BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of SJA Transport, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture.	:	Case No. 17-779-TR-CVF (OH3210302495C)
In the Matter of SJA Transport, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture.	:	Case No. 17-1199-TR-CVF (OH3238011444C)

SJA TRANSPORT, INC.'S REPLY IN SUPPORT OF ITS POST-HEARING BRIEF

I. INTRODUCTION

The Staff ("Staff") has failed to meet its burden of showing that, by a preponderance of the evidence, SJA Transport, Inc. ("SJA") violated 49 C.F.R. § 180.415(b) and 49 C.F.R. § 177.823(b). First, Staff ***admits*** that SJA was in full compliance with the express requirements of § 180.415(b) so there is no violation that can be prosecuted. Second, because the plain language of § 180.415(b) is unambiguous, this Commission cannot look outside the express language of the regulation for guidance on its application, thus making Staff's interpretation of the regulation irrelevant. Third, Staff's application and interpretation of § 180.415(b) is unreasonable because Staff abandoned its long-standing interpretation of § 180.415(b) (which changed to SJA's detriment)—without notice—just weeks before SJA's first alleged violation and just months after giving at least ***four*** passing inspections to SJA vehicles under the same conditions. Not only is that extremely unfair, arbitrary, and unreasonable, Staff's request that this Commission ignore its previous interpretation and application of the cargo tank testing requirement for transporting ethanol and adopt *Staff's* ***new*** interpretation that the marking

regulation should also include which test to use is unfair (and wrong). As the undisputed evidence shows, on one hand the Staff is telling this Commission that it should rely on the Staff's new interpretation on the applicable regulation for proper cargo tank markings. Then, on the other hand, Staff is asking this Commission to ignore its interpretation of the cargo tank testing requirement that SJA relied on prior to the Staff's flip-flop in application in late 2016. The Staff cannot arbitrarily apply and change interpretations without proper notice to an industry. The alleged violations of § 180.415(b) must be dismissed.

Similarly, the Staff is also asking this Commission to adopt its new interpretation of § 177.823(b) and ignore the fact that, for years, SJA was operating in the exact manner in which it had been instructed by the regulators tasked with enforcing the regulation. Given Staff's previous guidance on § 177.823(b), and SJA's reliance on that advice, the alleged violation of § 177.823(b) should be dismissed.

In summary, all violations against SJA should be dismissed and the Commission should order Staff to publish notice (whether electronic, postal or by publication) to registered Ohio transporters on Staff's new interpretations.

II. LAW AND ARGUMENT

A. **SJA Did Not Violate § 180.415(b**).

The Commission should find that SJA did not violate 49 C.F.R. § 180.415(b). First, it is undisputed—and Staff admits—that SJA's cargo tanks complied with the express requirements of 49 C.F.R. § 180.415(b). Second, because the plain language of § 180.415(b) is unambiguous, this Commission cannot look outside the express language of the regulation for guidance on its application making Staff's interpretation of the regulation irrelevant. Third, Staff's application and interpretation of § 180.415(b) is unreasonable because Staff changed its long-standing

interpretation without notice to Ohio transporters just weeks before issuing SJA the alleged violations.

1. *It is undisputed that SJA's cargo tanks complied with the express requirements of 49 C.F.R. § 180.415(b).*

As explained in SJA's Brief, the unambiguous language of § 180.415(b) requires ***only*** that cargo tanks be marked according to the test it has ***passed***. (*See* SJA's Post Hearing Br. at 8–10.) Here, SJA's cargo tanks were tested under, and passed, the requirements for the K-EPA 27 Test. (Transcript ("Tr.") 133, 137.) Further, Staff ***admits*** that SJA had the proper markings for the K-EPA 27 test: "Nor does the Staff dispute that the marking on the tanks were appropriate for having passed the EPA Method 27 Test." (Staff's Post-Hearing Br. ("Staff Br.") at 10.)

Staff's admission should end this Commission's analysis on SJA's challenge to the alleged violations of § 180.415(b). In fact, 49 C.F.R. § 180.415(b) only requires that the tank be marked: (1) durably and legibly, (2) in English, (3) with the date (month and year), (4) with the type of test or inspection performed, (5) with letters and numbers at least 1.25 inches high, near the front head, and (6) with "K-EPA27." (*See* § 180.415(b); *see also* Staff Exs. 2, 4, and 5; Tr. 20–22; 50–53; 80–85; 128–130; 133–138.) These requirements are an exhaustive list. Yet, Staff fails to allege even a single violation from this exhaustive list. For this reason alone, the alleged violations of § 180.415(b) must be dismissed.

2. *Because the plain language of § 180.415(b) is unambiguous, Staff's interpretation of the regulation is irrelevant.*

The plain language of § 180.415(b) is unambiguous. In fact, Staff fails to allege *any* ambiguity in the regulation. (*See generally*, Staff's Br.) Yet, despite alleging no ambiguity, Staff requests that this Commission look beyond the plain language of the regulation and adopt Staff's *interpretation* of how it should be applied. (*See* Staff's Br. at 9 ("This interpretation, this

understanding, of [§ 180.415(b)] was long-standing among the Commission Staff.").) Without an ambiguity, however, the Staff's interpretation of § 180.415(b) is irrelevant because well-established Ohio law prohibits this Commission from looking outside the express language of § 180.415(b) when applying it to the relevant facts.

The law on this point is clear—a regulation must be applied as written when its language is clear and unambiguous. *See AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, 969 N.E.2d 1166, ¶ 18 ("When construing a statute, [the Commission] must first examine its plain language and apply the statute as written when the meaning is clear and unambiguous."). Before the Commission can look outside the plain language of § 180.415(b) for an interpretation, the Staff must first establish that there is an ambiguity in the regulation's express language. *See State v. Wheeling & Lake Erie Ry. Co.*, 152 Ohio App. 3d 24, 2003-Ohio-1420, 786 N.E.2d 540, ¶ 10 (6th Dist.) ("[The Commission] may interpret a statute ***only*** where the statute is ambiguous.") (emphasis added).

It is undisputed here that the language of § 180.415(b) is unambiguous. Tellingly, Staff does not even allege that § 180.415(b) is ambiguous. (*See generally*, Staff Br.) Instead, Staff asks the Commission to skip this legally required step and to look directly at the legislative intent and history of § 180.415(b). (*See* Staff's Br. at 8–9.) The Staff's failure to show—or even allege—an ambiguity in the regulation is fatal to its argument. *See State v. Gonzales*, 150 Ohio St. 3d 261, 2016-Ohio-8319, 81 N.E.3d 405, ¶ 17 ("The state fails to point to any ambiguity in the statute. Without that, we must simply apply the statute as written, *without delving into legislative intent*.") (emphasis added) (vacated on other grounds); *see also Ohio AG v. John Doe*, 141 Ohio App. 3d 242, 251, 750 N.E.2d 1149 (10th Dist. 2000) (stating that "the inquiry into the

legislative intent and legislative history *is inappropriate*" without the initial finding that the statute is ambiguous) (emphasis added). Thus, the regulation must be applied as written.

Because the plain language of § 180.415(b) is unambiguous, the Staff's interpretation of the regulation is irrelevant. Accordingly, the *only* issue raised by an alleged violation of § 180.415(b) is whether SJA's markings complied with § 180.415(b). Because it is undisputed that SJA's cargo tanks were marked in accordance with the express and unambiguous requirements of § 180.415(b), the alleged violations must be dismissed.

3. Staff's interpretation and application of § 180.415(b) is unreasonable because Staff changed its long-standing application and interpretation just weeks before issuing SJA the alleged violations.

In addition to being irrelevant, this Commission should not adopt Staff's application and interpretation of § 180.415(b) because Staff's application and interpretation is unreasonable. As explained in SJA's Merit Brief, § 180.415(b) is a markings requirement, *not* a testing requirement. (SJA's Br. at 8–11.) Section 180.415(b) requires ***only*** that cargo tanks be marked according to the test it has passed. (*Id*.) Conversely, the *testing* requirement for cargo tanks is § 180.407. (*See id* at 10.) This test mandates that certain tests be passed before carriers can transport certain substances such as ethanol. (*Id*.)

For over 13 years, the Staff interpreted the *testing* requirement to allow carriers to use the K-EPA 27 Test as a substitute for the K-Test when transporting ethanol. (Tr. 146–156; SJA Exs. 6, 7, 9, 10, 11.) While the Staff may deny this interpretation with its words, its actions prove otherwise. **Indeed, during at least *four* inspections that occurred within the 14 months prior to the December 30, 2016 alleged violation, Staff affirmed SJA's action of transporting ethanol while only having passed the K-EPA 27 Test.**

Specifically, on October 29, 2015, SJA was transporting ethanol and the cargo tank had passed the K-EPA 27 Test but not the K-Test. (Tr. 154–156; SJA Exs. 7, 11.) No violation was issued. (SJA Ex. 11.)[1] Then, on December 23, 2015, an SJA cargo tank was transporting ethanol but again had *only* passed the K-EPA 27 Test. (Tr. 146–151; SJA Exs. 6, 8.) This time the inspection was done by the Ohio State Highway Patrol, but the result was the same—no violations were issued. (Tr. 146–151; SJA Exs. 6, 8.) The third inspection took place on June 2, 2016, and SJA was transporting ethanol with a cargo tank that had only passed the K-EPA 27 Test. (Tr. 152; SJA Ex. 9.) Again, the inspector found that SJA had not committed any violations. (Tr. 152; SJA Ex. 9.) Finally, on August 1, 2016—less than five months before the December 30, 2016 alleged violation—SJA's cargo tank transporting ethanol had passed the K-EPA 27 Test but not the K-Test, and the inspector did not issue a violation for an improper test. (Tr. 153–154; SJA Ex. 10.) Staff's actions prior to the issuance of the alleged violations in this case are inconsistent with its new interpretation of the regulation.

What is more, Robert Barrett, the *same* inspector who issued the violation on December 30, 2016, was still uncertain on the interpretation of the *testing* requirement even after issuing the violation. In an email to Mr. Belna on January 5, 2017, Mr. Barrett stated:

> **From:** robert.barrett@puco.ohio.gov
> **Sent:** Thursday, January 05, 2017 1:08 PM
> **To:** Belna
> **Subject:** 2016 EPA Method 27 guidance-interp
> **Attachments:** 2016 interp - EPA 27 +.pdf
>
> Rob,
>
> I received this this afternoon. It appears all CT will need the additional leak test ASAP unless dedicated to gasoline service.

(SJA Ex. 13.)

[1] Notably, the PUCO inspector awarded SJA a CVSA sticker which indicates a perfect inspection. (Tr. 155–156; SJA Ex. 11.)

Mr. Barrett's email tellingly explains to Mr. Belna that "***it appears***" all cargo tanks would require the K-Test unless dedicated to gasoline service. (SJA Ex. 13) (emphasis added). Mr. Barrett's uncertain statement of "it appears" that the K-Test is required to transport ethanol is further confirmation that Staff had yet to form a definite interpretation of the regulation and failed to notify Ohio transporters of its ***new interpretation***.

Moreover, the transportation industry as a whole has yet to reach a definitive interpretation and application of the *testing* requirement. Less than one year ago, in October 2017, as reported in an industry-wide publication, David Ford, HAZMAT Program Manager for FMCSA was asked whether the K-EPA 27 Test could be used as a substitute for the K-Test. Mr. Ford was noted as stating:

> We realize this is a hot issue. Our agency [FMCSA] is not enforcing this. This has been out there for a year. We have not taken action. Now I know some states are enforcing it, but we're not. We've been doing this educational thing and trying to tell shops and carriers. This is a 180-degree turn. ***This is a big change in how we've done business***.

(SJA Ex. 14) (emphasis added). These statements, in an industry-wide publication, confirm there was, and still is, significant confusion among carriers, regulators, administrative agencies, and others about when the K-EPA 27 Test can be used as an alternative to the K-Test.

Even with this confusion, Staff asserts that SJA "should have known" that the K-Test was required to transport ethanol and urges this Commission to adopt its *new* interpretation of the *testing* requirement and enforce it through the requirements of the *markings* requirement. (Staff's Br. at 12.) Staff's argument is inconsistent and without merit.

The evidence undeniably shows that—without notice or warning to carriers—the Staff's long-standing interpretation of the *testing* requirement changed in late 2016 and was still in question in early 2017. Without notice from Staff of its change of interpretation and

enforcement, SJA has absolutely no way of knowing that its past practices would now be considered a violation.

Additionally, Staff's argument is inconsistent because on one hand, Staff is asking this Commission to adopt its interpretation of the *markings* requirement (§ 180.415(b)) and find that SJA violated the regulation despite undisputedly having the proper markings for the only test it has passed, the K-EPA 27 Test. Yet, on the other hand, Staff would have this Commission ignore its long-standing interpretation of the *testing* requirement (§ 180.407) that allowed carriers to transport ethanol with *only* the K-EPA 27 Test, and was relied upon by SJA and changed without notice. Staff cannot have it both ways and have the Commission adopt one of Staff's interpretations while ignoring another one.

For these reasons, this Commission should reject the Staff's second interpretation of the *testing* (K-Test) requirement as unreasonable, dismiss SJA's alleged violation of § 180.415(b), and order Staff to provide written, general notice to all Ohio carriers that the K-EPA 27 Test will no longer be accepted in lieu of the K-Test when transporting petroleum distillate fuels such as ethanol.

D. SJA Did Not Violate 49 C.F.R. § 177.823(a).

This Commission should also dismiss SJA's alleged violation of § 177.823(a) based on the Staff's unannounced change in its application and enforcement. As explained in SJA's Merit Brief, SJA was simply operating pursuant to the direction it received from Staff. (SJA's Br. at 19–20.) SJA was informed by Staff that to comply with § 177.823(a) when transporting two or more hazardous materials, SJA should placard its cargo tanks according to the material with the lowest flashpoint. (Tr. 172–173.) That is exactly what SJA did but it was still issued a violation.

Mr. Belna stated that Staff and other state inspectors have instructed him that when a cargo tank is transporting two or more substances it was only necessary to placard the cargo tank for the substance with the lowest flashpoint.[2] (Tr. 171–173.) Mr. Belna explained that because ethanol has a *lower* flashpoint than diesel fuel that the cargo tank only carried the "1987" placard for ethanol. (Tr. 172.) As Mr. Belna stated, this had been SJA's practice "for years" because "you want to placard for something that's the worst product . . . that's what we've been told, and that's even what the state inspector told this driver." (Tr. 172.)

Much like SJA's alleged violation of the K-Test requirement, SJA was simply operating in the manner in which it had been instructed—to placard its cargo tanks according to the material with the lowest flashpoint—by the regulators tasked with enforcing the requirement. Once SJA was made aware of the expectation, it took immediate action and began operating in accordance with the expectation and interpretation. But, given Staff's lack of clear guidance in the past, and SJA's reliance on that advice, this alleged violation should be dismissed like the alleged violation of § 180.415(b).

IV. CONCLUSION

Staff has no basis for ticketing SJA for marking violations, both as a matter of law and fact. Just as important, Staff should not be allowed to arbitrarily change its interpretation of the testing requirements and marking requirements for transport vehicles without proper notice to the industry. SJA has no issue with complying with Staff's new interpretations going forward but does take issue with Staff and the State Highway Patrol issuing violations when both approved SJA vehicles under the same conditions just months before. Accordingly, SJA respectfully requests that this Commission (1) dismiss the alleged violation of § 180.415(b) issued on

[2] The flashpoint of a substance is the *lowest* temperature at which vapors from the substance could ignite when exposed to a flame. (Tr. 54–55.)

December 30, 2016, and the alleged violations of § 180.415(b) and § 177.823(a) issued on February 21, 2017, and (2) order Staff to issue a written, general notice by electronic mail, publication or by letter to Ohio registered transporters regarding the new interpretation and enforcement of § 180.415(b) and § 177.823(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Summary: Reply SJA Transport, Inc.'s Reply in Support of Its Post-Hearing Brief electronically filed by Mr. Timothy J Cole on behalf of SJA Transport, Inc.