

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant,

v.

MFN Services Corp.
d/b/a 7-Eleven 32620,

Respondent.

Docket No. C-15-3031
FDA Docket No. FDA-2015-H-2246

Decision No. CR4646

Date: June 28, 2016

INITIAL DECISION

I sustain the determination of the Center for Tobacco Products (CTP) of the United States Food and Drug Administration (FDA) to impose a civil money penalty of \$500 against Respondent, MFN Services Corp. d/b/a 7-Eleven 32620.

I. Background

Respondent requested a hearing in order to challenge CTP's determination to impose a \$500 civil money penalty against it. I held a hearing by telephone on April 7, 2016. At the hearing I received exhibits into evidence from CTP that are identified as CTP Ex. 1-CTP Ex. 9. I heard the cross-examination testimony of

James Naso, an inspector working on behalf of CTP. I also heard the cross-examination testimony of Kristen Neves, Respondent's owner.¹

CTP filed a brief in support of its position. Respondent filed a pre-hearing brief and a post-hearing brief.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether Respondent violated regulations governing the sale of tobacco products to minors and whether a civil money penalty of \$500 is reasonable.

B. Findings of Fact and Conclusions of Law

CTP determined to impose a civil money penalty against Respondent pursuant to the authority conferred by the Federal Food, Drug, and Cosmetic Act (Act) and implementing regulations at Part 21 of the Code of Federal Regulations (C.F.R.). The Act prohibits the misbranding of tobacco products while they are held for sale after shipment in interstate commerce. 21 U.S.C. § 331(k). FDA and its agency, CTP, may seek civil money penalties from any person who violates the Act's requirements as they relate to the sale of tobacco products. 21 U.S.C. § 331(f)(9). The sale of tobacco products to an individual who is under the age of 18 and the failure to verify the photographic identification of an individual who is not over the age of 26 are violations of implementing regulations. 21 C.F.R. §§ 1140.14(a), (b)(1).

There is no dispute that Respondent offers tobacco products for sale to the public. At issue in this case is whether Respondent unlawfully: sold tobacco products to minors; and failed to check the identification of minor purchasers of tobacco products.

CTP's case against Respondent rests on the testimony of Mr. Naso and corroborating evidence including photographs of packages of cigarettes. CTP Ex. 4. Mr. Naso testified that he visited Respondent's business establishment on two occasions. On each occasion he came in the company of a minor who was employed for the purposes of determining whether Respondent sold tobacco

¹ Respondent offered Ms. Neves' written direct testimony as an exhibit. I inadvertently failed to admit that testimony as an exhibit at the hearing. I do so now, and identify it as R. Ex. 1.

products to minors and checked their identification. CTP Ex. 4 at 2. He testified that on November 20, 2014, he went to Respondent's establishment in the company of a minor, entered the establishment, and personally witnessed the minor purchase a package of Marlboro cigarettes. Id. at 3. He observed that the employee who sold the cigarettes to the minor did not check the minor's identification. Id. Mr. Naso testified that he labeled the cigarettes as identification and photographed all of the panels of the package. The photographs are in evidence as an attachment to CTP Ex. 4.

Mr. Naso testified that he again visited Respondent's establishment in the company of a minor on February 27, 2015. CTP Ex. 4 at 3. On this occasion he did not enter the store but verified that the minor did not possess tobacco products prior to her entry. Id. at 4. He also verified that the minor had her identification in her possession. Id. Mr. Naso averred that he then watched the minor enter the establishment and subsequently exit the premises and return to his vehicle. The minor told him that she had purchased a package of cigarettes and that the employee who sold her the package did not check her identification. Id. The minor presented Mr. Naso with a package of Marlboro Gold Pack cigarettes. Id. Mr. Naso testified that, as with the previous inspection, he labeled the cigarettes as identification and photographed all of the panels of the package. The photographs are in evidence as an attachment to CTP Ex. 4.

I find Mr. Naso's testimony to be credible and unbiased. It, plus the corroborating evidence, consisting of the photographs made of cigarette packages on November 20, 2014 and February 27, 2015, is sufficient in my opinion to prove that Respondent unlawfully sold tobacco products to a minor on both dates and failed to check the minor's identification on those occasions. On November 20, 2014 Mr. Naso personally witnessed Respondent's sale of a tobacco product to a minor and the failure to check the minor's identification. He did not witness the transaction that occurred on February 27, 2015. However, the corroborating evidence produced by the minor – a package of Marlboro Gold Pack cigarettes – is sufficient proof to establish an unlawful sale and a failure to check identification on that date. Mr. Naso testified, credibly, that the minor had no cigarettes in her possession when she entered Respondent's establishment. He observed the establishment while she was inside and observed the minor proceed immediately to his vehicle upon her departure from the establishment. At that point the minor presented him with a package of Marlboro Gold Pack cigarettes. There would have been no means for the minor to obtain those cigarettes between the time she entered the establishment and when she presented them to Mr. Naso upon exiting unless someone in Respondent's establishment provided them to her.

Moreover, it is reasonable to infer that the Respondent employee who sold the cigarettes to the minor on February 27, 2015 failed to check the minor's

identification. That identification clearly identified the minor as being underage. The reasonable inference is that the employee would not have sold the cigarettes to the minor but for his or her failure to check the identification on February 27.

Respondent attacks Mr. Naso's credibility on several grounds. I do not find that it impeached his credibility substantially. First, it asserts that Mr. Naso bases his conclusions about what happened on February 27, 2015 on the hearsay statements of the minor who made the purchase on that date. Respondent points out that CTP did not produce the minor as a witness and that her assertions to Mr. Naso are not only hearsay but also that it is not possible to impeach them. It asserts, therefore, that I should not accept her statements as reliable evidence of what happened on February 27.

I agree with Respondent that the minor's account of what occurred on February 27, 2015 is not, in and of itself, reliable proof. It is, as Respondent points out, hearsay that is not subject to impeachment. I would not rule in favor of CTP if her statements to Mr. Naso were the only evidence of what occurred on that date. However, there is, as I have discussed, important independent proof that an unlawful transaction occurred on that date and that Respondent failed to check the minor's identification. That proof consists of the package of Marlboro Gold cigarettes that the minor obtained and gave to Mr. Naso coupled with Mr. Naso's credible testimony that the minor did not possess cigarettes prior to entering Respondent's establishment. That is enough to establish an unlawful transaction and failure to check the minor's identification on that date.

Respondent also argues that Mr. Naso's testimony is not credible because, as of the hearing, he no longer remembered the precise details of what occurred on November 20, 2014 and February 27, 2015. That may be so – and understandable given the large number of inspections that Mr. Naso performs – but, notwithstanding, his memory of what occurred, even if not precise in every detail, is more than amply corroborated by Mr. Naso's contemporaneous report of the events on the two dates plus the physical evidence consisting of the cigarettes purchased on each date.

Respondent argued additionally that Mr. Naso has a "clear financial bias" because he gets paid by the hour and the more inspections he performs the more he gets paid. Respondent's post-hearing brief at 4. I do not find the evidence of how Mr. Naso is compensated establishes bias on his part because his compensation is not predicated on the outcome of his inspections. Presumably, Mr. Naso gets paid as much to perform inspections that reveal no unlawful transactions as he is to perform inspections that establish violations.

