

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF FULL UP, LLC,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE NO. 15-1573-TR-CVF
(OH3202306182C)

OPINION AND ORDER

Entered in the Journal on November 30, 2016

I. SUMMARY

{¶ 1} The Commission finds Full Up, LLC in violation of numerous Commission hazardous material transportation regulations and directs Full Up, LLC to pay the assessed civil forfeiture of \$3,850 within 60 days of this Opinion and Order.

II. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} On July 11, 2015, a vehicle operated by Full Up, LLC (Full Up or Respondent), and driven by Mr. Alahmad (Mr. Alahmad),¹ was inspected for alleged violations of the Commission's hazardous materials regulations. Respondent was timely served with a Notice of Preliminary Determination (NPD or Staff Ex. 6) in accordance with Ohio Adm.Code 4901:2-7-12, notifying him that Staff intended to assess a \$3,850 civil forfeiture for the following violations of the Code of Federal Regulations (C.F.R.): 49 C.F.R. 393.102(a), improper securement system (tiedown assemblies) (1-2 nylon webbing strap securing 2-300 gallon bulk packages) \$100; 49 C.F.R. 171.2(a), transporting Class 3 hazardous materials in an unauthorized package – an intermediate bulk container (IBC)- non-specification (49 C.F.R. 173.242) \$900; 49 C.F.R. 172.602(a), failing to maintain emergency response information with shipment \$450; 49 C.F.R. 177.817(a), failing to maintain carrier shipping papers \$900; 49 C.F.R. 177.823(a), failing to obtain required placards or markings while transporting bulk package containing

¹ Mr. Alahmad is the owner and operator of Full Up, Inc.

hazardous materials \$900; Ohio Adm.Code 4901:2-5-10, failing to provide for intrastate company markings, as set forth in 49 C.F.R. 390.21 \$100; and Ohio Adm.Code 4901:2-6-03, failing to obtain a uniform program permit prior to transporting hazardous materials \$500. As a result of five of the alleged violations, the vehicle was placed out-of-service (Staff Ex. 1). A prehearing conference was conducted in this case on November 5, 2015, and a hearing was conducted on February 11, 2016. At the hearing, Staff witnesses Inspector Phillip Haskins and Jonathan Frye testified in support of the recommended violations and forfeiture amount, respectively (Tr. at 4-14, 18-20, 22-27). Respondent appeared pro se and submitted testimony on his own behalf. No post hearing briefs were filed in this proceeding.

III. DISCUSSION

A. *Applicable Law*

{¶ 3} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations (FMCSR), 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-03(b) requires all motor carriers engaged in intrastate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Additionally, under Ohio Adm.Code 4901:2-5-03(a), the Commission adopted certain provisions of the federal hazardous materials regulations (HMR). Pursuant to 49 C.F.R. 171.8, the HMR apply to persons who transport hazardous materials in commerce. Ohio Adm.Code 4901:2-6-14(a) also provides that “[n]o carrier may transport hazardous materials, in commerce, into, within, or through this state unless such carrier has registered with, and received a uniform program permit from, the [C]ommission or a reciprocity state.”

{¶ 4} R.C. 4923.99 authorizes the Commission to assess a civil forfeiture of up to \$25,000 per day, per violation, against any person who violates the safety rules

adopted by the Commission when transporting persons or property, in interstate commerce, in or through this state. Ohio Adm.Code 4901:2-7-20 requires that, at the hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

B. *Brief Statement of Issues*

{¶ 5} Our conclusion in this case is based on the disposition of four crucial issues: (1) whether the finding of a violation of 49 C.F.R. 171.2(a) depends upon the amount of hazardous material contained in the containment package; (2) whether the report of the Delaware Police Department is allowable evidence to support a finding that Respondent had committed violations of the HMR; (3) whether Mr. Alahmad was required to obtain certain licenses and certifications, as well as attach markings and placards to his vehicle and the containment packages, before operating the vehicle in question; and (4) whether Staff presented sufficient evidence to support the alleged securement violation.

C. *Summary of Evidence Presented at Hearing*

1. STAFF TESTIMONY

{¶ 6} Inspector Haskins, a field inspector in the Hazardous Materials Enforcement Division,² testified that on July 11, 2015, he inspected a pickup truck and flatbed trailer with two large tanks driven by Respondent after being called in to assist with an investigation with the Delaware, Ohio Fire and Police Departments (Tr. at 6-7). Inspector Haskins noted that the Delaware Fire and Police Departments contacted him in order to help investigate the situation and any violations with the Commission's transportation regulations (Tr. at 9); however, Inspector Haskins acknowledged that he did not see Mr. Alahmad driving the truck hauling the tanks (Tr. at 14). Upon his

² Inspector Haskins has worked as a field inspector in the Hazardous Materials Enforcement Division for 29 years and holds numerous certifications requiring annual recertifications in order to perform the duties required by the Federal Motor Carrier Safety Administration.

inspection, Inspector Haskins testified that Mr. Alahmad was transporting gasoline, a flammable liquid, between two facilities he owned, which Inspector Haskins estimated to be approximately 75 yards apart from each other (Tr. at 10, 19). Additionally, Inspector Haskins testified that he had taken photographs during the course of his inspection which show that there was some level of gasoline in the bulk containers (Tr. at 10; Staff Ex. 2). Inspector Haskins noted on the record that the containers located on the trailer had a capacity of approximately 330 gallons each; however, he was unsure of the actual amount of gasoline in the container at the time of the inspection (Tr. at 10-11, 14). He did, however, testify that the containers appeared to be laden with several inches of product in the bottom of the containers, which he estimated to be approximately 30 gallons (Tr. at 11, 14-15). Inspector Haskins also noted that he discovered a hose leading to a storage tank below ground at the time of his arrival, and he was unsure how much product had been unloaded prior to his inspection.

{¶ 7} Inspector Haskins indicated that the Delaware Fire and Police Departments worked in collaboration with the Hazardous Materials Enforcement Division and provided copies of the reports prepared by the police department (Tr. at 11-12; Staff Ex. 3). In the reports, the police department noted that Respondent was transporting large amounts of gasoline between two businesses he owned in large water tanks on a trailer (Staff Ex. 3). Additionally, Inspector Haskins testified that it was the Delaware Police Department that witnessed Mr. Alahmad operating the vehicle on the highway and informed him that the tanks had a considerable amount of material in them at the time of transport (Tr. at 10-11, 18).

{¶ 8} Staff witness Frye, the Chief of the Transportation Department's Compliance Division, testified that the monetary amount assessed for the violations was determined by using a civil forfeiture assessment worksheet, a civil forfeiture violations chart, and the inspection report in the case (Tr. at 23-24; Staff Ex. 4; Staff Ex. 5). Mr. Frye

added that the recommended civil forfeiture amount of \$3,850 is consistent with the guidelines issued by the Commercial Vehicle Safety Alliance (CVSA) and recommended that the Commission order the Respondent to pay this amount as a forfeiture (Tr. at 25-26; Staff Ex. 6).

2. RESPONDENT TESTIMONY

{¶ 9} Mr. Alahmad testified that he has been operating two gas stations for almost 20 years, one of which is Full Up (Tr. at 29; Staff Ex. 1; Staff Ex. 3). Additionally, he indicated that he is required to conduct a test on the fuel pumps every year and was testing five pumps at the time of the inspection. Additionally, Mr. Alahmad stated that, rather than the 30 gallons estimated by Inspector Haskins, the tanks only contained a couple of inches, or the equivalent of 24.99 gallons. (Tr. at 16.) In fact, Mr. Alahmad noted that Inspector Haskins arrived nearly 30 minutes after the Delaware, Ohio Police and Fire Departments called him, alleging it was not possible that the tanks were full, or even filled to the amount alleged by Inspector Haskins, as that amount of time would not have allowed the tanks to be emptied (Tr. at 17).

{¶ 10} Mr. Alahmad further testified that it was a customer that first notified the police that Mr. Alahmad was pumping gas into the two water tanks and that the police officer did not actually see him driving on the highway (Tr. at 30-31). Mr. Alahmad also testified that Inspector Haskins could not have seen any gas in the tanks, as it was "just 24 gallons, or maybe a couple of inches" from testing the five pumps (Tr. at 30-31). Although Mr. Alahmad admitted he drove his pickup truck and trailer with two tanks on the highway between the two gas stations, he claimed that there was no gas in the tanks at the time he did so (Tr. at 32). Mr. Alahmad claimed that he had no reason to transport gasoline fuel from one station to the other, as his gas was delivered to both stations by another company (Tr. at 32). In addition, Mr. Alahmad asserted that he did not believe he should be subject to the Commission's transportation rules and

regulations or be required to have a commercial driver's license (CDL), as his intended purpose was not to transport gas, but rather, to conduct tests on his gas pumps, which is required only once a year (Tr. at 28, 33).

{¶ 11} In addition, Mr. Alahmad made several statements on the record pertaining to his concerns that multiple reports submitted as exhibits by Staff in this proceeding did not contain truthful information and that he needed the police officer to testify at the hearing; however, Mr. Alahmad acknowledged that he had not subpoenaed the police officer to be present (Tr. at 32). Mr. Alahmad presented no evidence rebutting the alleged violation for improper securement, pursuant to 49 C.F.R. 393.102(a).

D. Commission Conclusion

1. WHETHER MR. ALAHMAD IS SUBJECT TO THE COMMISSION'S RULES AND REGULATIONS

{¶ 12} Mr. Alahmad also questioned whether the Commission's transportation rules should apply to him and to his activities on the day of the alleged violations. According to 49 C.F.R. 383.5, a CMV includes any motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle "is of any size and is used in the transportation of hazardous materials." Mr. Alahmad acknowledged on the record that, in order to conduct the fuel tests on the various pumps at his two gas stations, he was required to operate his truck and trailer on the highway approximately 75 yards between the two locations (Tr. at 16, 19, 32; Staff Ex. 1 at 2). We note that, while an exception exists to the application of the motor carrier regulations for persons transporting property not in furtherance of a commercial enterprise, this exception does not apply in this situation. In fact, Mr. Alahmad professed several times that, at the time of inspection, he was conducting annually required testing for the operation of his gas stations (Tr. at 28, 33). Clearly, he was acting

in furtherance of a commercial enterprise. Therefore, as an initial matter, we find that Mr. Alahmad was subject to the Commission's rules and regulations at the time of the inspection.

2. WHETHER THE AMOUNT OF GASOLINE IN THE TANKS IS DISPOSITIVE OF THE ALLEGED HAZARDOUS MATERIALS VIOLATIONS

{¶ 13} Mr. Alahmad raised several concerns with the testimony of Inspector Haskins, claiming that Inspector Haskins was incorrectly stating how much gasoline remained in the tanks at the time of the inspection. While Mr. Alahmad did not deny that he had utilized the tanks to temporarily test the underground storage tanks at his gas stations, he argued that no gas remained in the tanks while he was driving the vehicle (Tr. at 32).

{¶ 14} 49 C.F.R. 383.5 defines "hazardous materials" as "any material that has been designated as hazardous under 49 U.S.C. 5103 and is required to be placarded under subpart F of 49 C.F.R. Part 172 ***." 49 C.F.R. 5103 specifically classifies gasoline as a hazardous material. The Commission also notes that Inspector Haskins' opinion that the liquid inside both portable tanks was a hazardous material was based on his visual observation of liquid inside the tank, the hose connected to the tank leading to the underground storage tank, and the smell of gasoline. With this information, Inspector Haskins estimated that the tanks contained approximately 30 gallons of gasoline. (Tr. at 10, 15-16.) Staff also presented photographs of the tanks in question which showed liquid in the tanks (Staff Ex. 2); however, no sample of the liquid was collected for testing. The Commission believes Staff has provided sufficient evidence to prove that gasoline, a hazardous material, was present in the tanks at the time of the inspection. Staff also provided evidence to show that Mr. Alahmad attached various signs on the side of the containers, which included warnings stating that the materials inside the tanks were "Flammable," and that passerby should "Keep Out" (Staff Ex. 3). Not only do these signs fail to satisfy all of the requirements set forth in 49 C.F.R.

177.823(a)³, their mere existence bolsters Staff's claims that Mr. Alahmad was transporting hazardous materials and had exhibited some comprehension as to the danger of such transport.

{¶ 15} Furthermore, according to 49 C.F.R. 171.8 and 172.514, even if a tank only contains residue from gasoline, any hazardous material tank with a capacity over 119 gallons is considered bulk packaging and is still required to be placarded, and the driver is required to have a hazardous materials endorsement on his CDL (Tr. at 19-20). Mr. Alahmad testified that he had no certifications to operate a commercial motor vehicle (CMV), including a hazardous materials endorsement. The capacity of Mr. Alahmad's tanks was approximately 330 gallons each (Tr. at 10; Staff Ex. 6). We also take notice that the placarding of hazardous materials in bulk packaging is required even if the tank is empty, unless, pursuant to 49 C.F.R. 172.514 and 173.29, the tank is cleaned of residue and the placards are removed, obliterated, or securely covered in transportation. All of the evidence on the record indicates that the portable tanks contained gasoline fuel and there was insufficient evidence presented by Mr. Alahmad that the tanks had been cleaned to the point where placarding would not be necessary. *See In re Lyden Oil Co.*, Case No. 08-734-TR-CVF, Opinion and Order (June 10, 2009) at 3-5. It is true that Mr. Alahmad indicated on July 8, 2015, during the first interaction with the Delaware Police Department, that the tanks had been washed prior to use; however, there is no evidence that such washing occurred between both gas stations on July 11, 2015 (Staff Ex. 3).

³ The required markings and placards would include, but would not necessarily be limited to, markings or labels on the tanks with the name and identification number specified for the material in 49 C.F.R. 172.101, pursuant to 49 C.F.R. 172.302, 177.332, and 177.336; and placards on the two opposite sides of the IBCs, pursuant to 49 C.F.R. 172.504 and 172.514. We do acknowledge that the "Flammable" sign required for Class 3 hazardous materials, pursuant to 49 C.F.R. 172.419, was the correct sign for this particular class of hazardous material; however, Respondent failed to properly display the placards in the appropriate locations on the IBCs.

{¶ 16} The fact that the bulk containers would be regulated at all times, regardless if there was only residue from the gasoline or 30 gallons of gasoline in the containers, allows this Commission to determine that Mr. Alahmad's admission that he drove on the highway with the bulk containers is sufficient to prove he engaged in the transportation of hazardous materials. Accordingly, we find that Respondent was in violation of 49 C.F.R. 171.2(a).

3. RELIANCE ON REPORTS OF OTHER AGENCIES FOR HAZARDOUS MATERIALS VIOLATIONS

{¶ 17} As to Mr. Alahmad's assertions that Inspector Haskins did not see him transporting the containers between the two gas stations, the Commission finds that Staff reasonably relied on the report from the Delaware Police Department to conclude that Mr. Alahmad had, in fact, transported such hazardous materials.

{¶ 18} The Commission notes that it consistently attempts to apply the Ohio Rules of Evidence to the extent practicable. Pursuant to Ohio Rules of Evidence Rules 801(c)(2) and 803(6), the inspection reports submitted by Staff were appropriately admitted into the record and may be relied upon to prove the contents therein. Furthermore, both inspection reports had detailed notes of the inspection and the events leading up to the inspection, providing further certainty as to the occurrence of the alleged violations. (Staff Ex. 1; Staff Ex. 3.) Mr. Alahmad provided no evidence to refute the allegations that he had driven with the tanks; rather, he admitted that he had driven on the highway with the tanks and he merely disagreed with the contents of the reports and stated they were inaccurate (Tr. at 32). *See In re George E. Kuhn & Co.*, Case No. 02-3140-TR-CVF. Accordingly, we find that Staff has provided sufficient evidence to show that Respondent transported gasoline, a hazardous material as defined by 49 C.F.R. 5103, without proper authorization, as detailed below, and in violation of Commission regulations.

4. CDL AND PLACARD REQUIREMENTS

{¶ 19} Mr. Alahmad also questioned whether he was required to have a CDL and certain placards and markings on the tanks and his vehicle. 49 C.F.R. 383.93(b)(4) provides, in pertinent part, that "An operator must obtain State-issued endorsements to his/her CDL to operate commercial motor vehicles which are: * * * (4) used to transport hazardous materials * * *." Accordingly, we find that, because Mr. Alahmad was operating a CMV and was subject to the Commission's rules and regulations at the time of the inspection, he should have possessed the required paperwork and exhibited the necessary placards authorizing his operation of the vehicle and transportation of hazardous materials. Therefore, we find Respondent was in violation of the following regulations: Ohio Adm.Code 4901:2-5-10, Ohio Adm.Code 4901:2-6-03, 49 C.F.R. 177.817(a), 49 C.F.R. 172.602(a), and 49 C.F.R. 177.823(a).

5. ALLEGED SECUREMENT VIOLATION

{¶ 20} The last alleged violation was in regard to the improper securement system utilized for the two bulk containers. 49 C.F.R. 393.102(c)(3) provides that articles of cargo will be considered to have met the securement requirements if they are "[s]ecured in accordance with the applicable requirements of §§ 393.104 through 393.136." Further, 49 C.F.R. 393.110(b) states that "[w]hen an article is not blocked or positioned to prevent movement in the forward direction by a headerboard, bulkhead, other cargo that is positioned to prevent movement, or other appropriate blocking devices, it must be secured by at least: (1) one tiedown for articles 5 feet (1.52 meters) or less in length, and 1,100 pounds (500 kg) or less in weight." These requirements are in addition to those set forth in 49 C.F.R. 393.106, which provide the general requirements for securing cargo. 49 C.F.R. 393.5 also defines "article of cargo" as an "unit of cargo, * * * including articles grouped together so that they can be handled as a single unit or unitized by wrapping, strapping, banding or edge protection device(s)."

{¶ 21} Although no testimony was provided during the hearing on this particular violation, the inspection report clearly notes that a one-to-two inch nylon webbing strap was the only type of securement utilized for the two 330 gallon bulk package containers (Staff Ex. 1). There was no other cargo or securement mechanisms in place to prevent forward motion of the containers. Additionally, the pictures presented by Staff confirm that only one nylon strap was used to secure both containers to the trailer and that the bulk containers were not attached or unitized in any way that would lead us to determine that they constituted a single article of cargo (Staff Ex. 2). Therefore, at least two straps, or an equivalent means of securement, would have been necessary to satisfy the C.F.R. securement requirements. As Mr. Alahmad failed to rebut any of this evidence in the record during the evidentiary hearing, we find that Staff has provided sufficient evidence to establish that Respondent did, in fact, violate 49 C.F.R. 393.102(a).

6. SUMMARY OF COMMISSION CONCLUSIONS

{¶ 22} In summary, the Commission finds that Staff presented sufficient evidence demonstrating that the proposed forfeitures were consistent with CVSA guidelines and that Respondent had violated all seven of the cited code sections (Tr. at 25-26). Accordingly, the Commission finds that, by a preponderance of the evidence presented, Mr. Alahmad is liable for all seven violations listed in the NPD.

{¶ 23} We would also like to note that the fact of whether Mr. Alahmad was aware of the regulations at the time of the inspection is irrelevant for the disposition of this case (Tr. at 33). Mr. Alahmad's lack of knowledge of the transportation regulations does not constitute an excuse for any measure of non-compliance with the regulations. We expect any driver performing transportation in a CMV to be aware of and comply with all applicable transportation regulations contained in the C.F.R. This is especially true when that carrier is transporting hazardous materials, which constitute much

greater danger to the traveling public. The safety of the traveling public in any case involving hazardous materials is of particular concern to the Commission. For that reason, we direct Mr. Alahmad, in the event he decides to continue to transport gasoline or any other hazardous material, to obtain necessary licenses and operating authority as described in this Opinion and Order, or, in the alternative, we strongly encourage Mr. Alahmad to engage a licensed and fully authorized company to conduct all necessary tests for his business that require the transportation of gasoline. Mr. Alahmad testified that the company he previously used to test his pumps only charged him \$150 (Tr. at 33). While we do sympathize with Mr. Alahmad that the amount of forfeiture assessed in this proceeding is much larger than the cost to have another company conduct the test, we must be mindful of the general public's safety and encourage all of those who transport hazardous materials to seek out the necessary certifications before doing so.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 24} On July 11, 2015, an inspector for the Ohio State Highway Patrol stopped and inspected a motor vehicle, operated by Full Up, LLC, and driven by Issa Alahmad, in the state of Ohio. The inspector discovered the alleged violations of 49 C.F.R. 383.23(a)(2), 49 C.F.R. 391.41(a)-(f), 49 C.F.R. 393.102(a), 49 C.F.R. 171.2(a), 49 C.F.R. 172.602(a), 49 C.F.R. 177.817(a), 49 C.F.R. 177.823(a), Ohio Adm.Code 4901:2-5-10, and Ohio Adm.Code 4901:2-6-03.

{¶ 25} Respondent was timely served with an NPD, alleging violations of 49 C.F.R. 393.102(a), 49 C.F.R. 171.2(a), 49 C.F.R. 172.602(a), 49 C.F.R. 177.817(a), 49 C.F.R. 177.823(a), Ohio Adm. Code 4901:2-5-10, and Ohio Adm.Code 4901:2-6-03. In the NPD, Respondent was notified that Staff intended to assess civil monetary forfeiture of \$3,850.

{¶ 26} A prehearing conference was conducted in this case on November 5, 2015; however, the parties failed to reach a settlement agreement during the conference.

{¶ 27} A hearing was held on February 11, 2016.

{¶ 28} Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 29} Staff has proven by a preponderance of the evidence, that Respondent violated 49 C.F.R. 393.102(a), 49 C.F.R. 171.2(a), 49 C.F.R. 172.602(a), 49 C.F.R. 177.817(a), 49 C.F.R. 177.823(a), Ohio Adm. Code 4901:2-5-10, and Ohio Adm.Code 4901:2-6-03.

{¶ 30} Respondent should be assessed the \$3,850 forfeiture for the violations cited in the NPD.

V. ORDER

{¶ 31} It is, therefore,

{¶ 32} ORDERED, That Respondent pay a civil forfeiture of \$3,850 for violations of 49 C.F.R. 393.102(a), 49 C.F.R. 171.2(a), 49 C.F.R. 172.602(a), 49 C.F.R. 177.817(a), 49 C.F.R. 177.823(a), Ohio Adm. Code 4901:2-5-10, and Ohio Adm.Code 4901:2-6-03, in accordance with this Opinion and Order. Payment shall be made by check or money order payable to the "Treasurer, State of Ohio" and mail or deliver it to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. The case number (15-1573-TR-CVF) and inspection number (OH3202306182C) should be written on the face of the check or money order. Payment must be made within 60 days of this Opinion and Order. It is, further,

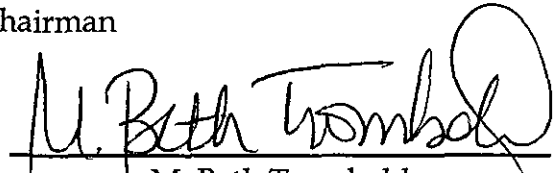

{¶ 33} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Asim Z. Haque, Chairman

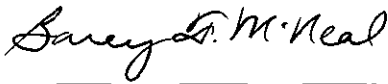
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Secretary