state of Ohio. Staff found the following violation of the Code of Federal Regulations (C.F.R.): 49 C.F.R. Section 177.817(e) - Shipping paper accessibility - shipping paper was inside of a plastic folder in between other delivery paperwork.
- (2) D&J Transport was timely served a Notice of Apparent Violation and Intent to Assess Forfeiture and a Notice of Preliminary Determination that set forth a civil forfeiture of \$600.00 for violation of 49 C.F.R. Section 177.817(e).
- (3) A hearing in this matter was convened on April 21, 2011.

- (4) Staff demonstrated at hearing, by a preponderance of the evidence, that D&J Transport violated 49 C.F.R. Section 177.817(e).

It is, therefore,

ORDERED, That D&J Transport pay the assessed amount of \$300.00 for violation of 49 C.F.R. Section 177.817(e). Payment should be made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. In order to assure proper credit, D&J Transport is directed to write the case number (3212300206C) on the face of the check or money order. 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,

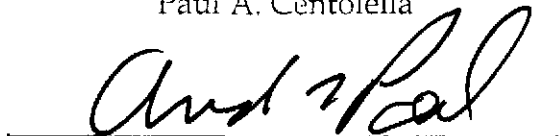
ORDERED, That a copy of this opinion and order be served upon each party of record.

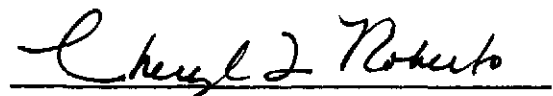
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella


Steven D. Lesser

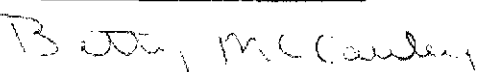

Andre T. Porter


Cheryl L. Roberto

KKS/vrm

Entered in the Journal

AUG 24 2011



Betty McCauley
Secretary