

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Denver M. Beck, Jr., Notice)
of Apparent Violation and Intent to Assess) Case No. 08-1133-TR-CVF
Forfeiture.) (3210301303D)

OPINION AND ORDER

The Commission, considering the public hearing held on January 21 2009, issues its opinion and order in this matter.

APPEARANCES:

Churchill, Smith, Rice, Swinkey & Kuhn, LLP, by David L. Rice, 9042 Lewis Avenue, Temperance, Michigan 48182, on behalf of Denver M. Beck, Jr.

Richard Cordray, Ohio Attorney General, by Werner L. Margard III and William L. Wright, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

Nature of the Proceeding:

On March 4, 2008, Commission staff stopped and inspected a motor vehicle, operated by Ports Petroleum Company, Inc. and driven by Denver M. Beck, Jr. (Mr. Beck, respondent) in the state of Ohio. Staff found the following violation of the Code of Federal Regulations (C.F.R.):

49 C.F.R. Section 392.10(a)(4) - Failing to stop at railroad crossing--- HM cargo CT CVM containing flammable Class 3 residue, UN ID# 1203, failed to stop prior to crossing mainline R.R. crossing.¹

¹ 49 C.F.R. Section 392.10(a) provides, in pertinent part, that: ...the driver of a commercial motor vehicle specified in paragraphs (1) through (6) of this section 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; thereafter listens and looks in each direction along the tracks for an approaching train; and ascertains that no train is approaching. When it is safe to do so, the driver may drive the commercial motor vehicle across the tracks in a gear that permits the commercial motor vehicle to complete the crossing without a change of gears. The driver must not shift gears while crossing the tracks.

49 C.F.R. Section 392.10(a)(4) provides, in pertinent part, that vehicles which must stop before crossing railroad tracks include: Every cargo tank motor vehicle, whether loaded or empty, used for the transportation of any hazardous material....

Mr. Beck 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. Beck was notified that staff intended to assess a civil monetary forfeiture totaling \$157.50 for violation of 49 C.F.R. Section 392.10(a)(4). A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement during the conference. Subsequently, a hearing was convened on January 21, 2009. Thereafter, respondent and staff filed their briefs of the case on March 10, 2009 and March 13, 2009, respectively.

Background

At the time of the inspection in this case, Mr. Beck was driving a truck placarded for Class 3 flammable materials from Toledo, Ohio, to Lima, Ohio. After the inspection, Mr. Beck was cited for failure to stop at the railroad crossing that intersects West Breese Road, just east of South Dixie Highway, in Allen County.

Issue in the Case:

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

Discussion:

In this case, Specialist Barrett testified that he was parked in a small asphalt lot on the south side of Breese Road, adjacent to the north-south main line railroad track. Specialist Barrett stated that he observed a cargo tank commercial vehicle exit Interstate 75 and, after stopping behind a car at the intersection of Breese Road and the Interstate 75 exit ramp, turn right onto Breese Road and proceed over the grade crossing without stopping (Tr. 9-10, 13, 19, Staff Exhibit 1- driver/vehicle examination report). Specialist Barrett further testified that, from his position by the roadside, he could not see the brake lights of the truck driven by Mr. Beck (Tr. 17-18).

Mr. Beck, for his part, testified that he has driven a truck for over 30 years, that he has received no citations as a truck driver, that he is paid by the hour and has no incentive to hurry, and that his employer is very safety conscious (Tr. 39-40). Mr. Beck stated that he turned on his warning lights, observed the inspector in a parking lot by the roadside, and brought his truck to a momentary stop before proceeding over the railroad tracks. He did not change gears while traversing the crossing. Mr. Beck testified that he was within two car lengths of the crossing, 50 feet, when he stopped (Tr. 44, 45, 47-49).

The Commission initially notes that 49 C.F.R. Section 392.10(a) specifies 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...." We also note that, under Rule 4901:2-7-20(A), O.A.C., staff is required to prove the occurrence of a violation by a preponderance of the evidence.

In the record of this case, Mr. Beck testified that he stopped before going over the crossing (Tr. 47-48). Mr. Beck testified that he has 30 years of driving experience and that, being paid by the hour, he had no incentive to hurry and go over the crossing without stopping (Tr. 39-40). Mr. Beck stated that he turned on his warning lights and observed the inspector before he went over the crossing (Tr. 44, 48-49). In addition, Specialist Barrett testified that he could not see the brake lights of the truck driven by Mr. Beck (Tr. 17-18). Considering this last point, the Commission believes that Specialist Barrett's testimony does raise a question about whether it was actually possible for him to observe whether the truck stopped or not. Accordingly, after reviewing all of the evidence presented, the Commission is of the opinion that the record in the case does not reveal, by a preponderance of the evidence, whether Mr. Beck drove over the railroad crossing without stopping, or whether he did stop, as he claimed. This finding that the staff did not meet its burden of proof, as set forth in Rule 4901:2-7-20(A), O.A.C., does not mean that the Commission has found that Mr. Beck stopped at the crossing. The Commission's opinion is limited to the finding that insufficient evidence has been presented to conclude that Mr. Beck did not stop his truck before driving over the railroad tracks in violation of 49 C.F.R. Section 392.10(a)(4).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On November 20, 2006, staff of the Public Utilities Commission's Transportation Enforcement Division stopped and inspected a motor vehicle driven by Mr. Beck in the state of Ohio. Staff found the following violation of the Code of Federal Regulations (C.F.R.): 49 C.F.R. Section 392.10(a)(4) - Failing to stop at railroad crossing-- HM cargo CT CVM containing flammable Class 3 residue, UN ID# 1203, failed to stop prior to crossing mainline R.R. crossing.
- (2) Mr. Beck was timely served a Notice of Preliminary Determination that set forth a civil forfeiture of \$157.50 for violation of 49 C.F.R. Section 392.10(a)(4).
- (3) A hearing in this matter was convened on January 21, 2009.

- (4) Specialist Robert Barrett testified that he observed Mr. Beck, driving a cargo tank commercial vehicle, exit Interstate 75 and, after stopping behind a car at the intersection of Breese Road and the Interstate 75 exit ramp, turn right onto Breese Road and proceed over the grade crossing without stopping. Specialist Barrett further testified that, from his position by the roadside, he could not see the brake lights of the truck driven by Mr. Beck.
- (5) Mr. Beck testified that he stopped before going over the crossing. Mr. Beck testified that he has 30 years of driving experience and that he turned on his warning lights and observed the inspector before he went over the crossing. Mr. Beck also claimed to have no incentive to hurry and go over the crossing without stopping.
- (6) Insufficient evidence has been presented to conclude that Mr. Beck did not stop his truck before driving over the railroad tracks. Staff, therefore, has not proven by a preponderance of the evidence, pursuant to Rule 4901:2-7-20(A), O.A.C., that a violation of 49 C.F.R. Section 392.10(a)(4) occurred.

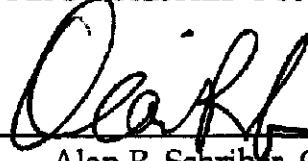
ORDER:

It is, therefore,

ORDERED, That the alleged violation of 49 C.F.R. Section 392.10(a)(4) be dismissed and removed from the Commission's safety net and respondent's history of violations. It is, further,

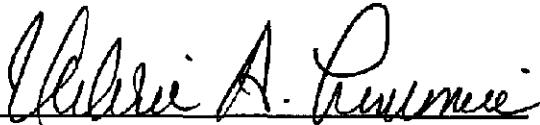
ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Paul A. Centolella



Valerie A. Lemmie



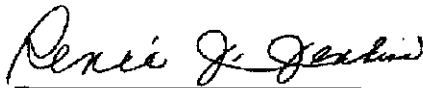
Ronda Hartman Fergus

Cheryl L. Roberto

KKS/vrm

Entered in the Journal

JUL 15 2008



Renee J. Jenkins
Secretary