

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of a Penalty Assessment
Against

HAROLD LEMAY ENTERPRISES,
INC.

in the amount of \$200

DOCKET TG-180253

ORDER 01

DENYING MITIGATION

BACKGROUND

- 1 On March 20, 2018, Washington Utilities and Transportation Commission (Commission) safety investigators conducted a destination check at the private lot of Harold LeMay Enterprises, Inc. (LeMay or Company). The investigators inspected LeMay vehicles as they returned to the lot at the end of their shift. During this destination check, Commission Motor Carrier Safety Investigator Sandra Yeomans documented the following two *North American Standard Out-of-Service Criteria handbook* (out-of-service criteria) violations: one violation of Title 49 C.F.R. Part 393.9(b), for inoperable brake lights on vehicle 3571 (brake light violation); and one violation of Title 49 C.F.R. Part 396.3(a)(1) because a tire was rubbing against the pitman arm on the front left steering axle of vehicle 1044 (tire violation).¹ Ms. Yeomans placed both vehicles out of service.
- 2 On April 10, 2018, the Commission assessed a \$200 penalty (Penalty Assessment) against the Company with respect to the two out-of-service criteria violations found in the destination check.
- 3 On April 25, 2018, the Company responded to the Penalty Assessment, contesting the violations and requesting a hearing to present evidence. The Company admitted the brake lights were inoperable at the time of the investigation, but contends that the vehicle should not have been placed out of service because the brake lights were immediately repaired on site.² The Company disputed the tire violation, asserting that Ms. Yeomans

¹ WAC 480-70-201 adopts by reference sections of Title 49 C.F.R. Accordingly, Commission safety regulations with parallel federal rules are hereinafter referenced only by the applicable provision of 49 C.F.R.

² The Company further speculated that the brake lights were operable during the shift, and the fuse may have popped while going over speed bumps in LeMay's yard.

did not verify the tire was rubbing against the vehicle at the time of inspection, which is a necessary element of the violation. Finally, the Company argued that the Commission erroneously reported the out-of-service violations to the Federal Motor Carrier Safety Administration (FMCSA) as occurring during a “roadside inspection,” which negatively impacts the Company’s *Compliance, Safety, Accountability* (CSA) score resulting in injury to the Company’s reputation. The Company asserts the inspections did not occur on the roadside, but on LeMay’s private property.

4 On May 4, 2018, Commission staff (Staff) filed a response recommending the Commission deny the Company’s request for mitigation of the penalty. With regard to the brake light violation, Staff argues that the out-of-service criteria states a vehicle shall be placed out-of-service at any time if the vehicle does not have at least one operative stop lamp on the rear of a single unit vehicle. Because the brake light violation was present at the time of inspection, Staff argues that the vehicle had an out-of-service defect. With regard to the tire violation, Staff asserts that Ms. Yeomans did observe the front driver-side tire make contact with the vehicle, and correctly reported the violation.³

5 On August 24, 2018, the Commission conducted a brief adjudicative proceeding before Administrative Law Judge Laura Chartoff.

6 Jennifer Cameron-Rulkowski, Assistant Attorney General, Olympia, Washington, represents Staff. Eric M. Laiho, Davis Grim Payne & Marra, Seattle, Washington, represents LeMay.

7 Staff presented testimony and evidence from Sandra Yeomans, Motor Carrier Safety Investigator, and Robert Auderor, Motor Carrier Safety Investigator.

8 LeMay presented testimony from Donald Kenney, Maintenance Manager for LeMay; Ian March, Driver of Vehicle 1044 for LeMay; and Larry Meany, former district general manager for LeMay.

DISCUSSION AND DECISION

9 Solid waste carriers must comply with motor carrier safety regulations, including those concerning vehicle safety.⁴ Specifically, WAC 480-70-201 provides that solid waste carriers must comply with parts of 49 C.F.R. listed in the rule and adopted by reference,

³ On August 13, 2018, The Commission issued a corrected Penalty Assessment, correcting the C.F.R. citation for the brake light violation. Then, on August 23, 2018, the Company filed a response to the corrected Penalty Assessment.

⁴ WAC 480-70-201(1).

including C.F.R. Part 393 related to vehicle parts and accessories required for safe operation, and Part 396 related to inspection repair and maintenance. WAC 480-70-201 further provides that solid waste carriers must make vehicles available for inspection by Commission representatives, and provides that “the Commission will place out-of-service any motor vehicle having safety defects identified in the *North American Uniform Out of Service Criteria*.”

10 Violations discovered during safety inspections are generally subject to penalties of \$100 per violation.⁵ In some cases, Commission requirements are so fundamental to safe operations that the Commission will issue penalties for first-time violations.⁶ Violations meeting the out-of-service criteria meet this standard.⁷

11 In this case, Motor Carrier Safety Inspector Sandra Yeomans conducted a level 1 destination check on LeMay’s premises of the vehicles returning to the yard at the end of their shift. She documented two out-of-service criteria violations that resulted in the Commission issuing LeMay a penalty of \$200. The Company disputes that the violations occurred. We discuss each violation in detail, below.

12 **Brake Light Violation.** During the destination check of vehicle 1044, Ms. Yeomans discovered the rear brake lights were not operational, which is a violation of 49 C.F.R. 393.9(a). Soon after the violation was discovered, LeMay’s mechanic repaired the lights by replacing the fuse. Ms. Yeomans documented the out-of-service criteria violation in the vehicle examination report and placed the vehicle out-of-service. Later the same day, Ms. Yeomans re-inspected the brake lights and returned the vehicle to service.

13 The Company does not dispute that the brake light violation occurred, or that this type of violation requires a vehicle to be placed out-of-service. Accordingly, we conclude that Staff appropriately reported the violation and the Commission appropriately assessed a \$100 penalty.

14 The Company argues that because it immediately repaired the violation, the truck did not meet the out-of-service criteria when Ms. Yeomans placed it out-of-service. However, Ms. Yeomans asserts she properly followed the out-of-service criteria, and the Company provided no evidence that Ms. Yeomans was required to re-inspect the brake lights prior to documenting the violation and placing the vehicle out-of-service. The Company also

⁵ See RCW 81.04.405.

⁶ Docket A-120061, Enforcement Policy for the Washington Utilities and Transportation Commission ¶¶12, 15 (Jan. 7, 2013) (Enforcement Policy).

⁷ Id.

argues that the brake light fuse likely popped when going over a speed bump in LeMay's yard immediately prior to the inspection, and, therefore, the brake lights were operational during the shift. The timing of the violation is irrelevant. The out-of-service criteria do not require the inspector to establish when the violation occurred. The inspector must determine only that the dangerous condition is present upon inspection. Accordingly, we deny the Company's contest of this violation.

15 **Tire Violation.** The Tire Violation is described in the out-of-service criteria as follows:

ANY TIRE ON ANY FRONT STEERING AXLE(S) OF A POWER UNIT

...

(8) So mounted or inflated that it comes into contact with any part of the vehicle.
(396.3(a)(1))

NOTE: An out-of-service condition exists only if the tire can be made to contact another component at the time of inspection.

16 Here, Staff alleges it observed a tire make contact with the pitman arm. The Company disputes this fact, claiming Staff assumed the tire made contact with the pitman arm on the basis of the arm's worn appearance, but failed to verify that there was contact between the tire and the pitman arm at the time of inspection.

17 Ms. Yeomans testified that, during the inspection, she observed that the pitman arm was shiny with some paint rubbed off, so she directed the driver to turn the wheel and observed the tire make contact with the pitman arm. She determined that this was an out-of-service violation. She further testified that while various Commission and LeMay personnel were participating in the inspections, no one other than her was in a position to observe the tire making contact with the pitman arm, including the driver, who would not have been able to see the violation from his vantage point behind the wheel. Ms. Yeomans testified that she continued on with the inspection. She also documented wear on the pitman arm, which is a separate, non-critical violation. Ms. Yeomans and Mr. Auderor both testified to discussing the pitman arm violation with LeMay personnel.

18 Mr. Kenney, maintenance manager for LeMay testified that he was present when this vehicle was inspected and at no point did he observe the tire making contact with the pitman arm. He testified that the only test he observed related to steering and tires was the rock test, which tests steering wheel components. He also testified that the Ms. Yeomans did not discuss the tire violation with him, but did discuss the condition of the pitman arm.

- 19 Mr. March, driver for LeMay, testified that he was present during the inspection and also testified that the only test Ms. Yeomans conducted related to steering or tires was the rock test. He further testified that Ms. Yeomans did not discuss the violation with him.
- 20 Mr. Meany, the Company's general manager, testified that he did not observe the inspection of Mr. Marsh's vehicle, but noticed that the inspection was taking a long time and asked Ms. Yeomans if there was an issue. He testified that Ms. Yeomans indicated there was a problem with the steering linkage on the pitman arm, specifically, that the pitman arm appeared shiny.
- 21 After weighing the evidence, we find it is more likely than not that Ms. Yeomans observed the tire making contact with the pitman arm at the time of the inspection. Ms. Yeomans has substantial training and experience in conducting motor carrier safety inspections.⁸ She testified credibly that she directed the driver to turn the wheel and observed the tire make contact with the pitman arm. Furthermore, she testified that she was the only person in a position to see the violation, and that she continued with her inspection without alerting anyone to the violation until she issued the report.
- 22 We find Mr. Meany and Mr. March's testimony less convincing with respect to whether Ms. Yeomans observed the violation because they were not in position to see the violation. It is also likely that they do not recall the test occurring because Ms. Yeomans did not point out the violation when she observed it, and instead continued on with the inspection. Finally, the fact that Ms. Yeomans and Mr. Auderor specifically mentioned the condition of the pitman arm with Mr. Meany and Mr. Kenney does not convince us that Ms. Yeomans based the tire violation solely on the condition of the pitman arm. The pitman arm's condition is a separate violation, and was cited as such in Staff's report.
- 23 We find that Ms. Yeomans observed the tire making contact with the pitman arm at the time of the inspection. We therefore conclude the out-of-service violation occurred and that the Commission appropriately assessed a \$100 penalty for the violation.
- 24 **Penalty Mitigation.** The Commission considers several factors when entertaining a request for mitigation, including whether the company introduces new information that may not have been considered in setting the assessed penalty amount, or explains other circumstances that convince the Commission that a lesser penalty will be equally or more effective in ensuring the company's compliance.⁹

⁸ TR 9-10.

⁹ Enforcement Policy ¶19.

25 Because the Company neither introduced new information nor presented any
circumstances that would warrant reducing the penalty, we deny the Company's request
for mitigation.

26 **CSA Score.** Finally, the Company asserts that the Commission incorrectly reported the
out-of-service violations to the FMSCA as "roadside violations," which negatively
impacts the company's CSA score. The Company argues that the violations were not
"roadside" because the inspection occurred on private property, and asks the Commission
to correct the data reported to FMSCA.

27 Staff did not directly address the FMSCA definition of "roadside inspection." Staff refers
to the inspection that they conducted here as a destination check, which is an inspection
of vehicles in operation. Staff states that the vehicles inspected were in operation because
they were returning from their shift. Staff explained that a second type of inspection, a
terminal inspection, is done in conjunction with a compliance review of a company.
Regardless of inspection type, Staff argues that it makes no difference whether a violation
is found during a destination check or terminal inspection. In either case, the vehicles
would be placed out-of-service, and penalties would be assessed.

28 We conclude the location of the inspection is not relevant to our determination of whether
the violation occurred or whether a penalty should be assessed. Furthermore, Staff's data
report to FMSCA is beyond the scope of this proceeding, which is limited to the issue of
penalties. Even if this issue were properly before us, the Company failed to cite any legal
authority or provide evidence to establish that "roadside" inspections cannot be
conducted on the Company's private property. Therefore, we deny the Company's
request to revise the data reported to FMSCA.

FINDINGS AND CONCLUSIONS

29 (1) The Commission is an agency of the State of Washington, vested by statute with
authority to regulate rates, rules, regulations, and practices of public service
companies, including solid waste collection carriers, and has jurisdiction over the
parties and subject matter of this proceeding.

30 (2) LeMay is a solid waste collection carrier subject to Commission regulation.

31 (3) Staff conducted a destination check of LeMay's commercial vehicles returning to
LeMay's yard after their shift.

32 (4) During the destination check, Commission Motor Carrier Safety Investigator
Sandra Yeomans found that vehicle 3571 had inoperable brake lights.

- 33 (5) LeMay violated 49 C.F.R. Part 393.9(a) when it operated a vehicle 3571 with
inoperable brake lights.
- 34 (6) The Commission should penalize LeMay \$100 for one violation of 49 C.F.R. Part
393.9(a),
- 35 (7) During the destination check, Ms. Yeomans observed a tire make contact with the
pitman arm on vehicle 1044.
- 36 (8) LeMay violated 49 C.F.R. Part 393.3(a)(1) when it operated vehicle 1044 with a
tire so mounted or inflated that it came in contact with any part of the vehicle.
- 37 (9) The Commission should penalize LeMay \$100 for one violation of 49 C.F.R.
393.3(a)(1).
- 38 (10) The Commission should assess a total penalty of \$200 for two violations of
WAC480-70 and Title 49 C.F.R.
- 39 (11) LeMay paid the \$200 Penalty Assessment on June 16, 2018.

ORDER

THE COMMISSION ORDERS:

- 40 (1) LeMay's request for mitigation of the \$200 penalty is DENIED.
- 41 (2) No payment is due.

DATED at Olympia, Washington, and effective September 18, 2018.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

LAURA CHARTOFF
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-610(7) provides that any party to this proceeding has twenty-one (21) days after the entry of this Initial Order to file a *Petition for Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-610(7)(b). WAC 480-07-610(7)(c) states that any party may file a *Response* to a Petition for review within seven (7) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

Any Petition or Response must be electronically filed through the Commission's web portal as required by WAC 480-07-140(5). Any Petition or Response filed must also be electronically served on each party of record as required by WAC 480-07-140(1)(b).