

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
(OH3280005035C)

OPINION AND ORDER

The Commission, considering the evidence of record, issues its Opinion and Order in this matter.

APPEARANCES:

Beery & Spurlock Co., L.P.A., by David A. Turano, 275 East State Street, Columbus, Ohio 43215, on behalf of Stony Run Enterprises, Inc.

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

Nature of the Proceeding:

On November 8, 2013, Motor Carrier Enforcement Inspector Kevin Swartz (Inspector Swartz), with the Ohio State Highway Patrol (Highway Patrol), stopped and inspected a motor vehicle, operated by Stony Run Enterprises, Inc. (Stony Run or Company or Respondent) and driven by Robert B. Updike in the state of Ohio. Inspector Swartz found the following violation of the Code of Federal Regulations (CF.R.): 49 C.F.R. 173.24(b)(1) - Release of hazardous materials from package - Bulk tank leaking from under tank storage/transfer pump, through a bolt onto the ground.¹

Stony Run was timely served a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-12. In this notice, Stony Run was notified that Staff intended to assess a civil monetary forfeiture totaling \$1,600.00 for the violation of 49 C.F.R. 173.24(b)(1). A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement during the conference, and a hearing was convened on July 23, 2014. At hearing, the forfeiture

¹ 49 C.F.R. 173.24(b)(1) provides, in relevant part, that "[e]ach 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."

amount was re-calculated to \$1,200.00 for the 49 C.F.R. 173.24(b)(1) violation. Thereafter, Staff and Stony Run filed their briefs of the case on September 22, 2014, and reply briefs on October 6, 2014.

Background

Stony Run's employee, Robert B. Updike, was driving a Company truck placarded for a 1760, Class 8, corrosive material and hauling 1,997 gallons of a herbicide, Paraquat Dichloride, with the trade name Gramoxone SL 2.0 (Gramoxone), from Greensburg, Indiana to Stony Run's terminal at Hamilton, Ohio. The truck was stopped for inspection at the Harrison Truck Scales, Mile Post 2, on I-74 in Hamilton County, Ohio. During the inspection, drops of a liquid were seen leaking from an area around a bolt beneath Stony Run's tank trailer. Upon further investigation, liquid was discovered in the storage/transfer pump compartment (meter box)² of the tank trailer, and Stony Run was cited for the 49 C.F.R. 173.24(b)(1) violation in this matter, failure to meet hazardous materials packaging requirements.

Issue in the Case:

At issue is whether there was a violation of 49 C.F.R. 173.24(b)(1) by Stony Run in transporting a hazardous material that allegedly leaked from the Company's tank trailer, thereby causing Stony Run to contravene the hazardous materials packaging requirements. Staff contends that the liquid observed dripping onto the asphalt beneath the tank trailer, and the presence of uncontained liquid in the meter box attached to the tank trailer, demonstrate that hazardous material leaked from the meter box, through the fitting of a bolt beneath the meter box, and thence escaped into the environment.

Summary of the Evidence:

Inspector Swartz testified that, during the inspection of Stony Run's truck, he observed drips of a liquid leaking from the underside of the tank trailer. He testified that, upon further inspection, he observed an uncontained, bluish-green liquid at the base of the transfer pump in the meter box. Inspector Swartz testified that that the liquid, which the driver verified as the hazardous material being hauled, had leaked from a bolt beneath the meter box; therefore, he cited Stony Run for the violation in this case. Inspector Swartz then identified photographs taken the inspection site, Staff

² The meter box, located on the side of Stony Run's tank trailer, contains a hydraulic pump for transferring the liquid, hazardous material cargo, an air eliminator for purging the transfer hoses of air, and a meter for measuring product flow. The meter box is designed to act as a catch basin or containment area with a valve to drain liquid in case of a spill. (Tr. at 103.)

Exhibits 2 - 8, and the Company's Bill of Lading and Material Safety Data Sheet (MSDS)³, Staff Exhibits 9 and 10, respectively. He confirmed that the photographs depict what he observed at the inspection site and that the bill of lading and MSDS present detailed information about the hazardous material, Gramoxone (Tr. at 24-29, 30-34, 35-36, 38-40.)

Inspector Swartz testified that his knowledge of the liquid in the meter box was based on the following: the 1760, Class 8, hazardous material placards displayed on Stony Run's tank trailer, what he observed, his conversation with the driver, and what he had read on the Company's bill of lading. However, he saw no leaks from the main cargo tank or the transfer pump. Inspector Swartz testified that he did not test the liquid for hazardous material with hazardous material test strips, and he took no sample of the liquid for later testing. Inspector Swartz noted that the shipper's MSDS lists the product Gramoxone as having a bluish-green color and a characteristic, strong odor.⁴ He testified that he observed two drips of liquid from the bolt on the underside of the tank trailer, and noted that he did not see green in the spot on the asphalt beneath the trailer. He testified that this lack of green coloration in the spot was due to the drops of liquid being diluted by space in the area on the asphalt. He also stated that he did not notice a strong odor during the inspection. (Tr. at 54, 56-58, 63-66, 69-70.) Further, Inspector Swartz noted that the driver, wearing gloves, cleaned up the liquid with absorbent pads and proceeded on the road after the inspection (Tr. at 28-29, 54-55).

Douglas Mowen, a motor carrier enforcement officer with the Highway Patrol, testified that he also was performing inspections at the Harrison Truck Scales and that he observed part of the inspection conducted by Inspector Swartz. Officer Mowen testified that the doors to the meter box of Stony Run's tank trailer were open when he was called over to the truck by Inspector Swartz and that there was a lot of greenish, bluish liquid in the bottom of the box. Officer Mowen stated that he saw both the spot on the asphalt beneath Stony Run's truck and a drop of the liquid dripping into the spot. In addition, Officer Mowen identified Staff Exhibits 3, 4, and 7 - the photographs of the open meter box on Stony Run's tank trailer and the spot beneath the trailer. He stated that the photographs depict what he saw at the inspection site on the day of the inspection. (Tr. at 72-78.)

³ An MSDS is a document that contains specific safety information about a hazardous materials load. The MSDS in this case, introduced into evidence as Staff Ex. 10, was obtained from the shipper, Syngenta, by Staff in preparation for the hearing (Tr. at 38-39, 59).

⁴ The MSDS for the load of hazardous material in Stony Run's tank trailer states that: "The odor of this product is from the stenching agent, which has been added, not from the Paraquat" (Staff Ex. 10 at 2).

Jonathan Frye, staff member of the Commission's Transportation Department, testified that the monetary amount assessed for the violation was re-calculated due to an error in the computation of the forfeiture. He testified that the amount of the assessed violation, \$1,200.00, was determined by using a civil forfeiture assessment work sheet, a civil forfeiture violations chart, and the inspection report in the case. Mr. Frye testified that the violation, failure to meet hazardous materials packaging requirements, is listed in the violations chart and that the violation is indicated by a violation group number in the violations chart that refers to the amount of the forfeiture.

Mr. Updike, Stony Run's safety director and the Company's driver at the time of the inspection, testified that Gramoxone has a very strong, pungent odor and that he did not smell an odor during the inspection (Tr. at 104). Mr. Updike testified that he did not see any leaks of liquid from the meter box to the ground. He explained to Inspector Swartz that the box was designed to catch any drips or leaks and that Gramoxone was a weed killer used to spray on fields. (Tr. at 103, 108.)

Mr. Updike testified that Stony Run's truck had been running in the rain. He noted that there are holes for unloading hoses in the housing of the meter box, and suggested that rainwater had leaked in through the holes and collected at the base of the transfer pump. Mr. Updike noted that Gramoxone, which has a dye added to it, is very dark green in color. He stated that he was 99 percent, but not 100 percent, sure that the liquid was rainwater. However, he indicated that the rainwater might have gotten into the dye and a drip turned it green. Mr. Updike testified that pure Gramoxone, when it comes into contact with stainless steel, will turn a bright purple. He noted that the meter box of Stony Run's truck was constructed of stainless steel, and, as a result, if the liquid in the meter box had been pure Gramoxone, he would have expected it to be a bright purple in color. (Tr. at 112, 117-120, 123-125, 127-128.)

Larry Miller, vice president of Stony Run, testified that the liquid in the meter box on Stony Run's tank trailer was rainwater. Referring to the photograph labeled Staff Exhibit 3, which depicts the meter box, Mr. Miller testified that the metal in the meter box has been stained. He explained that if water gets into the meter box, it shows up green because of the stained condition of the metal in the box. Whereas liquid in another part of the photograph, not in contact with the metal of the meter box, shows up clear because it is water from running Stony Run's truck in the rain the night before the inspection. Mr. Miller, however, testified that he was not at the inspection. Further, he agreed that something was dripping from the meter box onto the ground. (Tr. at 132, 135-136; Staff Ex. 3.)

Patricia Miller, president of Stony Run, testified concerning rainwater accumulation in Stony Run's vehicle and the coloration of Gramoxone. With regard to

rainwater accumulation, Ms. Miller testified that computer print outs from Stony Run's files show that the Company's truck had been running in the rain in the two days prior to the inspection date. She noted weather report information indicating that, on a trip to Rochelle, Georgia from Greensburg, Indiana, the truck had been through various amounts of rainfall. With regard to the coloration of Gramoxone, Ms. Miller testified that Gramoxone has a dark green color. Referring to photographs labeled Respondent Exhibits 3-7, which depict a glass jar containing Gramoxone, Ms. Miller testified that Gramoxone is so dark green in color that, even when placed in the light on a window sill, one cannot see through it. She noted that photographs of the open glass jar show the green Gramoxone in the lid and on a white piece of paper dipped into the jar. Ms. Miller testified that the piece of paper dipped into the Gramoxone shows both dark green and light green colors. Further, she testified that Staff Exhibit 3, the photograph of the meter box on Stony Run's truck, shows a very pale green and a dark area of indeterminate color. (Tr. at 137-155; Respondent Exs. 1-7; Staff Ex. 3.)

Discussion:

Before considering the evidence presented at hearing, the Commission will discuss an argument raised by Stony Run on brief (Respondent's Initial Brief at 7-13). Specifically, Stony Run argues that it was improperly charged with a violation under 49 CFR 173.24(b)(1). Stony Run states that 49 CFR 173.24(b)(1), which regulates packages used for the shipment of hazardous materials, is clearly intended to address receptacles that are used for the containment of hazardous materials offered for transport. Stony Run notes that the hazardous materials regulation, 49 C.F.R. 171.8, defines "package" to mean "a package plus its contents", while "packaging" is defined as "a receptacle and any other components or materials necessary for the receptacle to perform its containment function in compliance with the minimum packaging requirements of this subchapter." Stony Run thus argues that the meter box where Inspector Swartz discovered an accumulation of liquid does not meet this definition. According to Stony Run, the meter box is a storage compartment for meter and pump apparatus; it was never intended nor represented to be a receptacle used to transport hazardous materials.

Stony Run argues that the only "package" Staff can point to in support of the alleged violation of 49 CFR 173.24(b)(1) would be Respondent's tank trailer. However, Stony Run notes that the terms "cargo tank" and "cargo tank motor vehicle" are defined separately from "package" in the definitional section of the hazardous materials regulations 49 CFR 171.8 and that there is a clear distinction between "package" and "cargo tank"/"cargo tank motor vehicle". Stony Run argues that the proper charge should have been an alleged violation of 49 CFR 177.834(j)(2), which provides, in part, that "a person may not drive a cargo tank motor vehicle containing a

hazardous material regardless of quantity unless * * * all valves and other closures in liquid discharge systems are closed and free of leaks * * * ". Even so, Stony Run argues that the evidence does not support a finding that a violation had occurred as both Inspector Swartz and the driver acknowledged that there was no leakage from either the cargo tank or pump apparatus (Tr. at 49-54, 70, 113). Stony Run argues that 49 CFR 173.24(b)(1) has no application to the incident involved, and the Commission should find that Respondent was improperly charged with a violation under that code section.

Staff states that the violation charged against Respondent under 49 CFR 173.24(b)(1) applies to bulk packaging. Staff notes that bulk packaging is defined under 49 C.F.R. 171.8 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." Staff further notes that the type of bulk packaging the Respondent was transporting was a "cargo tank", which is defined as a type of bulk packaging under 49 C.F.R. 171.8.⁵ Staff, therefore, argues that the violation in this matter was properly charged under 49 CFR 173.24(b)(1).

The Commission agrees with Staff's position on this issue. Clearly, as stated in 49 C.F.R. 171.8, the cargo tank on Stony Run's trailer is considered a bulk package. Therefore, the Commission finds that the 49 CFR 173.24(b)(1) violation charged against Respondent in this case is proper. Moreover, we do not find it contradictory that, according to Inspector Swartz's testimony, the main cargo tank and transfer pump themselves were not leaking (Tr. at 54, 57, 69-70). The leak in question, identified by Inspector Swartz and Officer Mowen, came from the meter box affixed to Stony Run's tank trailer (Tr. at 25, 33, 70). As noted previously, the meter box contains equipment used for the transfer of the hazardous material from the cargo tank to Stony Run's customers. Mr. Updike testified that the meter box was designed to catch any leaks or drips (Tr. at 103, 108); it thus does serve some containment function by catching errant drops of hazardous material during the unloading of Stony Run's cargo tank. The Commission, therefore, believes that the meter box must be considered a receptacle or containment package and that it is an integral part of Stony Run's larger bulk package, its cargo tank.

⁵ 49 C.F.R. 171.8 states, in part, that: "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."

The Commission next observes that the liquid in the meter box was not tested for hazardous material (Tr. at 56, 66, 116), and no odor of Gramoxone was detected by either Inspector Swartz or the driver, Mr. Updike (Tr. at 64-65, 104). Also, according to Mr. Updike, pure Gramoxone in contact with Stony Run's stainless steel meter box would have been a bright purple in color (Tr. at 124-125, 127-128).

The Commission, however, also notes that the C.F.R. section cited for the violation in this matter, 49 C.F.R. 173.24(b)(1), does not specify the amount of any hazardous material that must be present in order to constitute a release of that material. That C.F.R. section merely states that there can be "no identifiable (without the use of instruments) release of hazardous materials to the environment." Bearing this wording in mind, the Commission notes that witnesses for both Staff and Stony Run agreed that the liquid in the meter box had a green color (Tr. at 27, 117). Mr. Updike testified that Gramoxone contains a dye making it a dark green in color and that a small amount of Gramoxone will turn rainwater green (Tr. at 117-118). Further, when testifying as to the composition of the liquid in the meter box, Mr. Updike stated that "there might have been a drip and it turned green" and that the liquid was "probably rainwater that has got mixed with a drop or two of something that was in there." He then affirmed that "the dye would come from the Gramoxone." (Tr. at 118-119.) In other words, our reading of Mr. Updike's testimony is that there was some herbicide in the liquid that collected in the meter box of Stony Run's tank trailer and leaked out onto the asphalt - probably a very small amount that was mixed with rainwater. The diluted nature of this liquid would account for the Gramoxone-rainwater-mix not turning purple in the stainless steel meter box, as would have happened if the liquid had been pure Gramoxone. The dilution would also account for the mixture lacking the characteristic, strong odor of Gramoxone that, according to both Staff and Stony Run witnesses, did not exist at the inspection site. The Commission, therefore, believes that, whether the small, leaked amount of Gramoxone was in the form of a liquid, the drop or two that Mr. Updike referred to in his testimony, or whether rainwater had come into contact with Gramoxone that had dried and stained the inside of the meter box, there was Gramoxone in the liquid nonetheless, as evidenced by the green coloration that was produced from the dye in the herbicide.

Finally, the Commission notes that, as argued by both Staff and Stony Run in their briefs of the case, Ohio Adm.Code 4901:2-7-20(A) requires Staff to prove the occurrence of a violation by a preponderance of the evidence. Staff and Stony Run claim, as support for their respective positions, that the preponderance of the evidence weighs in their favor. Staff notes that 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. 94 CA 526, 1995 WL 617, 611, *5 (Oct. 3, 1995). Further, quoting 1 *Ohio Jury Instruction*, Section 3.50, at 114-115 (1994),

Staff notes that: "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." (Staff Initial Brief at 6; Staff Reply Brief at 8.) Stony Run, on the other hand, states that Staff has an affirmative burden to demonstrate by a preponderance of the evidence that a violation has, in fact, occurred. Stony Run states that, in *State v. Stumpf*, 32 Ohio St. 3d 95, 102, 512 N.E. 2d, 598, 606 (1987), the Ohio Supreme Court observed: "The most acceptable meaning to be given the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its non-existence" and "preponderance of evidence means the greater weight of evidence". Stony Run argues that the sum of the evidence presented would not support a conclusion that it is more probable than not that the alleged violation occurred. (Respondent Initial Brief at 7-10; Respondent Reply Brief at 5-6.)

With regard to this issue, the Commission observes the following: two motor carrier enforcement officers of the Highway Patrol testified that they witnessed green liquid inside the meter box of Stony Run's tank trailer and drips of a liquid leaking onto the ground from beneath the trailer (Tr. at 25-26, 33-34, 58, 73-75, 77-78); one officer testified that the liquid he saw leaking around a bolt on the underside of the trailer, and dripping onto the ground, was green; that same officer testified that, during the inspection, Stony Run's driver, Mr. Updike, told him the green liquid inside the meter box was the hazardous material Stony Run was hauling (Tr. at 28); Mr. Updike testified that Stony Run's cargo tank held the hazardous material in question, Gramoxone (Tr. at 99, 117, 119); he testified that there was a green liquid in the meter box of the tank trailer during the inspection (Tr. at 107, 117); Mr. Updike then postulated that rainwater had gotten into the meter box, that a small amount of Gramoxone, which is dark green in color due to an added dye, had turned the rainwater green; he also testified that the color-producing dye would come from the Gramoxone; Mr. Miller, Stony Run's vice president, testified that if water gets into the meter box, it shows up green because of the stained condition of the metal in the box. In addition, Mr. Miller conceded that something was dripping out of the meter box onto the ground and that there was a spot on the ground beneath the meter box. (Tr. at 136.) In view of this testimony, the Commission is of the opinion that Staff has proven the occurrence of the violation in this matter by a preponderance of the evidence.

Conclusion:

Considered in its entirety, the Commission believes that the evidence presented at hearing does show that there was an identifiable release of hazardous material at the inspection site. Consequently, the Commission finds that sufficient evidence has been presented to conclude that Stony Run failed to satisfy hazardous material

packaging requirements by transporting a hazardous material that leaked from the meter box of its tank trailer. Stony Run, therefore, is liable for a violation of 49 C.F.R. 173.24(b)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On November 8, 2013, the Highway Patrol stopped and inspected a motor vehicle, operated by Stony Run and driven by Robert B. Updike in the state of Ohio. The Highway Patrol found a violation of 49 C.F.R. 173.24 (b) - Release of hazardous materials from package - Bulk tank leaking from under tank storage/ transfer pump, through bolt onto ground.
- (2) Stony Run was timely served with a NPD setting forth a civil forfeiture of \$1,600.00. At hearing, the forfeiture amount was re-calculated to \$1,200.00 for the 49 C.F.R. 173.24(b)(1) violation.
- (3) A hearing in this matter was convened on July 23, 2014.
- (4) Sufficient evidence was presented at hearing to conclude that Stony Run failed to satisfy hazardous material packaging requirements by transporting a hazardous material that leaked from the meter box of its tank trailer. Further, Staff proved the occurrence of the violation in this matter by a preponderance of the evidence. Stony Run, therefore, is liable for a violation of 49 C.F.R. 173.24(b)(1).
- (5) Stony Run's arguments at hearing were not sufficient to demonstrate that the Company should not be held liable for the civil forfeiture assessed for the 49 C.F.R. 173.24(b)(1) violation.
- (6) Pursuant to R.C 4923.99, Stony Run must pay the State of Ohio the civil forfeiture assessed for the 49 C.F.R. 173.24(b)(1) violation. Stony Run shall have 30 days from the date of this order to pay the total assessed amount of \$1,200.00 for the assessed forfeiture.

It is, therefore,


ORDERED, That Stony Run pay the total assessed amount of \$1,200.00 for the 49 C.F.R. 173.24(b)(1) violation, as set forth in Finding (6). 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, Stony Run is directed to write the case number (OH3280005035C) 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.

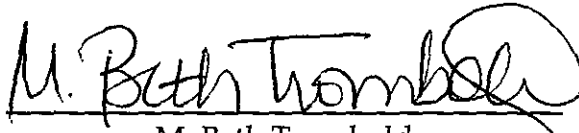
ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser


Lynn Slaby


M. Beth Trombold

Asim Z. Haque

KKS/dah

Entered in the Journal

~~DEC 03 2014~~


Barcy F. McNeal
Secretary

Barcy F. McNeal
Secretary