

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Michael P. Burch, Notice of )  
Apparent Violation and Intent to Assess ) Case No. 07-94-TR-CVF  
Forfeiture. ) (3202303704 D)

OPINION AND ORDER

The Commission, considering the public hearing held on May 8, 2007, issues its opinion and order in this matter.

APPEARANCES:

Michael P. Burch, 720 Adams Avenue, Logan, Ohio 43138, on his own behalf.

Marc Dann, Attorney General of Ohio, by John H. Jones, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

Nature of the Proceeding:

On August 1, 2006, Commission staff stopped and inspected a motor vehicle, operated by Wooster Motor Ways, Inc. and driven by Michael P. Burch (Mr. Burch, respondent) in the state of Ohio. Staff found violations of the Code of Federal Regulations (C.F.R.), including the following violation relevant to this case:

49 C.F.R. Section 392.10(a)(3) - Failing to stop at railroad crossing— placarded Class 8/Class 6.1.<sup>1</sup>

Mr. Burch was timely served a Notice of Preliminary Determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In this notice, Mr. Burch was notified that staff intended to assess a civil monetary forfeiture totaling \$120.00 for violation of 49 C.F.R. Section 392.10(a)(3). A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement during the

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<sup>1</sup> 49 C.F.R. Section 392.10(a) provides, in relevant part, that "...the driver of a commercial motor vehicle...shall not cross a railroad track or tracks at grade unless he/she first: Stops the commercial motor vehicle within 50 feet of, and not closer than 15 feet to, the tracks...."

49 C.F.R. Section 392.10(a)(3) provides that vehicles which must stop before crossing railroad tracks include "every commercial motor vehicle" required to be marked or placarded for various classifications of hazardous materials. Among the classifications of hazardous materials listed in this code section are Class 8/Division 6.1 Poison, the types of hazardous materials for which the respondent's truck was placarded.

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conference. Subsequently, a hearing was convened on May 8, 2007. Thereafter, staff filed its brief of the case on June 28, 2007. Mr. Burch filed a letter containing statements regarding the case on June 29, 2007.

### Background

At the time of the inspection in this case, Mr. Burch was driving a truck placarded for class 8/class 6.1 hazardous materials from Walton Hills, Ohio, to Indianapolis, Indiana. After the inspection, Mr. Burch was cited for failure to stop at the CSX railroad crossing that intersects U.S. Route 42 near Plain City, Ohio, in Union County.

### Issue in the Case:

Staff maintains that Officer Haskins, a hazardous materials specialist with the Commission, observed Mr. Burch committing the crossing violation and, thereafter, stopped his truck and cited him for that violation. Mr. Burch denied committing the violation.

### Discussion:

In this case, Officer Haskins testified that he was stationed approximately 75 feet from the crossing on a township road called Railroad Street and that he had an unobstructed view of Mr. Burch committing the violation (Tr. 17-18). Officer Haskins testified that he observed Mr. Burch proceeding through the clearly marked crossing at 40-50 miles per hour (Tr. 19). After observing Mr. Burch, Officer Haskins turned onto U.S. Route 42, but he was some distance from Mr. Burch's truck and was unable to get behind the vehicle. In order to avoid traffic lights and congested traffic in downtown Plain City, Ohio, Officer Haskins then used an alternate route, along two side streets, that reconnected with U.S. Route 42 on the other end of Plain City. He thus was able to get ahead of Mr. Burch's truck and pull it over into a parking lot in order to perform an inspection, approximately four miles from the railroad crossing (Tr. 20-24). Officer Haskins testified that, when informed about the reason for the stop, Mr. Burch replied that he "just forgot about that regulation" and also that he "doesn't haul haz mat much" (Tr. 26-27, 50; Staff Ex. 1).

Mr. Burch, for his part, testified that he did stop at the railroad crossing. He further testified that he did not make statements to Officer Haskins indicating that he did not stop (Tr. 47-49, 51-52). At hearing, and in additional information submitted on June 28, 2007 after the hearing (which included a map and photographs of views in the vicinity of the crossing, possible safe inspection sites on his route, and the actual inspection site in Plain City), Mr. Burch questioned how Officer Haskins could have witnessed his truck traveling over the crossing. Mr. Burch indicated that Officer Haskins' view of traffic approaching

the crossing would have been blocked by a house in the area. Also, considering that his route could have included a turn off Route 42 at some point, Mr. Burch asked how Officer Haskins could be certain of getting into position, by using side streets, to stop his truck four miles away from the crossing on Route 42, on the other side of Plain City. Mr. Burch indicated that the traffic behind his truck was not heavy and that Officer Haskins could have used the lights and siren on his vehicle to pull him over at several safe places nearer the crossing (Tr. 47-49, Respondent's post-hearing information).

On cross examination, Mr. Burch testified that he does not haul hazardous materials consistently, every day of the week, but that it was not possible he just forgot about the regulation requiring him to stop at railroad tracks. Mr. Burch testified that his company is very strict about safety and that he attends almost every one of his company's safety meetings. In addition, Mr. Burch testified that he was not asserting that Officer Haskins was not sitting in his vehicle near the crossing, but that he did not see the officer there (Tr. 49-52).

Mr. Burch testified that the cargo "totes" or tanks on his vehicle were empty, but had not been washed out. He testified that because the tanks had not been cleaned, his truck had to be placarded.<sup>2</sup> Lastly, Mr. Burch testified that, while he was not admitting to the violation, he would be willing to pay the forfeiture. Mr. Burch indicated that the loss of his commercial driver's license because of a crossing violation, for any length of time, would be financially harmful to him (Tr. 54-55, Respondent's post-hearing information).

The Commission initially observes that Section 392.10(a)(3) specifies that the driver of "every commercial motor vehicle" marked or placarded for specific classifications of hazardous materials, including the truck driven by Mr. Burch that was placarded for class 8/class 6.1 hazardous materials, shall not cross railroad tracks unless he or she first stops the vehicle within a distance from the tracks of 15 to 50 feet. After a review of the testimony and evidence submitted in the case, we believe that the record is clear regarding a violation of Section 392.10(a)(3). Although Mr. Burch questioned how Officer Haskins could observe his truck at the crossing and, utilizing routes over side streets in Plain City, intercept the truck later on Route 42, the Commission notes that Mr. Burch did not argue that Officer Haskins was not present near the crossing to observe his traverse of the railroad tracks. Instead, Mr. Burch merely testified that he did not see Officer Haskins near the crossing (Tr. 52). The Commission also notes that a plain reading of the hearing record demonstrates that Officer Haskins is a qualified hazardous materials inspector and that he presented knowledgeable and competent testimony at hearing. The Commission thus is of the opinion that Officer Haskins saw Mr. Burch commit the violation and

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<sup>2</sup> 49 C.F.R. Section 392.10, and the Department of Transportation interpretations to that code section, indicate that vehicles required to be placarded for hazardous materials (and thus vehicles that are required to stop at railroad crossings) include vehicles with cargo tanks that have not been cleaned of chemical residue and purged of vapors.

subsequently properly cited him for that violation. Mr. Burch's arguments at hearing were not sufficient to demonstrate that he should not be held liable for the civil forfeiture assessed for violation of Section 392.10(a)(3). Accordingly, the Commission finds that the respondent was in violation of Section 392.10(a)(3).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On August 1, 2006, Commission staff stopped and inspected a motor vehicle, operated by Wooster Motor Ways, Inc. and driven by Michael P. Burch (Mr. Burch, respondent) in the state of Ohio. Staff found violations of the Code of Federal Regulations (C.F.R.), including the following violation relevant to this case: 49 C.F.R. Section 392.10(a)(3) - Failing to stop at railroad crossing-- placarded Class 8/Class 6.1.
- (2) Mr. Burch was timely served a Notice of Preliminary Determination that set forth a civil forfeiture of \$120.00 for violation of 49 C.F.R. Section 392.10(a)(3).
- (3) A hearing in this matter was convened on May 8, 2007.
- (4) Staff demonstrated at hearing, by a preponderance of the evidence, that Mr. Burch violated 49 C.F.R. Section 392.10(a)(3). Further, the proposed forfeiture is consistent with the recommendations of the Commercial Vehicle Safety Alliance (Tr. 40-41).
- (5) Mr. Burch's arguments at hearing were not sufficient to demonstrate that he should not be held liable for the civil forfeiture assessed for violation of 49 C.F.R. Section 392.10(a)(3).
- (6) Pursuant to Section 4905.83, Revised Code, Respondent must pay the State of Ohio the civil forfeiture assessed for violation of 49 C.F.R. Section 392.10(a)(3). Mr. Burch shall have 30 days from the date of this entry to pay the assessed forfeiture of \$120.00.
- (7) Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793.

It is, therefore,

ORDERED, That Mr. Burch pay the assessed amount for the violation of 49 C.F.R. Section 392.10(a)(3) within 30 days to the State of Ohio, as set forth in Findings of Fact and Conclusions of Law (6) and (7). It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,

ORDERED, That a copy of this opinion and order be served upon each party of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



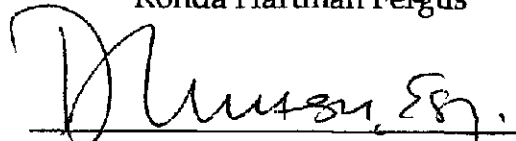
Paul A. Centolella



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Renee J. Jenkins  
Secretary