

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF McCUTCHEON
ENTERPRISES, INC., NOTICE OF
APPARENT VIOLATION AND INTENT TO
ASSESS FORFEITURE.

CASE NO. 21-492-TR-CVF
(OH1575002638C)

OPINION AND ORDER

Entered in the Journal on June 29, 2022

I. SUMMARY

{¶ 1} The Commission finds that Staff has demonstrated, by a preponderance of the evidence, that McCutcheon Enterprises, Inc., violated 49 C.F.R. 172.516(c)(6).

II. PROCEDURAL HISTORY

{¶ 2} On March 4, 2021, Ohio State Highway Patrol Trooper Timothy Mularcik (Trooper Mularcik) stopped and inspected a commercial motor vehicle (CMV) operated by McCutcheon Enterprises, Inc. (Respondent) and driven by Max O’Harra. At the time of the inspection, Trooper Mularcik prepared a report indicating one violation of the Federal Motor Carrier Safety Regulations (FMCSR), specifically, 49 C.F.R. 172.516(c)(6) (placard damaged, deteriorated, or obscured: two of four placards on left and right side faded to bright pink color).

{¶ 3} On April 14, 2021, Staff served a notice of preliminary determination (NPD) upon Respondent in accordance with Ohio Adm.Code 4901:2-7-07, alleging violations of the Commission’s Transportation regulations. Respondent was not assessed a forfeiture for the 49 C.F.R. 172.516(c)(6) violation.

{¶ 4} On April 26, 2021, Respondent requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} On May 7, 2021, the attorney examiner scheduled a prehearing conference for June 17, 2021, pursuant to Ohio Adm.Code 4901:2-7-16(B). The prehearing conference was conducted as scheduled, but the parties were unable to reach a settlement.

{¶ 6} On January 7, 2022, the attorney examiner scheduled a hearing for February 15, 2022.

{¶ 7} At the hearing on February 15, 2022, Trooper Mularcik and Bradley Long, Assistant Chief of Compliance for the Commission's Transportation Department, testified in support of the violations identified by Staff. Field Manager Brian Copeland and company president Calvin McCutcheon testified on behalf of Respondent.

III. LAW

{¶ 8} 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.

{¶ 9} Pursuant to 49 C.F.R. 172.516(c)(6), placards on a CMV must be maintained in a condition and color such that visibility of the placards is not substantially reduced due to damage or deterioration.

IV. ISSUES IN THE CASE

{¶ 10} Staff has the burden to prove, by a preponderance of the evidence, the violation of 49 C.F.R. 172.516(c)(6) - placard damaged, deteriorated, or obscured (two of four

placards on left and right side faded to bright pink color). Respondent contends that, although faded in color, the placards at issue still could be easily identified as “class 3 flammable.”

V. SUMMARY OF THE EVIDENCE

{¶ 11} Trooper Mularcik explained that he had stopped Respondent’s CMV for a roadside inspection. During the inspection, he observed that two of the four Class 3 placards on the sides of the trailer had faded from red to pink. Trooper Mularcik acknowledged that the hazard class number 3 were still clearly visible as to each impacted placard. (Tr. at 9-12, Staff Ex. 1 at 5, 6, 8.)

{¶ 12} Mr. Long testified that on April 14, 2021, Respondent was sent a NPD, which is issued after a settlement conference has been held and an agreement cannot be reached. He added that the NPD allows a respondent to pay the forfeiture amount or request an administrative hearing. (Tr. at 18.)

{¶ 13} On behalf of Respondent, Mr. Copeland and Mr. McCutcheon claim that, even in their faded condition, the placards at issue still displayed the hazard class 3 such that they were “easily identified as a flammable placard” (Tr at 21). They further testified as to other hazard class placards with different colors than class 3 flammable placards, such as orange for explosives, blue for dangerous, green for non-flammable fuels, black for corrosives, white for poisons, and yellow for oxidizers (Tr. at 22-23). Mr. McCutcheon noted that, while only hazard class 3 flammable materials have a red placard, “there is no color matrix applied to this regulation to show a standard that it has to be this bright or this color.” He asserts that “even if it is somewhat faded, it still represents the flammable characteristic of that waste stream.” (Tr. at 23.) Mr. McCutcheon emphasized that overall compliance, safety, and accountability (CSA) scores, as determined by the Federal Motor Carrier Safety Administration, are important to his company, as he takes such matters seriously. Mr. McCutcheon requests that the violation be removed from his CSA score. (Tr. at 23.)

VI. COMMISSION CONCLUSION

{¶ 14} The Commission finds that Staff has proven, by a preponderance of the evidence, that Respondent violated 49 C.F.R. 172.516(c)(6), which states that “Each placard on a transport vehicle [or] bulk packaging must be maintained by the carrier in a condition so that the format, legibility, color, and visibility of the placard will not be substantially reduced due to damage, deterioration, or obscurement by dirt or other matter * * *.”

{¶ 15} We initially observe that, pursuant to 49 C.F.R. 172.542(b), “in addition to complying with * * * [49 C.F.R. 172.519], the background color on a flammable placard must be red.” Further, 49 C.F.R. 172.519(d)(3) states that “upon visual examination, a color on a placard must fall within the color tolerances displayed on the appropriate Hazardous Materials Label and Placard Color Tolerance Chart (see §172.407(d)(4)) * * * .” Finally, 49 C.F.R. 172.407(d)(5)(i) requires that red placards should be consistent with “Pantone ® 186 U.”

{¶ 16} Upon reviewing photographs taken by Trooper Mularcik during the inspection, we conclude that two of the placards on the CMV were not compliant with the color marking requirements in 49 C.F.R. 542(b). A review of the photographs taken during the inspection clearly demonstrates that two of the placards had faded to where they were no longer red, as required by 49 C.F.R. 172.407(d)(5), and thus not consistent with “Pantone ® 186 U.” (Tr. at 10-13; Staff Ex. 1 at 5, 6, 8, 14). Further, contra to the position described by Respondent’s witnesses, we find that 49 C.F.R. 172.407(d)(5)(i) is clear in describing the color of red that is required for placard display. Accordingly, after reviewing all of the testimony and evidence presented, the Commission finds that, by a preponderance of the evidence, the placards at issue did not comply with federal requirements. Thus, Staff has met its burden, as set forth in Ohio Adm.Code 4901:2-7-20(A), to prove a violation of 49 C.F.R. 172.516(c)(6).

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 17} On March 4, 2021, Trooper Mularcik stopped and inspected a CMV operated by Respondent and driven by Max O’Harra. At the time of the inspection, Trooper Mularcik prepared a report indicating one violation of the FMCSR, specifically, 49 C.F.R. 172.516(c)(6) (placard damaged, deteriorated, or obscured: two of four placards on left and right side faded to bright pink color).

{¶ 18} On April 14, 2021, Staff served a NPD upon Respondent in accordance with Ohio Adm.Code 4901:2-7-07, alleging violations of the Commission’s transportation regulations. Respondent was not assessed a forfeiture for the 49 C.F.R. 172.516(c)(6) violation.

{¶ 19} On April 26, 2021, Respondent requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 20} On May 7, 2021, the attorney examiner scheduled a prehearing conference for June 17, 2021, pursuant to Ohio Adm.Code 4901:2-7-16(B). The prehearing conference was conducted as scheduled, but the parties were unable to reach a settlement. A hearing was not scheduled for many months thereafter because of the Covid-19 pandemic.

{¶ 21} On January 7, 2022, the attorney examiner scheduled a hearing for February 15, 2022.

{¶ 22} At the hearing on February 15, 2022, Trooper Mularcik and Bradley Long testified in support of the violations identified by Staff. Field Manager Brian Copeland and company president Calvin McCutcheon testified on behalf of Respondent.

{¶ 23} 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.

{¶ 24} Based on the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Respondent violated 49 C.F.R.

172.516(c)(6) placard damaged, deteriorated, or obscured (two of four placards on left and right side faded to bright pink color). Further, the Commission affirms that the violation does not result in any civil forfeiture assessment.

VIII. ORDER

{¶ 25} It is, therefore,

{¶ 26} ORDERED, That Respondent be found in violation of the Commission's transportation regulations, with no resultant civil forfeiture amount being assessed. It is, further,

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

COMMISSIONERS:

Approving:

Jenifer French, Chair
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

JML/hac

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

6/29/2022 2:17:20 PM

in

Case No(s). 21-0492-TR-CVF

Summary: Opinion & Order finding that Staff has demonstrated, by a preponderance of the evidence, that McCutcheon Enterprises, Inc., violated 49 C.F.R. 172.516(c)(6) electronically filed by Heather A. Chilcote on behalf of Public Utilities Commission of Ohio