

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Request of |) | |
| Thomas W. McGraw for an |) | Case No. 06-1311-TR-CVF |
| Administrative Hearing. |) | (320230368D) |

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, and being otherwise duly advised, hereby issues its opinion and order:

APPEARANCES:

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Stephen A. Reilly and Sarah Parrot, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Bellinger & Donahue, by Kerry M. Donahue, 6295 Emerald Parkway, Dublin, Ohio, 43016, on behalf of Thomas W. McGraw.

OPINION:

I. Background

On July 21, 2006, Philip Haskins, a Hazardous Materials Specialist employed by the Commission's Transportation Department Staff (Staff) inspected a commercial motor vehicle owned by Delille Oxygen Company and driven by Thomas W. McGraw (Respondent) (Tr. 11; Staff Ex. I).

Prior to the inspection, Mr. Haskins was traveling northbound on Alum Creek Drive. Mr. Haskins observed the vehicle driven by Respondent traveling in the opposite direction on Alum Creek Drive. The vehicle was displaying hazardous materials placards (Tr. 17). As Mr. Haskins approached the crossing, he observed the Respondent's vehicle approach the crossing; and, as Mr. Haskins passed through the grade crossing, he did not see the vehicle stop at the grade crossing (Tr. 16-17). Mr. Haskins then turned around and followed the Respondent's vehicle for approximately one mile before he stopped the vehicle for inspection (Tr. 19-20). During the inspection, Mr. Haskins confirmed that the vehicle contained hazardous materials in a quantity requiring placards (Tr. 15-16; Staff Ex. 1).

On the inspection report, Mr. Haskins noted an apparent violation of Title 49, Code of Federal Regulations (C.F.R.), Section 392.10(a)(3)(failure to stop at railroad grade

crossing) (Staff Ex. 1). Subsequently, on August 24, 2006, Staff issued a Notice of Apparent Violation and Intent to Assess Forfeiture to Thomas W. McGraw, proposing a forfeiture of \$112.50 for the apparent violation of 49 C.F.R. Section 392.10(a)(3) (Staff Ex. 4). Subsequently, on October 20, 2006, Staff issued a Notice of Preliminary Determination assessing a forfeiture of \$112.50 for the apparent violation (Staff Ex. 5).

On October 31, 2006, Mr. McGraw requested an administrative hearing regarding the apparent violation and proposed forfeiture. A hearing was held as rescheduled on July 16, 2008. At the hearing, Mr. Haskins and John Canty testified on behalf of Staff, and Mr. McGraw testified on his own behalf.

II. The Law

Pursuant to the provisions of Rule 4901:2-5-02, Ohio Administrative Code (O.A.C.), the Commission has adopted the provisions of the Federal Motor Carrier Safety Rules, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of hazardous materials into, through or within this state. Further, Section 4905.83, Revised Code, authorizes the Commission to assess a civil forfeiture of up to \$10,000 per day per violation against any person who violates the safety rules adopted by the Commission when transporting hazardous materials.

III. Discussion and Conclusion

The provisions of 49 C.F.R. Section 392.10 require every driver of a commercial motor vehicle carrying hazardous materials in quantities requiring placards to stop the commercial motor vehicle within 50 feet, and no closer than 15 feet, of a railroad grade crossing. In this case, Respondent does not dispute that his vehicle was transporting hazardous materials in quantities requiring placards. The primary dispute in this case is whether Respondent stopped his commercial motor vehicle within 50 feet, and no closer than 15 feet, of the grade crossing.

Mr. Haskins testified that, prior to the inspection, his vehicle was traveling north on Alum Creek Drive. As he approached the railroad grade crossing, he observed the commercial motor vehicle driven by Respondent approach the crossing from the opposite direction (Tr. 17). Mr. Haskins testified that, when he first observed the Respondent's vehicle, Mr. Haskins was approximately 100 feet from the crossing, and the Respondent's vehicle was 200 feet from the crossing (Tr. 28). Mr. Haskins observed the Respondent's vehicle approach the crossing and proceed through the crossing without stopping (Tr. 18, 21, 38-39, 45-46). Mr. Haskins testified that, at the point that the Respondent's vehicle passed through the crossing, the vehicle was almost beside his vehicle (Tr. 18).

The inspection report, prepared by Mr. Haskins during the subsequent inspection, notes that:

Vehicle was observed failing to stop at grade crossing as required. Driver only slowed the transport vehicle at crossing and proceeded to grade crossing, through grade crossing without stopping. Driver stated he thought he stopped and proceeded to ask what the law required for proper stopping at railroad grade crossings. The driver further stated that he did have his flashers on, I think.

(Tr. at 20-21; Staff Ex. 1).

Mr. Haskins testified that he was observing the Respondent's vehicle from the time it was 50 feet from the crossing through the time it was 15 feet from the crossing (Tr. at 21-22) and that it was not possible that the Respondent had stopped before Mr. Haskins approached the crossing (Tr. at 27). Mr. Haskins also testified that he had an unobstructed view of the Respondent's vehicle as it approached and passed through the crossing (Tr. 18, 22, 45). Mr. Haskins further stated that he did not see that the Respondent's vehicle's flashers had been activated (Tr. at 26).

Mr. McGraw testified that he has been driving commercial motor vehicles transporting hazardous materials for three years and that he had no other violations before or after the alleged violation (Tr. at 72). Mr. McGraw testified that, on the day of the inspection, he was traveling southbound on Alum Creek Drive and that there were two vehicles behind him (Tr. at 73). As he approached the grade crossing, he turned on his flashers and began to slow down about 50 feet from the crossing. Mr. McGraw testified that he came to a complete stop 15 feet in front of the crossing and observed that the vehicles behind him came to a complete stop (Tr. at 74, 80, 83-84). He then proceeded through the grade crossing. Mr. McGraw stated that he did not see Mr. Haskins' vehicle before Mr. Haskins signaled him to pull over approximately two miles from the grade crossing (Tr. at 74). Mr. McGraw testified that, during the inspection, he explained to Mr. Haskins that he had stopped at the grade crossing but that he stopped the conversation after Mr. Haskins strongly disagreed (Tr. at 75). Mr. McGraw also stated that he was unaware that he had been cited for the alleged violation until receiving the Notice of Apparent Violation and Intent to Assess Forfeiture about 30 days after the inspection (Tr. at 76-77, 83, 85).

Rule 4901:2-7-20, O.A.C., requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence. The Commission finds that, based upon the record in this proceeding, Staff has proven that the Respondent, acting knowingly, violated 49 C.F.R. Section 392.10(A)(3), as alleged. Staff's witness, Mr. Haskins, testified unequivocally that the commercial motor vehicle driven by Respondent failed to stop at the grade crossing (Tr. 18, 21, 38-39, 45-46). The record is clear that Mr. Haskins had an unobstructed view of the crossing at the time of the violation (Tr. 18, 22, 45). The record further demonstrates that Mr. Haskins followed the commercial motor vehicle to a safe location in which to perform the inspection (Tr. 19-20). Further, Mr. Haskins testimony is

supported by the inspection report which was prepared by Mr. Haskins contemporaneously with the inspection (Tr. at 10; Staff Ex. 1). We find that the testimony by Mr. Haskins regarding the circumstances of the violation to be persuasive and that the weight of the evidence supports the conclusion that the violation occurred as alleged by Staff.

The Staff also presented testimony from John J. Canty, the Assistant Chief of the Compliance Division of the Transportation Department, regarding the proposed civil forfeiture. Mr. Canty testified that, in determining the amount of the proposed forfeiture, the Staff considered the nature and gravity of the alleged violation, the extent of the alleged violation, the Respondent's culpability for the violation and the Respondent's history of violations, as well as the amount and relative hazard of the hazardous materials on the vehicle (Tr. 53-59, 65; Staff Ex. 3). Further, Mr. Canty testified that the proposed forfeiture of \$112.50 was consistent with the forfeiture proposed for drivers in similar circumstances (Tr. 69).

Rule 4901:2-7-06(A), O.A.C., states that, in assessing civil forfeitures, the Commission shall consider: the nature and circumstances of the violation, the extent and gravity of the violation, the degree of the Respondent's culpability, the Respondent's prior violations, the Respondent's ability to pay, and all other matters as justice requires. Based upon the testimony of Mr. Canty at the hearing, the Commission finds that, considering these factors, the amount of the proposed forfeiture in this case is fair, reasonable and consistent with the forfeitures proposed for drivers in similar circumstances. Accordingly, the Commission will assess a civil forfeiture of \$112.50 against the Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On October 31, 2006, Thomas W. McGraw filed a request for an administrative hearing regarding an apparent violation of 49 C.F.R. Section 392.10 and a civil forfeiture of \$112.50 proposed by the Staff.
- (2) A hearing was held on July 16, 2008.
- (3) Rule 4901:2-7-20, O.A.C., requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.
- (4) Based upon the record in this proceeding, Staff has proven that the Respondent, acting knowingly, violated 49 C.F.R. Section 392.10(A)(3).
- (5) Considering the nature and circumstances of the violation, the extent and gravity of the violation, the degree of the Respondent's culpability, the Respondent's prior violations, the Respondent's ability to pay and all other matters as justice requires, the proposed forfeiture of \$112.50 is fair,

reasonable and consistent with the forfeitures proposed for drivers in similar circumstances.

ORDER:

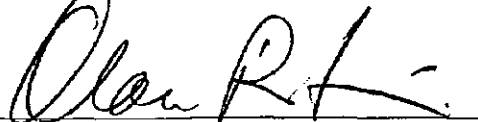
It is, therefore,

ORDERED, That Respondent be assessed a civil forfeiture of \$112.50 for violation of 49 C.F.R. Section 392.10(A)(3), as adopted by the Commission. It is, further,

ORDERED, That Respondent pay the civil forfeiture of \$112.50 within 30 days after the effective date of this Opinion and Order. Payment should be made payable to "Treasurer, State of Ohio" and mailed to PUCO, Attention Fiscal Division, 13th Floor, 180 East Broad Street, Columbus, Ohio 43215. In order to assure proper credit, Respondent is directed to write the case number on the face of the check. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

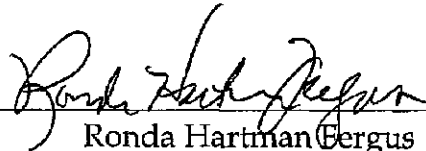
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Bergus



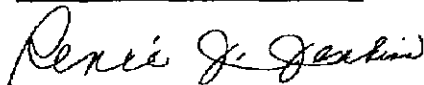
Cheryl L. Roberto

Valerie A. Lemmie

GAP:ct

Entered in the Journal

OCT 14 2009



Renee J. Jenkins
Secretary