

**FILE**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of Michael Burch,  
Notice of Apparent Violation  
and Intent to Assess Forfeiture.

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Case No. 07-94-TR-CVF  
(OH3202303704D)

**PUCO**

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**MERIT BRIEF  
SUBMITTED BY STAFF OF  
PUBLIC UTILITIES COMMISSION OF OHIO**

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**INTRODUCTION**

A driver of a commercial motor vehicle transporting placarded Class 8 amounts of hazardous materials shall not cross a railroad track or tracks at grade unless first stopping the commercial motor vehicle within 50 feet of, and not closer than 15 feet to, the tracks. The Respondent, Michael Burch, failed to obey this regulation of the Federal Motor Carrier Safety Regulations (FMCSR), when Inspector Haskins of the Public Utilities Commission of Ohio (PUCO) witnessed him failing to stop at the CSX main line railroad crossing, which intersects U.S. Route 42 near Plain City, Ohio, on August 1, 2006. A driver of a commercial motor vehicle who fails to comply with this safety regulation places himself, other motorists, surrounding community, and the environment at serious risk of harm. The risk of a collision between a train and a commercial motor vehicle transporting hazardous materials can be avoided and the public safely protected if drivers comply with this important transportation safety regulation. The PUCO is responsible for enforcing this law and protecting the public.

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This is a simple case. The facts are clear. Mr. Burch was observed by Inspector Haskins, who was an eye-witness to Mr. Burch committing this violation. The evidence is not contradicted and supports the fact that Mr. Burch failed to stop his commercial motor vehicle with a load of hazardous materials at the railroad crossing on U.S. 42 near Plain City, Ohio.

The Commission should find that Transportation Staff met its burden of showing that Mr. Burch was driving a commercial motor vehicle with placarded hazardous materials and failed to stop at the railroad crossing on U.S. 42 near Plain City on August 1, 2006. Mr. Burch argues that the Inspector couldn't have witnessed him driving across the tracks, because it took the Inspector time and distance, using short-cut routes, to stop him in congested traffic. This argument should be rejected. How many miles later or time longer it took for Inspector Haskins to stop Mr. Burch immediately following the violation does not diminish or taint the merits of this case and Inspector Haskins' credibility as an eyewitness against Mr. Burch. The evidence supports the Inspector's citation against Mr. Burch for failing to stop at a railroad crossing, as required by the FMCSR and applied to the facts of this case.

#### **STATEMENT OF FACTS**

On August 1, 2006, at approximately 1:05 p.m., Inspector Haskins was parked on a township road just north of U.S. 42 in Union County, Ohio, when he observed Michael Burch failing to stop at a grade crossing while transporting

placarded hazardous materials.<sup>1</sup> Using Staff Exhibit D as a diagram, Inspector Haskins marked with a pen where he was sitting when observing the violation.<sup>2</sup> The vehicle Mr. Burch was driving was traveling in a southbound direction.<sup>3</sup> Inspector Haskins was approximately 75 feet from the crossing on a township road called Railroad Street and had an unobstructed view of the violation.<sup>4</sup> Once stopped, Inspector Haskins conducted a level 2 walk-around safety inspection.<sup>5</sup> Inspector Haskins executed a report from his inspection, which was marked as Staff Exhibit A for this proceeding.<sup>6</sup>

Upon completing the inspection, Inspector Haskins cited Mr. Burch with 49 C.F.R. 392.10 (a) (3) failure to stop at a grade crossing, while transporting placarded hazardous materials.<sup>7</sup> Using Staff Exhibits B1, B2, B3, and B4, Inspector Haskins showed for the record pictures of how the crossing appeared from all directions.<sup>8</sup> Inspector Haskins also used a grid format that depicted an overview of the crossing at the U.S. 42/CSX line crossing from Staff Exhibit C.<sup>9</sup>

Inspector Haskins testified the speed limit for that route is 45 miles per hour.<sup>10</sup> Using Staff Exhibits B3 and B4, Inspector Haskins testified there are lights and gates at this crossing, as well as a warning crossbuck sign that is

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<sup>1</sup> Tr. at 7-8.

<sup>2</sup> Tr. at 8-9.

<sup>3</sup> Tr. at 8-9.

<sup>4</sup> Tr. at 17-18.

<sup>5</sup> Tr. at 8; 13.

<sup>6</sup> Tr. 9.

<sup>7</sup> Tr. at 14.

<sup>8</sup> Tr. at 14-15.

<sup>9</sup> Tr. at 16.

<sup>10</sup> Tr. at 18.

approximately 100 yards from the crossing.<sup>11</sup> Inspector Haskins estimated Mr. Burch's speed through the crossing at 40-50 miles per hour.<sup>12</sup>

After observing this violation, Inspector Haskins put his vehicle in gear to pursue Mr. Burch and stop him.<sup>13</sup> It took him between 5 and 10 minutes to stop Mr. Burch.<sup>14</sup> In relation to the crossing, the stop occurred approximately four miles from the crossing.<sup>15</sup> Inspector Haskins testified he was a good distance behind the truck once he pulled onto U.S. Route 42 and that he was unable to get behind the vehicle.<sup>16</sup> Once he reached downtown Plain City, where there was traffic lights and congested traffic, he turned right off of U.S. 42 onto Center Street for a short distance and then turned left onto Central Avenue.<sup>17</sup> Mr. Burch continued straight on U.S. 42, where a short distance further U.S. Route 42 would turn right through the center of Plain City.<sup>18</sup> The short-cut route Inspector Haskins took connected back onto U.S. 42 on the other end of town.<sup>19</sup>

By taking the short-cut, Inspector Haskins was able to get ahead of Mr. Burch on U.S. Rout 42.<sup>20</sup> Inspector Haskins waited to observe Mr. Burch's vehicle approach and he pulled in front of the vehicle and instructed Mr. Burch to pull over in a parking lot, so he could conduct the inspection.<sup>21</sup> Inspector Haskins

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<sup>11</sup> Tr. at 19.

<sup>12</sup> Tr. at 19.

<sup>13</sup> Tr. at 20.

<sup>14</sup> Tr. at 20.

<sup>15</sup> Tr. at 20-21.

<sup>16</sup> Tr. at 21.

<sup>17</sup> Tr. at 21-22.

<sup>18</sup> Tr. at 22-23.

<sup>19</sup> Tr. at 22-24.

<sup>20</sup> Tr. at 23-24.

<sup>21</sup> Tr. at 24.

identified the vehicle as the same vehicle that he witnessed traveling through the crossing without stopping.<sup>22</sup> Inspector Haskins testified that he informed Mr. Burch the reason why he was stopped.<sup>23</sup> And Mr. Burch replied he just forgot about the regulation and further stated that he doesn't haul HazMat much.<sup>24</sup> The comments made by Mr. Burch were reported by Inspector Haskins in the notes section of Staff Exhibit A, which is the Driver/Vehicle Examination Report. Inspector Haskins then proceeded to conduct an inspection on Mr. Burch's vehicle, prepared a report of inspection, and served a copy on Mr. Burch.<sup>25</sup> The material being transported that day by Mr. Burch was a corrosive material which was also poisonous, so it has two hazards.<sup>26</sup>

Mr. Burch was issued a civil forfeiture notice in the amount of \$120.00 for failing to stop at railroad crossing transporting placarded hazardous materials.<sup>27</sup> The civil forfeiture assessed Mr. Burch is consistent for this type of violation under the Commercial Vehicle Safety Alliance and Hazardous Materials Regulations.<sup>28</sup>

## ARGUMENT

Ohio participates in the federal Commercial Motor Carrier Safety Assistance Program, which can be found in the federal regulations at 49 C.F.R. 350. This is a federal grant program that provides financial assistance to Ohio,

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<sup>22</sup> Tr. at 25.

<sup>23</sup> Tr. at 26.

<sup>24</sup> Tr. at 26-27; 50.

<sup>25</sup> Tr. at 27-30.

<sup>26</sup> Tr. at 30.

<sup>27</sup> Tr. at 41-43.

<sup>28</sup> Tr. at 38-41.

and other states, to reduce the severity and number of accidents involving drivers like Mr. Burch in this case. Not surprisingly, this federal grant program sets forth conditions that Ohio, and the other participant states, must meet. It requires the states adopt and enforce state laws, rules and standards identical to federal motor carrier safety rules or that have an identical effect.<sup>29</sup> The Commission has adopted the Federal Motor Carrier Safety Regulations, including the regulation involved in this case – 49 C.F.R. §§ 392.10 (a) (3).

The Commission's rules require all drivers operating in Ohio in interstate commerce, such as Mr. Burch, to operate in conformity with all regulations of the U.S. Department of Transportation, including 49 C.F.R. §§ 392.10 (a) (3). A violation of this regulation is a violation of the Commission's rules. Mr. Burch violated this safety regulation and should pay a \$120.00 civil forfeiture for failing to stop his commercial motor vehicle with placarded hazardous materials at a railroad crossing on U.S. Route 42.

**A. The Commission Staff showed by a preponderance of the evidence that Mr. Burch violated 49 C.F.R. §§ 392.10 (a) (3) as cited in the Inspection Reports, Staff Exhibit A.**

According to 49 C.F.R. § 392.10 (a) (3), every driver of a commercial motor vehicle that transports placarded hazardous materials shall not cross railroad tracks at grade unless first stopping within 50 feet of, and not closer than 15 feet to, the tracks.<sup>30</sup> Inspector Haskins observed, from an unobstructed stationary position approximately 75 feet from the railroad crossing, Mr. Burch driving a

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<sup>29</sup> Ohio Admin. Code Ann. § 4901:2-5-02 (Baldwin 2005).

<sup>30</sup> 49 C.F.R. § 392.10 (a) (3).

commercial motor vehicle placarded with hazardous materials at approximately 40-50 miles per hour over the CSX main line crossing on U.S. route 42 without stopping.<sup>31</sup>

The bulk of Mr. Burch's testimony dwells more on the area where he was stopped for the violation on U.S. Route 42 in relation to the crossing, being approximately four miles from the railroad crossing, and wondering how Inspector Haskins knew what route he was traveling when taking short-cuts to catch him.<sup>32</sup> Mr. Burch seems conflicted on how it was possible for Inspector Haskins to witness this violation at the site of the railroad crossing, on the one hand, and then get in front of him, using side-streets, to waive him down for the inspection and violation notice on the other side of Plain City.

But Mr. Burch does not contest that he traveled the route that Inspector Haskins testified Mr. Burch took going South on U.S. Route 42 to Plain City and through Plain City.<sup>33</sup> Also, Mr. Burch did not contest the fact that he rarely transports Hazmat materials.<sup>34</sup> At the time of the stop for the violation, Mr. Burch testified that he asked Inspector Haskins "how does he know I didn't stop when he wasn't there and he was clear down here."<sup>35</sup> On cross examination, Mr. Burch stated that he was not saying that Inspector Haskins wasn't at the railroad

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<sup>31</sup> Tr. at 17-19.

<sup>32</sup> Tr. at 47-49.

<sup>33</sup> Tr. at 49-50.

<sup>34</sup> Tr. at 50.

<sup>35</sup> Tr. at 52.

crossing to observe him traveling over the tracks, but instead he just didn't see him.<sup>36</sup>

Inspector Haskins testified the speed limit for U.S. Route 42 is 45 miles per hour.<sup>37</sup> Inspector Haskins observed, from an unobstructed stationary position approximately 75 feet from the railroad crossing, Mr. Burch driving a commercial motor vehicle placarded with hazardous materials at approximately 40-50 miles per hour over the CSX main line crossing on U.S. route 42 without stopping.<sup>38</sup> Inspector Haskins pursued Mr. Burch and stopped him approximately four miles down U.S. Route 42 in Plain City, Ohio.<sup>39</sup> Once stopped, Inspector Haskins testified that he informed Mr. Burch of the reason why he was stopped.<sup>40</sup> And Mr. Burch replied he just forgot about the regulation and further stated that he doesn't haul HazMat much.<sup>41</sup> Inspector Haskins made notes of Mr. Burch's words in his report, which was generated at the conclusion of the inspection that day.<sup>42</sup> Inspector Haskins has no motive to make this information up against Mr. Burch.

In *Grosjean v. The Pennsylvania Rd. Co.*, 146 Ohio St. 643, 646, 67 N.E. 2d 623, 624 (1946), the court held in the syllabus that a *prima facie* case is made by a party where evidence is offered to support that party's claim. To rebut such *prima facie* case it is incumbent on the other party to produce evidence that

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<sup>36</sup> Tr. at 52.

<sup>37</sup> Tr. at 18.

<sup>38</sup> Tr. at 17-18.

<sup>39</sup> Tr. at 20-21.

<sup>40</sup> Tr. at 26.

<sup>41</sup> Tr. at 26-27; 50.

<sup>42</sup> Tr. at 27-30.



counterbalances the evidence by which the *prima facie* case was made. *Id.* In this case, the Transportation Staff satisfied its burden of proof by a preponderance of the evidence that Mr. Burch failed to stop at the CSX main line railroad on U.S. 42 near Plain City, Ohio, while transporting placarded hazardous Class 8 materials on a commercial motor vehicle on August 1, 2006. A *prima facie* case has been made by the Transportation Staff, which has not been rebutted by Mr. Burch. The Commission should find in favor of the Transportation Staff, as to the violation for failing to stop at the railroad crossing.

**B. The Commission should assess the civil forfeiture proposed by Staff against Mr. Burch as it is consistent with the Commercial Vehicle Safety Alliance and Hazardous Materials Regulations.**

The General Assembly has required that the Commission's civil forfeitures be consistent with the recommended fines adopted by the Commercial Vehicle Safety Alliance.<sup>43</sup> The civil forfeiture Staff proposed in this case is consistent with the recommended fines adopted by the CVSA.<sup>44</sup>

First, the information from the inspection is automatically uploaded into the computer system at the Public Utilities Commission of Ohio's Compliance Division.<sup>45</sup> A compliance officer will then generate a fine based upon the code sections that the inspector indicated were violated on the vehicle examination

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<sup>43</sup> Ohio Revised Code Ann. §§ 4919.99 and 4921.99.

<sup>44</sup> Tr. at 37-41.

<sup>45</sup> Tr. at 34-35.

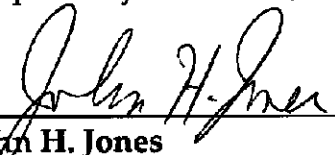
report or Staff Exhibit A using the Forfeiture Assessment sheet (Staff Exhibit F) and the Civil Forfeiture Violations Chart (Staff Exhibit G) in tandem.<sup>46</sup>

In this case, the violation for failing to stop at a railroad crossing while transporting placarded hazardous materials is a \$120.00 fine.<sup>47</sup> This is the civil forfeiture amount that is applicable to this case, which is consistent with the recommended fines adopted by the Commercial Vehicle Safety Alliance and the Hazardous Material Regulations.<sup>48</sup> Therefore, the Commission should adopt and assess this civil forfeiture amount to Mr. Burch.

### CONCLUSION

None of the facts comprising Staff's case have been contradicted. Those facts lead only to the conclusion that Mr. Burch violated the Commission's regulation as alleged. Nothing was presented in the hearing that would relieve Mr. Burch from his responsibility for this violation. The Attorney Examiner and the Commission should find accordingly that Mr. Burch violated the Commission's regulation as alleged.

Respectfully submitted,



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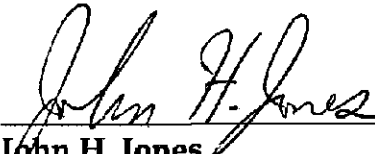
<sup>46</sup> Tr. at 34-36; 37-41.

<sup>47</sup> Tr. at 39-41.

<sup>48</sup> Tr. at 39-41.

## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief Submitted by Staff of Public Utilities Commission of Ohio** was served by regular U.S. mail, postage prepaid, or hand delivered, upon the Respondent, this 29<sup>th</sup> day of June, 2007.

  
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**John H. Jones**  
**Assistant Attorney General**

Party of Record:

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