



OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
Appeals Division

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Appeal No. 2201030 Hunter Severini v. Tri Power Electrical LLC November 17, 2022

APPEAL DECISION

The appeal of Petitioner, citizen-complainant, is **granted**.

Petitioner appeals from a recommended decision by Hearing Officer E. Hudson (Manhattan), dated August 9, 2022, dismissing a violation of § 24-163 of the Administrative Code of the City of New York (Code) for idling a motor vehicle engine for longer than three minutes. Having fully reviewed the record, the Board finds that the hearing officer’s decision is not supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Summons	Law Charged	Hearing Determination	Appeal Determination	Penalty
213491502	Code § 24-163	Dismissed	Reversed – In Violation	\$350

In the summons, Petitioner affirmed observing on April 25, 2022, 20 Union Square West, Manhattan, Respondent’s truck with NJ license plate # 29494MN idling for longer than three minutes, from 10:47:22 a.m. to 10:50:53 a.m.

At the telephonic hearing, held on August 8, 2022, Petitioner produced two photographs of the truck and a video taken by him at the time and place of occurrence. He testified that he observed the vehicle, a truck with a boom lift. The lettering on the truck indicated it was operated by a company that does electrical work. Portions of the street and sidewalk surrounding the truck had been cordoned off with a barrier constructed of yellow security tape and orange cones, and there were boxes and other materials on the sidewalk. The driver was not in the midst of any activity at the time. Through the vehicle was idling, neither the boom lift system nor any other equipment in the truck was in use.

Respondent’s representative did not deny that the truck was idling at the time. He testified as follows. The driver had set up a work site at the location in preparation for overhead electrical work for which the boom would be used to elevate him or another worker in a bucket lift to the area above requiring repair. The strap on the boom that keeps it secured to the truck when not in use had been loosened to prepare for the lift. The lift cannot operate unless the truck’s engine is on. He pointed out in the video that the emergency lights were flashing and that the driver was not in the vehicle, as he was circling the vehicle in preparation for the lift. He explained that when the vehicle is off, the driver sets up the worksite, then turns the engine on, and leaves the cab of the truck to initiate the lift procedure. He then walks around the site to ensure the area is safe and steps up to the boom to begin work. Petitioner responded that while Respondent’s representative’s statements as to the process of preparing the boom lift seemed plausible, he did not see any activity at the time. He asserted that if he saw any machinery at all being operated either before or after the duration of the video, he would not have filed a complaint.

In the decision dismissing the violation, the hearing officer noted that Code § 24-163 does not exempt vehicles equipped with a lifting device from the idling restriction when the lifting device is not in use. She found that here, however, Respondent was using the truck’s engine to operate a loading or unloading device, and so the exemption applied.

On appeal, Petitioner claims that Respondent did not prove that it was exempt from Code § 24-163, as the video does not show the vehicle using any processing devices. He quotes the “processing device” definition of §39-01 of Title 15 of the Rules of the City of New York (RCNY).

On this record, the Board finds that Petitioner's evidence established the Code § 24-163 charge, which prohibits the idling of a motor vehicle engine in excess of three minutes while parked, standing, or stopped. *See* 48 RCNY § 6-12(b). Here, Petitioner testified that he observed Respondent's truck idling for more than three minutes at the cited date, time, and location and submitted photographs and a video. The burden then shifted to Respondent to refute the charge or otherwise establish a defense. *See* 48 RCNY § 6-12(a). Respondent's representative did not deny the idling occurred, but contended the idling fell within the exemption in Code § 24-163(a) applicable when the vehicle's engine is used to operate a loading or unloading or processing device, as the boom truck's engine was used to operate to load and unload workers to perform electrical work at elevated heights. However, the exemption from the idling prohibition is limited to vehicles that are actually using their engines at the time the idling is occurring to load, unload, or process material. *See DEP v. Sergio Visquerras*, Appeal No 1400923 (November 20, 2014) (violation sustained where vehicle concededly not used in loading, unloading or processing during cited four minutes). The law does not allow vehicles to run their engines in excess of three minutes in anticipation of, or preparatory to, activities that might be exempt from the idling restrictions. *See* Code § 24-163 (a) (permitting idling in excess of three minutes where an engine is being "used to operate a loading, unloading or processing device"); *DEP v. G & H Professional Transport LLC*, Appeal No. 2100438 (June 24, 2021) (rejecting contention idling was allowed while car carrier was waiting to load or unload vehicles); *DEP v. Cody Construction Corp.*, Appeal No. 2100222 (July 22, 2021) (rejecting argument that idling was necessary to lubricate the vehicle's hydraulic lift and allow operation of an unloading device); *NYC v. John P. Picone Inc.*, Appeal No. 1600120 (March 31, 2016). Rather, the vehicle must be "actually engaged" in the exempted activity in order to fall into one of the exceptions. *See DEP v. Academy Express LLC*, Appeal No. 2001409 (January 14, 2021); *NYC v. Jenna Concrete Corp.*, Appeal No. 40554 (October 26, 2006).

Contrary to the hearing officer's conclusion, the Board finds that for the full duration of the complainant's video the truck's lift remains in the lowered position, no worker is on top of the truck near the lift bucket and boom, the truck's cab is empty, and the truck is otherwise unattended. Moreover, there was no evidence to show that the engine had to be activated during the preparatory stages of the actual lift. Therefore, the Board finds that Respondent failed to establish a defense to the violation.

Accordingly, the Board reverses the hearing officer's decision dismissing a violation of Code § 24-163, sustains the charge, and imposes the civil penalty of \$350.

By: OATH Appeals Division



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9 Bond Street, 6th Floor
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Appeal No. 2200822

DEP v. Justin Xpress LLC

August 25, 2022

APPEAL DECISION

The appeal of Petitioner, Department of Environmental Protection (DEP), is **granted**.

Petitioner appeals from a recommended decision by Hearing Officer E. Hudson (Manhattan), dated April 20, 2022, dismissing a violation of § 24-163 of the Administrative Code of the City of New York (Code) for idling a motor vehicle engine for longer than three minutes. Having fully reviewed the record, the Board finds that the hearing officer’s decision is not supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Summons	Law Charged	Hearing Determination	Appeal Determination	Penalty
00702880L	Code § 24-163	Dismissed	Reversed – In Violation	\$350

BACKGROUND

In the summons, the issuing officer (IO) affirmed, as verified through a review of departmental records, that on June 4, 2021, on 48th Street between Barnett Avenue and 39th Avenue, Queens, a citizen-complainant witnessed Respondent’s truck, NJ License Plate # AW919J idling for longer than three minutes from 8:20 a.m. to 8:26 a.m.

At the telephonic hearing, held on April 20, 2022, the representative for Petitioner, DEP, relied on the IO’s affirmed statement in the summons and submitted the citizen’s idling complaint and affidavit, photographs of the side and rear of the cited truck, and a video of the truck idling at the cited location. Respondent’s representative, owner of Respondent Trucking and Construction company, did not deny that the truck was idling for longer than three minutes but asserted that the truck was in the process of regenerating, which required that the engine keep running for at least an hour.

The hearing officer found that regeneration does not fall within the exceptions to the prohibition on idling. However, she dismissed the instant summons on the grounds that it was duplicative of another summons, 00702883R (83R), heard during the same hearing, which had also charged Respondent with a violation of Code § 24-163 for idling the same truck for longer than three minutes on the same date but from 8:09 a.m. to 8:12 a.m. at the intersection of 48th Street and 37th Avenue.

On appeal, Petitioner’s representative contends that the hearing officer erred in dismissing the instant summons on the grounds that it was duplicative of summons 83R, as the two summonses were issued at separate locations at different times. Respondent did not answer the appeal.

ISSUE ON APPEAL

The main issue on appeal is whether the instant summons is duplicative of summons 83R.

APPLICABLE LAW

Code § 24-163(a) provides, in pertinent part:

No person shall cause or permit the engine of a motor vehicle, other than a legally authorized emergency motor vehicle, to idle for longer than three minutes, except as provided in subdivision (f) of this section, while parking . . . , standing . . . , or stopping . . . , unless the engine is used to operate a loading, unloading or processing device.

ANALYSIS

For the following reasons, the Board reverses the hearing officer's decision.

On this record, the Board finds that summons 80L is not duplicative of 83R. Generally, a violation is duplicative of another violation when each cites the same respondent at the same place of occurrence on the same date of violation on the same factual basis under either the same provision of law or a different provision of law with the same elements of proof. *See NYC v 187 Pinehurst Owners Corp.*, Appeal No. 1300221 (July 25, 2013). Here, although the instant summons and summons 83R both charge Respondent with violations of Code § 24-163 for the same truck on the same date, that alone does not render the two summonses duplicative. Rather, a violation of Code § 24-163 is established when someone permits the engine of a motor vehicle to idle for longer than three minutes while parked, standing, or stopped. Once the vehicle is no longer idling (i.e., the engine is turned off) or the vehicle is no longer parked, standing, or stopped, the violation has ceased. Should someone then permit the vehicle to again idle for longer than three minutes while the vehicle is parked, standing, or stopped, that would serve as a different factual basis for a new violation of Code § 24-163. *See DEP v. Go New York Tours Inc.*, Appeal No. 1901486 (November 7, 2019). Here the two instances of idling occurred independently. They were not one instance of continuous idling. The truck was idling while parked, standing, or stopped at one location, then ceased idling and was driven to a different location, where it again idled while parked, standing, or stopped, both occurrences being separate violations of Code § 24-163.

Finally, as noted by the hearing officer, the Board has previously held that it is not a defense to a Code § 24-163 charge that a vehicle was undergoing regeneration at the time a summons was issued. *See DEP v. Accord Bus LLC*, Appeal No. 2001542 (March 17, 2021) (regeneration, a method of servicing and restoring vehicle's operating system, does not fall under any exception to three-minute idling limit in Code § 24-163); *DEP v. Fedex Ground Package System Inc*, No. 1901699 (regeneration does not fall within limited exemptions provided by Code § 24-163). Here, Respondent did not demonstrate that any of the Code § 24-163 exceptions apply, and therefore, failed to establish an affirmative defense to the idling charges.

Accordingly, the Board reverses the hearing officer's decision dismissing the charge, sustains the violation of Code § 24-163, and imposes the civil penalty of \$350.

By: OATH Appeals Division