

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)

OPINION AND ORDER

Entered in the Journal on November 7, 2018

I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated, by a preponderance of the evidence, that SJA Transport, Inc. violated 49 C.F.R. 180.415(b), cargo tank test or inspections markings: failure to display K marking for leakage test, and 49 C.F.R. 177.823(a), no placards or 1993 identification number markings on cargo tank.

II. PROCEDURAL HISTORY

{¶ 2} On December 30, 2016, Hazardous Materials Specialist Robert Barrett of the Commission stopped and inspected a commercial motor vehicle (CMV) operated by SJA Transportation, Inc. (SJA or Respondent) and driven by David Hauenstein. At the time of the inspection, Specialist Barrett prepared a report that identified one violation of the Federal Motor Carrier Safety Regulations (FMCSR), specifically, 49 C.F.R. 180.415(b), cargo tank test or inspection markings: failure to display K marking for leakage test. In accordance with Ohio Adm.Code 4901:2-7-12, SJA was served on January 6, 2017, with a Notice of Preliminary Determination (NPD). In the NPD, Respondent was notified that Staff intended to assess a civil forfeiture of \$1,260 for the violation.

{¶ 3} On February 21, 2017, Motor Carrier Enforcement Inspector Michael Byrne of the Ohio State Highway Patrol stopped and inspected a CMV operated by SJA and driven by Billy Nichols. At the time of the inspection, Inspector Byrne prepared a report that identified two FMCSR violations, specifically, 49 C.F.R. 180.415(b), cargo tank test or

inspection markings: failure to display K marking for leakage test, and 49 C.F.R. 177.823(a), no placards or 1993 identification number markings for diesel fuel. In accordance with Ohio Adm.Code 4901:2-7-12, on April 12, 2017, SJA was served with an NPD; \$1,260 was assessed for violating 49 C.F.R. 180.415(b), cargo tank test or inspections markings: failure to display K marking for leakage test, and \$1,260 was assessed for violating 49 C.F.R. 177.823(a), no 1993 identification number markings on cargo tank.

{¶ 4} Prehearing conferences were conducted on May 11, 2017, and September 8, 2017, respectively. Staff and SJA requested continuances of several scheduled hearing dates during 2017 and 2018; ultimately, the cases were consolidated into one hearing, which was conducted on April 23, 2018. At the hearing, Staff witnesses included Specialist Barrett and Inspector Byrne, as well as Kelly Hedglin, Field Supervisor and former Hazardous Materials Specialist; Andy Conway, Engineering Specialist; Ron Swegheimer, Chief of Transportation Enforcement; and Rod Moser, Chief of Compliance. Robert Belna, President of SJA, testified on behalf of SJA.

III. LAW

{¶ 5} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the FMCSR, specifically, 49 C.F.R. Sections 40, 367, 380, 382, 383, 385, 386, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Through the same rule, the Commission also adopted those portions of the regulations contained in 49 C.F.R. 107, Subparts F and G, and 49 C.F.R. 171 to 180, as are applicable to transportation of hazardous materials by motor vehicle. Ohio Adm.Code 4901:2-5-03(C) requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Further, 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.

{¶ 6} 49 C.F.R. 180.415(b) states that "Each cargo tank must be durably and legibly marked, in English, with the date (month and year) and the type of test or inspection performed, subject to the following provisions: * * * (3)(vi) K for leakage test for a cargo tank tested under Section 180.407, except Section 180.407(h)(2); and K-EPA27 for a cargo tank tested under Section 180.407(h)(2) after October 1, 2004." 49 C.F.R. 177.823(a) states that "A carrier may not move a transport vehicle containing a hazardous material unless the vehicle is marked and placarded in accordance with part 172 * * *."

IV. ISSUES

{¶ 7} The issues in this case are whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent violated 49 C.F.R. 180.415(b), cargo tank test or inspections markings: failure to display K marking for leakage test, and 49 C.F.R. 177.823(a), no placards or 1993 identification number markings on cargo tank.

V. SUMMARY OF THE EVIDENCE

{¶ 8} Specialist Barrett testified that on December 30, 2016, he stopped and inspected a cargo tank that was transporting ethanol, which was described on shipping papers as alcohols n.o.s., hazard class 3, UN 1987, packing group II. The cargo tank was marked K-EPA27, which is a vapor recovery test for cargo tanks that transport petroleum distillates. (Tr. at 12-13, 23.) Because ethanol is not a petroleum distillate, Specialist Barrett contends, the cargo tank should have been leak tested and marked with the letter K (Tr. at 12, 15-16). Specialist Barrett explained that he knew from prior conversations with his supervisor, and from an August 3, 2016 interpretation from the U.S. Pipeline and Hazardous Materials Safety Administration (PHMSA), that the K-EPA27 test can only be used on cargo tanks transporting petroleum distillates (Tr. at 23-24; SJA Ex. 1). He did not recall exactly when the prior discussion with his supervisor occurred (Tr. at 23-26, 29).

{¶ 9} Inspector Byrne testified that on February 21, 2017, he inspected an SJA cargo tank with four compartments; compartments one, three, and four contained residue of diesel fuel, UN 1993, while compartment two contained ethanol, UN 1987 (Tr. at 35, Staff Ex. 3). Inspector Byrne asserts that, although the cargo tank was placarded and marked UN 1987 to indicate alcohols n.o.s., i.e., ethanol, there were no UN 1993 markings and placards to indicate residue of diesel fuel. Inspector Byrne did not recall whether the driver stated that the cargo tank was marked and placarded for the hazardous material with the lowest flash point.¹ (Tr. at 37-38, 54-55.) In addition, Inspector Byrne noted, the cargo tank was marked K-EPA27, which is a vapor recovery test for cargo tanks hauling petroleum distillates; however, he contends, ethanol is not a petroleum distillate, and there was no letter K on the cargo tank to indicate that it had passed the K leakage test (Tr. at 37-38, 41, 44-46; Staff Ex. 3). He asserts that Field Supervisor Kelly Hedglin, who was present during the inspection, confirmed that he had identified both violations correctly. Inspector Byrne did not recall if he had previously issued any violations pursuant to 49 C.F.R. 180.415(b). (Tr. at 47-49.)

{¶ 10} Kelly Hedglin testified that she has been a Field Supervisor for one year and was previously a Hazardous Materials Specialist for 27 years. She contends that SJA's cargo tank should have been placarded and marked UN 1993 to indicate the diesel fuel residue. (Tr. at 61-62; 191-192.) Ms. Hedglin noted that, pursuant to 49 C.F.R. 172.336(c), a cargo tank must be placarded and marked for the hazardous materials that are being transported; placarding and marking in a compartmentalized cargo tank only for hazardous material with the lowest flashpoint is only permitted if the cargo tank contains more than one kind of petroleum distillate fuel (Tr. at 191-192). In addition, Ms. Hedglin confirmed that, because compartment two of the cargo tank contained ethanol, UN 1987, the K-EPA27 test indicated on the cargo tank was not applicable, and the cargo tank should have been tested for leakage and marked with a K (Tr. at 62-63). She noted that the limited applicability of the K-EPA27

¹ A flash point is the minimum temperature at which a liquid gives off vapor in sufficient concentration to form an ignitable mixture with air near the surface of the liquid.

test to cargo tanks carrying petroleum distillates was finalized in federal regulations in 2004 or 2005 (Tr. at 62-63). Because ethanol was not commonly transported in Ohio in 2004-2005, Ms. Hedglin added, initially there were few inspections where she found that the K-EPA27 test was incorrectly applied to a cargo tank transporting ethanol. However, prior to Inspector Byrne's inspection, she asserts that there were "multiple situations" where she found such a violation. (Tr. at 64.) When training new employees, Ms. Hedglin specifically instructs them about the K test and its requirements (Tr. at 66-68).

{¶ 11} Andy Conway testified that he has a bachelor of science degree in chemical engineering and a minor in chemistry, in addition to being a registered professional engineer (Staff Ex. 6 at 1). Mr. Conway explained that ethanol is not a petroleum distillate fuel, because ethanol is derived from plants such as corn, whereas petroleum distillates are derived from crude oil (Staff. Ex. 6 at 3). He observed that, pursuant to 49 C.F.R. 180.407(h)(2), the K-EPA27 test is permissible as an alternative to the K leakage test only if a cargo tank is equipped with vapor collection equipment and is transporting petroleum distillate fuel (Staff. Ex. 6 at 2, 5). Mr. Conway noted that a Federal Motor Carrier Safety Administration (FMCSA) Safety Advisory issued November 30, 2016, confirms that the K-EPA27 test cannot be used as a substitute for the K leakage test for cargo tanks transporting ethanol (Staff Ex. 6 at 5; SJA Ex. 2 and 5). He also contends that SJA was incorrect to test and mark the cargo tanks K-EPA27, because its cargo tanks were not carrying a petroleum distillate, but rather were carrying ethanol blends that could not be defined as petroleum distillates (Staff. Ex. 6 at 2, 4). Mr. Conway testified that the blend in question consisted of 98 percent ethanol (Tr. at 73).

{¶ 12} Ron Swegheimer testified that he has been Chief of Transportation Enforcement for nearly five years and previously was a Hazardous Materials Specialist for approximately 24 years (Staff Ex. 7 at 1). Mr. Swegheimer explained that the K test focuses on whether there are leaks from a cargo tank which reduce the tank's integrity to retain hazardous material, whereas the K-EPA27 test ensures that vapors released while loading

and unloading a cargo tank are captured, thus creating a closed system (Tr. at 98-99). He added that 49 C.F.R. 180.407(h) was amended in 2003 to allow the K-EPA27 test to substitute for the K test, provided that a cargo tank is equipped with vapor recovery equipment and is transporting petroleum distillate fuels (Tr. at 79-80, 85-86; Staff Ex. 7 at 4).

{¶ 13} Mr. Swegheimer examined SJA Ex. 4, a March 18, 2016 PHMSA interpretation responding to his same-day email inquiry concerning “[t]ransportation of UN 3295, hydrocarbons liquid n.o.s., 3, [packing group] I in a DOT-407 cargo tank equipped with vapor recovery.” The interpretation states that the K-EPA 27 test may be substituted for the K test only for cargo tanks with a vapor recovery system that are hauling a petroleum distillate or a petroleum distillate/alcohol blend used as fuel for internal combustion engines (SJA Ex. 4). Mr. Swegheimer testified that transportation of ethanol in MC 306 and DOT 406 cargo tanks did not typically occur until late 2008 and subsequent years. Further, he contends that, at the time of his March 18, 2016 inquiry to PHMSA, there was no confusion concerning when the K-EPA27 test could be substituted for the K test on DOT 406 and MC 306 cargo tanks. (Tr. at 87-88; 101-102; 106).² He asserts that he made the inquiry because DOT 407 cargo tanks were being used to carry an increasing variety of hazardous materials. Mr. Swegheimer emphasized that his inquiry to PHMSA concerned “a specific material [i.e., hydrocarbons liquid n.o.s.] in a specific tank [i.e., a DOT 407 cargo tank].” (Tr. at 89-90.) Mr. Swegheimer further noted that petroleum production from Ohio’s Marcellus and Utica shale had increased, and that some bulk transporters had begun using DOT 407 cargo tanks to carry a “petroleum material” that “was not like the normal crude oil” (Tr. at 102-103).

² Mr. Swegheimer stated that cargo tanks are built to U.S. Department of Transportation specifications. He explained that DOT 406 and MC 306 cargo tanks are elliptical shaped and are typically used to transport petroleum distillate fuels, such as gasoline, at low pressure; DOT 407 cargo tanks are circular shaped and are used to transport materials at a higher pressure. He added that the cargo tanks inspected by Specialist Barrett and Inspector Byrne were both MC 306 low pressure tanks. (Tr. at 106-108.)

{¶ 14} Mr. Swegheimer also examined SJA Ex. 5, the November 30, 2016 FMCSA Safety Advisory, which concerns limited use of the K-EPA27 test in lieu of the K test on cargo tanks (Tr. at 92, 94). He noted that the Safety Advisory clarified that the K-EPA27 test cannot be used when a cargo tank carrier hauls a substance such as ethanol (Tr. at 94; SJA Ex. 5).

{¶ 15} Mr. Swegheimer concluded that Specialist Barrett and Inspector Byrne had correctly cited SJA for not using the K leakage test on its cargo tanks, given that the material being transported was ethanol, which is not a petroleum distillate fuel (Tr. at 91-92, 101; Staff Ex. 7 at 5). Mr. Swegheimer emphasized that the Commission has applied the regulations consistently following their adoption, and that the safety advisories and clarifications issued in 2015-2017 were in response to a change in materials being hauled and the type of cargo tank being used (Tr. at 107-108). He noted that only drivers, not carrier officials, had approached him regarding substitution of the K-EPA27 test for the K test (Tr. at 113-114).

{¶ 16} Mr. Moser testified that the monetary amount assessed for the violations in both inspections is consistent with the guidelines issued by the Commercial Vehicle Safety Alliance. He noted that hazardous materials violations start at a \$100 fine and then are adjusted to a higher or lower amount depending on factors that include, but are not limited to, whether the violation actually caused harm and what kind and amount of hazardous material was involved in the violation. Mr. Moser asserted that the forfeitures against SJA were calculated correctly. (Tr. at 117, 119, 121; Staff Ex. 9 and 10.)

{¶ 17} Mr. Belna testified that the cargo tanks inspected by Specialist Barrett and Inspector Byrne had passed the K-EPA27 test and fully complied with the markings requirement of 49 CFR 180.415(b), because the markings were durably and legibly marked, in English, in letters and numbers at least 1.25 inches high to indicate the month and year. In his opinion, SJA "was testing for everything we needed to be in compliance with [hauling]

ethanol.” (Tr. at 128-134, 137-138.) Mr. Belna added that SJA transports ethanol daily, but until Specialist Barrett’s December 30, 2016 inspection, Mr. Belna was unaware that a K test was necessary; rather, he believed that it was industry practice to use the K-EPA27 test (Tr. at 141, 158). Mr. Belna further contends that there have been Commission inspections of SJA cargo tanks that had no K test and were transporting ethanol, yet no violation was cited (Tr. at 145). Mr. Belna noted that such inspections occurred on October 29, 2015, December 23, 2015, June 2, 2016, and August 1, 2016 (Tr. at 146-149, 152-156; SJA Ex. 7, SJA Ex. 11; SJA Ex. 6, SJA Ex. 8; SJA Ex. 9; SJA Ex. 10).

{¶ 18} Mr. Belna stated that on January 5, 2017, Specialist Barrett sent him an email with the November 30, 2016 FMCSA Safety Advisory regarding limited use of the K-EPA27 test in lieu of the K test on cargo tanks. In the email, Specialist Barrett stated that he had just received the Safety Advisory, which indicates that the K-EPA27 test may only be used on cargo tanks with vapor recovery equipment that transport petroleum distillates. The Safety Advisory also stated that ethanol is not a petroleum distillate. (Tr. at 160-161; SJA Ex. 13, SJA Ex. 2.) Mr. Belna asserts that he was unaware of the Safety Advisory until he received Specialist Barrett’s e-mail, and contends that in January 2017, following Specialist Barrett’s inspection and after receipt of the Safety Advisory, he immediately took action to test SJA cargo tanks for leakage using the K test (Tr. at 158-159; 163-165, 186-187; SJA Ex. 13). Mr. Belna added that several months were needed to K test all 30 SJA cargo tanks, because the testing companies were “booked up for a period of time.” He noted that drivers generally do not carry papers with them indicating the test results, and agreed that if a cargo tank successfully passed the K test and was not marked with a K, a motor vehicle inspector would not know whether that cargo tank was K tested. (Tr. at 165, 175, 177.)

{¶ 19} While acknowledging that ethanol is not a petroleum distillate, Mr. Belna asserts that many bulk transportation carriers are confused regarding when the K-EPA27 test can be substituted for the K test (Tr. at 166-168, 174, 188). He noted that a March 2, 2018 article from Bulk Transporter magazine, an industry publication, states that federal officials

have not been enforcing regulations regarding the applicability of the K-EPA27 test. Mr. Belna contends that he has subscribed to Bulk Transporter for 15 to 20 years, but had not seen any previous articles concerning when the K-EPA27 test can be applied. (Tr. at 167-170, 177-178; SJA Ex. 14.) During cross-examination, Staff introduced Staff Ex. 11, a January 4, 2017 article from Bulk Transporter, which states that the K-EPA27 test may be used only on cargo tanks with vapor recovery equipment that are in dedicated petroleum distillate service. Mr. Belna admitted that he had overlooked the January 4, 2017 article. (Tr. at 178, 186-187; Staff Ex. 11.) Furthermore, Mr. Belna does not contest any of the contents of the January 2017 Bulk Transporter article (Tr. at 186; Staff Ex. 11).

{¶ 20} Mr. Belna explained that he tries to be current regarding changes in regulations, but he also relies on C.H. Bradshaw Company (C.H. Bradshaw), which tests SJA's cargo tanks, to be up-to-date regarding cargo tank requirements. He added that neither C.H. Bradshaw nor the president of the Ohio Petroleum Marketers Associations, with whom he had discussions, had informed him of the FMCSA November 30, 2016 Safety Advisory or of any PHMSA interpretations concerning the limited applicability of the K-EPA27 test. (Tr. at 178-180; SJA Ex. 2; SJA Ex. 13.)

{¶ 21} Finally, Mr. Belna asserts that SJA was cited under the wrong C.F.R. section for failure to have the K marking on the cargo tank. He observes that 49 C.F.R. 180.415(b) simply requires that a cargo tank be marked for the tests that it has passed, and he emphasizes that SJA's cargo tanks were marked K-EPA27 after passing that test. Mr. Belna contends that failure to K test a cargo tank should be cited under 49 C.F.R. 180.415(a), which states that "Each cargo tank successfully completing the test and inspection requirements contained in Sec. 180.407 must be marked as specified in this section." (Tr. at 185-186.)

{¶ 22} Mr. Belna next addressed the 49 C.F.R. 177.823(a) violation from the February 21, 2017 inspection, which concerns failure to mark the cargo tank with UN 1993 identification numbers and placards to indicate that diesel fuel was being transported. He

asserts that because the cargo tank also contained ethanol, which has a lower flash point than diesel fuel, the placards and UN 1987 identification number markings indicating ethanol were sufficient to comply with marking and placarding rules for the split load (Tr. at 170-172). Mr. Belna added that a commercial motor vehicle inspector had informed him that placarding and marking for hazardous material with the lowest flash point complies with hazardous materials rules (Tr. at 172-173). However, during cross-examination, Staff introduced Staff Ex. 12, a bulletin from the Petroleum Marketers Association of America (PMAA), that states placarding to the lowest flash point is only permitted when both gasoline and petroleum distillates, such as diesel fuel, are shipped simultaneously in a split load in separate compartments of the same cargo tank. Mr. Belna conceded that the PMAA bulletin does not state that ethanol can be part of a split load for placarding and marking purposes (Staff Ex. 12; Tr. at 181-182).

VI. COMMISSION CONCLUSION

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

{¶ 24} We first address SJA's apparent violation of 49 C.F.R. 177.823(a), no UN 1993 identification number markings and placards to indicate diesel fuel, and SJA's assertion that it properly placarded and marked the cargo tank to indicate transportation of only ethanol, which has a lower flash point than diesel fuel (Tr. at 170-172). In contrast, Staff contends that, pursuant to 49 C.F.R. 172.336(c), the cargo tank should have been placarded and marked for the diesel fuel in addition to the ethanol, because placarding and marking for the material with the lowest flash point in a compartmentalized cargo tank is only permitted if the cargo tank contains more than one kind of petroleum distillate fuel (Tr. at 38-40, 53, 191-192). We initially note that, under 49 C.F.R. 177.823(a), "A carrier may not move a transport vehicle containing a hazardous material unless the vehicle is marked and placarded in accordance with part 172 * * *." In addition, 49 C.F.R. 172.336(c) states that, on a compartmentalized cargo tank containing "more than one petroleum distillate fuel," it is

permissible to mark the cargo tank with "the identification number for the liquid petroleum distillate fuel having the lowest flash point * * *."

{¶ 25} The record indicates that the compartmentalized cargo tank carried diesel residue, UN 1993, in compartments 1, 3, and 4, while compartment 2 contained ethanol, UN 1987 (Tr. at 35, 171-173; Staff Ex. 3). Furthermore, during the hearing, SJA stipulated that ethanol is not petroleum distillate (Tr. at 140). Yet, the cargo tank showed only UN 1987 markings and placards; UN 1993 markings and placards "were missing on both sides and ends of the cargo tank" (Tr. 38, 40). Because the cargo tank did not contain more than one petroleum distillate fuel, the cargo tank should have displayed UN 1993 markings and placards in addition to the UN 1987 markings and placards, pursuant to 49 C.F.R. 177.823(a) and (c).

{¶ 26} We do not overlook Mr. Belna's testimony that, "for years," SJA has typically marked its cargo tanks for the lowest flashpoint, and that "the state inspector had told this driver" that such a practice was correct (Tr. at 172-173). However, Mr. Belna did not provide any written evidence, such as a U.S. Mail letter or an e-mail, confirming that Staff was enforcing 49 C.F.R. 177.823(a) such that placarding and marking only for the hazardous material with the lowest flashpoint was correct while diesel fuel residue and ethanol were being transported simultaneously. In short, Mr. Belna's testimony does not overcome Staff's evidence to the contrary. Therefore, we find that Staff proved, by a preponderance of the evidence, the 49 C.F.R. 177.823(a) violation, no UN 1993 placards/markings when required. (Staff Ex. 9.)

{¶ 27} Next, we examine SJA's apparent violation of 49 C.F.R. 180.415(b). SJA emphasizes that its cargo tanks had passed the K-EPA27 test for leakage, and that the K-EPA27 markings on its cargo tanks complied with 49 C.F.R. 180.415(b)(1) and (b)(2), because the markings were durably and legibly marked, in English, in letters and numbers at least 1.25 inches high to indicate the month and year (Tr. at 128-134, 137-138). In SJA's opinion,

49 C.F.R. 180.415(b) is simply a markings requirement, not a testing requirement, and its cargo tanks were marked as 49 C.F.R. 180.415(b) specifies (Tr. at 133-134, 137-138). In contrast, Staff asserts that, although SJA's cargo tanks had passed the K-EPA27 leakage test and were so marked, the cargo tanks were not transporting petroleum distillates, thus rendering the K-EPA27 leakage test inapplicable; instead, the cargo tanks should have been tested and marked for the K leakage test (Tr. at 12, 15-16, 23-24, 37-38, 41, 44-46, 62-63.)

{¶ 28} The Commission finds SJA's assertion that it was cited under the wrong C.F.R. section to be unpersuasive. In support of its argument that 49 C.F.R. 180.415(b) is purely a marking requirement, SJA proffers *In the Matter of National Safe T Propane*, Case No. 07-1207-TR-CVF (*National Safe T Propane*), Opinion and Order (June 25, 2008). There, contends SJA, the carrier was cited for a violation of 49 C.F.R. 180.415(b) and presented no evidence that the required test was done, because 49 C.F.R. 180.415(b) concerns the absence of proper markings, not whether such tests had actually occurred. *National Safe T Propane* at 5.³ However, the language quoted by SJA in its argument is not the Commission's conclusion; rather, it is the Commission's summary of the carrier's arguments. In other words, it is irrelevant to our conclusion in this matter. Moreover, SJA's contention that the "Commission's entire analysis [in *National Safe T Propane*] centered on whether the defendant violated Section 180.415(b) by having insufficient markings" is incorrect. Instead, the Commission specifically observed that the carrier did not submit any documentation proving that the correct tests were conducted, as the carrier contended, despite the incorrect marking. *National Safe T Propane* at 7.

{¶ 29} In considering the apparent violation of 49 C.F.R. 180.415(b), we observe that 49 C.F.R. 180.415(b) must be read in conjunction with 49 C.F.R. 180.407. 49 C.F.R. 180.415(b)(3)(vi) states that the K marking indicates the "leakage test for a cargo tank tested

³ In its briefing, SJA uses Westlaw pagination to cite to *National Safe T Propane*; Commission cites are to the original Opinion and Order.

under Sec. 180.407, except Sec. 180.407(h)(2),” while 49 C.F.R. 180.415(b)(3)(vii) states that the K-EPA27 marking indicates that the cargo tank was “tested under Sec. 180.407(h)(2) * * *.” Next, 49 C.F.R. 180.407(h)(2) states that the K-EPA 27 leakage test is applicable to “cargo tanks used to transport petroleum distillate fuels that are equipped with vapor collection equipment”; otherwise, the K leakage test described in 49 C.F.R. 180.407(h)(1) is applicable. Applying these rules to the December 30, 2016 and February 21, 2017 inspections, we observe that SJA was transporting ethanol, which as SJA stipulated, is not a petroleum distillate fuel (Tr. at 12, 35, 140-141). Because SJA did not transport a petroleum distillate fuel, its cargo tanks should have been tested and marked pursuant to the K test specified in 49 C.F.R. 180.407(h)(1), not the K-EPA27 test as permitted by 49 C.F.R. 180.407(h)(2). In sum, although SJA had indeed marked its cargo tanks for the K-EPA27 test, the K testing and marking necessary for transporting ethanol, which is not a petroleum distillate fuel, was absent. Thus, SJA is in violation of the requirement in 49 C.F.R. 180.415(b)(3)(vi).

[¶ 30] In finding that SJA violated 49 C.F.R. 180.415(b)(3)(vi), we note Staff’s testimony, not refuted by SJA, that the provisions in 49 C.F.R. 180.415(b) specifying when the K and the K-EPA27 leakage tests are applicable became effective more than 10 years ago, well before the inspections conducted by Specialist Barrett and Inspector Byrne (Tr. at 62-63, 79-80, 85-86). We also observe Mr. Belna’s testimony that he became president of SJA in 2003 and is aware of the regulations applicable to his industry (Tr. at 125-126). The limited applicability of the K-EPA27 test, then, is not a new provision of the C.F.R., and although Mr. Belna believed it was industry practice to apply the K-EPA27 test when hauling ethanol, there was adequate time for Mr. Belna or other SJA officials to learn that transportation of ethanol required leakage testing and marking for the K test, not the K-EPA27 test (Tr. at 141). Furthermore, Mr. Belna’s reliance on C.H. Bradshaw, which tests SJA’s cargo tanks, to be up-to-date regarding cargo tank requirements is correct only if he informs C.H. Bradshaw of the types of hazardous material that SJA is transporting; pursuant to 49 C.F.R. 180.407,

cargo tank testing requirements will vary depending on the kind of hazardous material transported (Tr. at 178-180).

{¶ 31} Regarding SJA's assertions of uncertainty regarding enforcement of 49 C.F.R. 180.415(b), we next examine SJA Exhibits 1 and 4, in which PHMSA officials respond to Mr. Swegheimer's March 18, 2016 email inquiry concerning applicability of the K-EPA27 test. The email clearly concerns "clarification on the acceptability of using an Environmental Protection Agency Method 27 alternative leak test on a DOT 407 cargo tank equipped with vapor collection equipment" (SJA Ex. 4). There is no indication that Mr. Swegheimer initiated the request because of any uncertainty concerning Staff enforcement of 49 C.F.R. 180.415(b) when a cargo tank is carrying ethanol and has been K-EPA27 tested.

{¶ 32} SJA's assertions of uncertainty regarding enforcement of 49 C.F.R. 180.415(b) also concern SJA Ex. 2 and 5, which consist of the FMCSA Safety Advisory issued Nov. 30, 2016, that discusses limitations on the use of the K-EPA27 test instead of K leakage test. While issued shortly before the December 2016 and January 2017 inspections conducted by Staff, the Safety Advisory, among other things, simply reiterates the limited applicability of the K-EPA27 test pursuant to 49 C.F.R. 180.407(h)(2) and 49 C.F.R. 180.415(b)(3)(vii); as noted above, 49 C.F.R. 180.415(b) became effective over ten years ago, which is adequate time for SJA to learn that transportation of ethanol is not permitted in a cargo tank that is K-EPA27 tested.

{¶ 33} Nor do we find that SJA's selective reading of the March 2, 2018 Bulk Transporter article requires a different conclusion. SJA insists that the article offers further proof of the uncertainty regarding the appropriate application of the K-EPA27 test, as it contains a quote from an FMSCA employee stating that "This is a 180-degree turn. This is a big change in how we've done business" (SJA Ex. 14 at 7). The Commission's observations on this point are three-fold. First, the article is not attributable to any specific author and does not explain the quoted FMSCA employee's role; thus, the article's reliability is of

questionable validity. Second, the full quote also contains the preceding statement, "Now, I know some states are enforcing it, but we're not" (SJA Ex. 14 at 7). According to the evidence presented by Staff, Ohio is one of those states that has been enforcing 49 C.F.R. 180.415(b); thus, any confusion on the federal level or in other states is irrelevant. Finally, the preceding paragraph in the article ends with the statement, "And PHMSA said you have to be in dedicated service in a petroleum distillate fuel. *If it's not a dedicated service, you must use the standard leakage test*" (Emphasis added.) (SJA Ex. 14 at 7). Here, there is no question that SJA was not in dedicated service of petroleum distillate fuel; it also transported ethanol, which Mr. Belna acknowledged is not a petroleum distillate (Tr. at 174). Thus, contrary to SJA's insistence that the article indicates uncertainty regarding what type of leakage test its cargo tanks needed to undergo and what test markings to display, the Commission finds that the article only underscores that SJA was correctly cited for not having cargo tanks that transport ethanol K tested for leakage.

{¶ 34} Finally, we note SJA's contention that Staff's inspection reports from October 29, 2015, December 23, 2015, June 2, 2016, and August 1, 2016 show no 49 C.F.R. 180.415(b) violation, even though the cargo tanks were transporting ethanol and had not been K-tested for leakage (Tr. at 145-149, 152-156; SJA Ex. 7, SJA Ex. 11; SJA Ex. 6, SJA Ex. 8; SJA Ex. 9; SJA Ex. 10). It is a matter of conjecture whether the lack of a 49 C.F.R. 180.415(b) violation in these inspections is because of different Staff interpretations prior to Specialist Barrett's and Inspector Byrne's inspections, or because of oversight by Staff. Regardless, SJA was still in violation of 49 C.F.R. 180.415(b) because, pursuant to the cross-reference to 49 C.F.R. 180.407(h), the K leakage test was required.

{¶ 35} In conclusion, the Commission finds that Staff has proven, by a preponderance of the evidence, that SJA violated 49 C.F.R. 180.415(b), cargo tank testing or inspection markings: failure to display K marking for leakage test, as cited on December 30, 2016. The Commission further finds that Staff has proven, by a preponderance of the evidence, that SJA violated 49 C.F.R. 180.415(b), cargo tank test or inspection markings: failure to display

K marking for leakage test, and 49 C.F.R. 177.823(a), no placards or 1993 identification number markings for diesel fuel, as cited on February 21, 2017. Accordingly, the Commission finds Respondent should be assessed a total monetary forfeiture of \$3,780, consisting of \$1,260 for each violation of 49 C.F.R. 180.415(b) and \$1,260 for the violation of 49 C.F.R. 177.823(a). SJA is directed to make payment of the \$3,780 civil forfeiture within 60 days of this Opinion and Order by certified check or money order payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Inspection Numbers OH3210302495C and OH3238011444C, as well as Case Numbers 17-779-TR-CVF and 17-1199-TR-CVF, should be written on the face of the certified check or money order to ensure proper credit.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 36} On December 30, 2016, Hazardous Materials Specialist Robert Barrett stopped and inspected a CMV operated by SJA. At the time of the inspection, Specialist Barrett identified a single violation of the Commission's transportation regulations, 49 C.F.R. 180.415(b), cargo tank or inspection markings: failure to display K marking for leakage test.

{¶ 37} SJA was timely served an NPD notifying it that Staff intended to assess a civil forfeiture of \$1,260 for the violation.

{¶ 38} On February 21, 2017, Motor Carrier Enforcement Inspector Michael Byrne stopped and inspected a CMV operated by SJA. At the time of the inspection, Inspector Byrne identified two violations of the Commission's transportation regulations, specifically, 49 C.F.R. 177.823(a), no placards/markings when required: UN 1993 markings and placards missing on both sides and both ends of cargo tank, and 49 C.F.R. 180.415(b), cargo tank or inspection markings: failure to display K marking for leakage test.

{¶ 39} SJA was timely served an NPD notifying it that Staff intended to assess \$1,260 for each violation, resulting in a civil forfeiture of \$2,520.

{¶ 40} Prehearing conferences were conducted on May 11, 2017, and September 8, 2017. An evidentiary hearing was held on April 23, 2018.

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

{¶ 42} Based on the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that SJA violated 49 C.F.R. 180.415(b), cargo tank testing or inspection markings: failure to display K marking for leakage test, as cited on December 30, 2016.

{¶ 43} Based on the record in this proceeding, the Commission further finds that Staff has proven, by a preponderance of the evidence, that SJA violated 49 C.F.R. 180.415(b), cargo tank test or inspection markings: failure to display K marking for leakage test, and 49 C.F.R. 177.823(a), no placards/ markings when required: UN 1993 markings and placards missing on both sides and both ends of cargo tank, as cited on February 21, 2017.

{¶ 44} Accordingly, Respondent should be assessed a total monetary forfeiture of \$3,780, consisting of \$1,260 for each violation of 49 C.F.R. 180.415(b) and \$1,260 for the violation of 49 C.F.R. 177.823(a), and should pay the forfeiture within 60 days from the date of this Opinion and Order.

VIII. ORDER

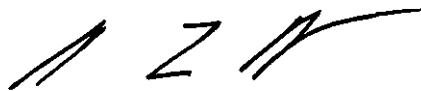
{¶ 45} It is, therefore,

{¶ 46} ORDERED, That SJA pay a total civil forfeiture of \$3,780, consisting of \$1,260 for each violation of 49 C.F.R. 180.415(b) and \$1,260 for the violation of 49 C.F.R. 177.823(a), within 60 days of this Opinion and Order. Payment shall be made by check or money order

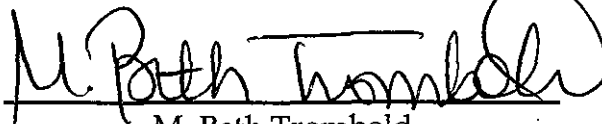
payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case Numbers 17-779-TR-CVF and 17-1199-TR-CVF, as well as Inspection Numbers OH3210302495C and OH3238011444C, should be written on the face of the check or money order. It is, further,

{¶ 47} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

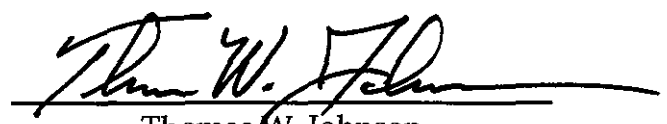
THE PUBLIC UTILITIES COMMISSION OF OHIO



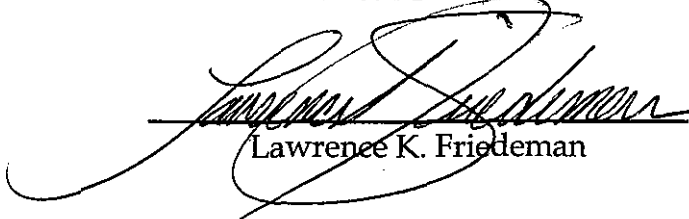
Asim Z. Haque, Chairman



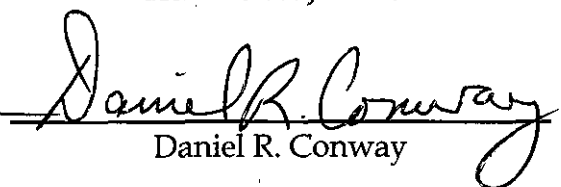
M. Beth Trombold



Thomas W. Johnson



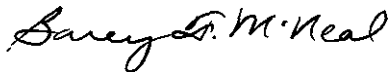
Lawrence K. Friedeman



Daniel R. Conway

JML/PAS/hac

Entered in the Journal
NOV 07 2018



Barcy F. McNeal
Secretary