

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF PHILLIP SCHERER,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE No. 16-730-TR-CVF
(OH3258008269C)

OPINION AND ORDER

Entered in the Journal on February 23, 2017

I. SUMMARY

{¶ 1} The Commission finds that Phillip Scherer had committed violations of the Commission's transportation regulations by failing to display carrier name and/or United States Department of Transportation (USDOT) number; and by operating a commercial motor vehicle in interstate commerce without an active USDOT number.

II. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} On January 29, 2016, Inspector Melanie Kurtz, an inspector with the Ohio State Highway Patrol (Highway Patrol) motor carrier enforcement division,¹ stopped and inspected a vehicle operated by Phillip Scherer (Mr. Scherer or Respondent) in the state of Ohio. Inspector Kurtz found two alleged violations of Title 49 of the Code of Federal Regulations (C.F.R.): 49 C.F.R. 390.21(B), failing to display carrier name and/or USDOT number (\$100); and 49 C.F.R. 392.9B(a), operating a commercial motor vehicle in interstate commerce without an active USDOT number (none available) (\$500).

{¶ 3} Mr. Scherer was timely served with a notice of preliminary determination (NPD or Staff Ex. 4), in accordance with Ohio Adm. Code 4901:2-7-12. In the NPD, Mr. Scherer was notified that Staff intended to assess civil monetary forfeitures totaling \$600 for violations of the above-noted sections of the C.F.R. A prehearing conference was conducted in this case; however, the parties failed to reach a settlement agreement during

¹ Inspector Kurtz has been conducting roadside inspections and enforcing federal transportation standards for approximately seven years (Tr. at 7).

the conference. Thereafter, a hearing was held on July 6, 2016, at which Mr. Scherer appeared on his own behalf. No post-hearing briefs were submitted in this proceeding.

III. ISSUE

{¶ 4} The sole issue in this case is whether Staff has proved by a preponderance of the evidence that Mr. Scherer was operating a commercial motor vehicle in commerce and, thus, subject to the Commission's jurisdiction. Mr. Scherer contends that he was exempt from the Commission's rules and regulations at the time of the inspection, as he claims he was simply operating his own personal vehicle and providing transportation to a few passengers from the Amish community without being compensated for his time.

IV. DISCUSSION

A. *Applicable Law*

{¶ 5} Under Ohio Adm.Code 4901:2-5-02(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations (FMCSR), 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. In addition, Rule 4901:2-5-02(B), O.A.C., requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all regulations of the USDOT, which have been adopted by the Commission. 49 C.F.R. 390.5 defines a commercial motor vehicle (CMV), in pertinent part, as follows:

any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle— (1) Has a gross vehicle weight rating or gross combination weight rating or gross vehicle weight or gross combination weight of 4,536 kilograms (10,001 pounds) or more whichever is greater * * *.

{¶ 6} Additionally, a for-hire motor carrier is defined as "a person engaged in the transportation of goods or passengers for compensation." 49 C.F.R. 390.5. However, 49 C.F.R. 390.3 provides rules governing the general applicability of the motor carrier

safety regulations, including exemptions to the rules. Specifically, 49 C.F.R. 390.3(f) provides: "Unless otherwise specifically provided, the rules in this subchapter do not apply to * * * (3) The occasional transportation of personal property by individuals not for compensation nor in the furtherance of a commercial enterprise."

{¶ 7} R.C. 4923.99 authorizes the Commission to assess a civil forfeiture of up to \$25,000 per day, per violation, against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce, in or through this state. Ohio Adm.Code 4901:2-7-20 requires that, at the hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

B. Summary of Evidence Presented at Hearing

1. STAFF TESTIMONY

{¶ 8} Inspector Kurtz testified that on January 29, 2016, she stopped Respondent on U.S. 24 as he appeared to be operating a commercial motor vehicle, noting that the trailer had a ladder and other equipment of the construction trade attached to the outside. Inspector Kurtz stated that she asked Mr. Scherer, the driver of the vehicle, what his destination was, and he responded that he and the other passengers in the truck were heading to a construction site on Central Avenue in Toledo, Ohio (Tr. at 8, 12). Inspector Kurtz testified that Mr. Scherer told her that he had been hired by a Dutch Harness company, located in Indiana, to drive the men and their tools to the job site in Toledo, Ohio. (Tr. at 8-9, 11; Staff Ex. 1.)² According to Inspector Kurtz, one of the passengers corroborated Mr. Scherer's statement by stating that he contacted Mr. Scherer to set up the mode of transportation, but the company would pay Mr. Scherer for his time (Respondent Ex. 1). Inspector Kurtz also stated that, upon her inspection, she determined that Mr. Scherer's vehicle had no markings and no authority to be operating outside of Indiana for for-hire transportation (Tr. at 9). Upon completing the inspection, Inspector Kurtz testified that she elected to escort Mr. Scherer and his passengers to the job site on

² Staff Ex. 1 provides the point of origin for Mr. Scherer and his passengers was Harlan, Indiana.

Central Avenue, rather than leaving them at the location of the inspection, and then placed him out of service. Once being placed out of service at the job site, Inspector Kurtz testified that Mr. Scherer approached her and attempted to provide different answers to her questions than the responses provided during her earlier questioning. (Tr. at 11-12, 17.) Inspector Kurtz also testified that, in addition to the passengers in the truck, the trailer itself was the load, as Mr. Scherer had indicated that the trailer did not belong to him at the time of the inspection (Tr. at 23, 25). In support of Inspector Kurtz's testimony, Staff submitted an inspection report that was completed contemporaneously at the time of the inspection and two photographs taken at the alleged job site (Tr. at 9-13; Staff Ex. 1; Staff Ex. 2; Staff Ex. 3). The photographs that were provided clearly show that the location to which Mr. Scherer led Inspector Kurtz subsequent to the initial stop was a construction site, as evidenced by the various construction machinery in the background and equipment attached to the trailer, mounds of unleveled dirt surrounding the site, and what appears to be a large, newly-paved concrete parking area (Tr. at 17; Staff Ex. 2; Staff Ex. 3).

{¶ 9} Upon questioning from Mr. Scherer, Inspector Kurtz explained that she noted the gross vehicle weight rating (GVWR) of 12,000 pounds on the single axle trailer after questioning one of the vehicle passengers who indicated that was the correct GVWR, adding that she was unable to locate a sticker on the trailer identifying the GVWR. Inspector Kurtz clarified that even if the GVWR noted on the inspection was not completely accurate, it would have no bearing on the outcome of this proceeding as the gross combination weight rating for the truck and trailer clearly would have exceeded 10,000 pounds. (Tr. at 15-16, 23-24.)

{¶ 10} The Staff also presented testimony from Jonathan Frye, the Chief of the Compliance Division of the Transportation Department, regarding the proposed civil forfeiture. Mr. Frye testified that Mr. Scherer was assessed a \$100 forfeiture for the violation of 49 C.F.R. 390.21(b), and a \$500 forfeiture for the violation of 49 C.F.R. 392.9B(a). Additionally, Mr. Frye added that this forfeiture amounts are consistent with forfeitures assessed against other carriers in similar cases. (Tr. at 29-30.)

2. RESPONDENT TESTIMONY

{¶ 11} Upon taking the stand, Mr. Scherer testified that the truck he was driving at the time of the inspection was his own personal vehicle. Mr. Scherer added that, while he did own the trailer for approximately ten years, he sold it to a company which later became L & G Dutch Harness and he was entitled to borrow the trailer whenever he chose to do so. Mr. Scherer added that this company has several other trucks and trailers and would have the ability to transport workers and tools with those vehicles. Mr. Scherer indicated that he was merely providing a favor to his passengers by driving them to Toledo, Ohio in order to purchase some furniture and they had requested the trailer so they would be able to haul the furniture safely in the event of inclement weather. (Tr. at 32-33, 35-36.) Mr. Scherer added that he had business in Detroit, Michigan and that stopping in Toledo, Ohio was not an inconvenience as he would be passing relatively close by on his way to Michigan. Mr. Scherer also noted that the area on Central Avenue was not a job site; rather, this was a finished development where acquaintances of Mr. Scherer's passengers resided. Further, Mr. Scherer denied that any construction tools were located within the trailer, but did note that the ladder and other equipment hanging on the side of the trailer are typically left attached. (Tr. at 33-36, 39-40.) Mr. Scherer also noted that he had just purchased the truck in January of 2016 and had not used it for any non-personal use (Tr. at 34-35). As a final matter, Mr. Scherer testified that as a valid commercial driver with all endorsements working on a part-time basis for Horizon Dedicated Transport, he would not act in such a way as to jeopardize his license and his livelihood (Tr. at 34, 38-39; Staff Ex. 1).

C. Conclusion

{¶ 12} Ohio Adm.Code 4901:2-7-20(A) requires that, at the hearing, Staff prove the occurrence of the violations by a preponderance of the evidence. The Commission finds that, based upon the record in this proceeding, Staff has proven by a preponderance of the evidence that Mr. Scherer was engaged in commerce at the time of the inspection. Despite his testimony provided during the hearing, we do not find that Mr. Scherer was engaged in the occasional transportation of persons or personal property not for compensation nor

in the furtherance of a commercial enterprise, as he alleges, which would have exempted him from regulation under 49 C.F.R. 390.3(f).

{¶ 13} Staff's witness, Inspector Kurtz, an officer who has conducted these types of inspections for over seven years, testified that she observed construction equipment in, and attached to the outside of, the trailer and heard Mr. Scherer himself state that he and his passengers were on their way to a construction site in Toledo, Ohio. Although Inspector Kurtz did not take any photographs of the inside of the trailer, we note the lack of photographs from the inside of the trailer is not dispositive in establishing the fact that Mr. Scherer committed the apparent violations, especially since Inspector Kurtz testified that she observed tools and ladders inside the trailer (Tr. at 22-23; Respondent Ex. 1). The photographs that were provided by Staff during the hearing clearly show that the location to which Mr. Scherer led Inspector Kurtz subsequent to the initial stop was a construction site, as evidenced by the various construction machinery in the background and equipment attached to the trailer, mounds of unleveled dirt surrounding the site, and what appears to be a large, newly-paved concrete parking area (Tr. at 17; Staff Ex. 2; Staff Ex. 3). Furthermore, despite Mr. Scherer stating that an acquaintance of one of the passengers lived in that development, Mr. Scherer provided no evidence of this claim, let alone evidence establishing whether the housing development had been completed prior to the inspection. Even more puzzling is the fact that Mr. Scherer did not indicate how his Amish passengers were going to physically move the trailer from the Central Avenue site to pick up the furniture and drive back to Indiana if he continued on his way to Michigan. In fact, during his testimony, he stated that they "were going to take care of it from there," and noted on the record that he was not going to haul anything back (Tr. at 40).

{¶ 14} Further, Inspector Kurtz's testimony is supported by the inspection report prepared by Inspector Kurtz contemporaneously with the inspection, and corroborated by discovery documents admitted on the record (Staff Ex. 1; Respondent Ex. 1). We find that the testimony by Inspector Kurtz regarding the circumstances of the violation to be persuasive and that the weight of the evidence supports the conclusion that the violations

occurred as alleged by Staff. The Commission, therefore, finds that, upon review of the testimony and the evidence submitted in this case, that Staff has proven by a preponderance of the evidence that the Respondent was in violation of 49 C.F.R. 390.21(b) and 49 C.F.R. 392.9B(a).

V. RESPONDENT'S MOTION TO DISMISS

{¶ 15} On January 5, 2017, Respondent filed a motion to dismiss this case, stating that the hearing was conducted approximately six months ago and that the evidence and testimony presented during the hearing clearly demonstrated that Mr. Scherer was not a for-hire motor carrier and was, instead, operating his personal vehicle, the GVWR was grossly exaggerated on the inspection report, and Inspector Kurtz's notes regarding the inspection were prejudicial to the Amish community (Respondent Ex. 1). No memoranda contra Respondent's motion to dismiss were filed in this proceeding.

{¶ 16} The Commission finds that the motion to dismiss should be denied. Having weighed all of the evidence presented during the evidentiary hearing in this case, the motion to dismiss raises no additional issues that were not thoroughly considered by the Commission for the adjudication of this matter. We find no basis for a dismissal at this stage of the proceeding, nor for the claims of prejudice noted by Respondent in his motion.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 17} On January 29, 2016, an inspector for the Ohio State Highway Patrol stopped and inspected a motor vehicle, operated by Phillip Scherer, in the state of Ohio. The inspector found violations of 49 C.F.R. 392.9b(a) and 49 C.F.R. 390.21(b).

{¶ 18} Staff served a NPD upon Phillip Scherer, in accordance with Ohio Adm.Code 4901:2-7-12, alleging violations of the Commission's transportation regulations.

{¶ 19} On April 7, 2016, Respondent filed a request for an administrative hearing in the above-captioned case in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 20} A prehearing settlement conference was held on May 9, 2016.

{¶ 21} An evidentiary hearing was held on July 6, 2016.

{¶ 22} Ohio Adm.4901:2-7-20 requires that, at hearing, Staff prove the occurrence of the violations by a preponderance of the evidence.

{¶ 23} Based on the record in this proceeding, Staff has proven that Respondent violated 49 C.F.R. 390.21(b) and 49 C.F.R. 392.9b(a).

{¶ 24} Pursuant to R.C. 4905.83, Respondent must pay the state of Ohio the civil forfeiture assessed for violations of 49 C.F.R. 390.21(b) and 49 C.F.R. 392.9B(a). Mr. Scherer shall have 60 days from the date of this Entry to pay the assessed civil forfeiture of \$600.

{¶ 25} 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, Fiscal Department, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793.

{¶ 26} As the Commission has thoroughly considered the evidence presented in this proceeding, Respondent's motion to dismiss should be denied.

VII. ORDER

{¶ 27} It is, therefore,

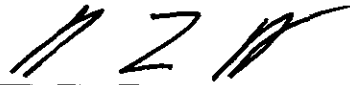
{¶ 28} ORDERED, That Respondent's motion to dismiss be denied. It is, further,

{¶ 29} ORDERED, That Mr. Scherer pay the assessed amount of \$600 for violation of 49 C.F.R. 390.21(b) and 49 C.F.R. 392.9B(a) as set forth in Paragraph 22. Payment should be made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Fiscal Department, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. To ensure proper credit, Mr. Scherer should write the inspection number (OH3258008269C) on the face of the check or money order. It is, further,

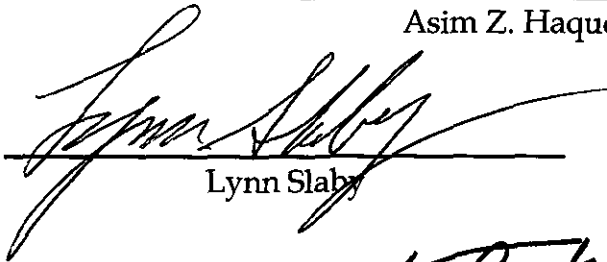
{¶ 30} ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this Opinion and Order. It is, further,

{¶ 31} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



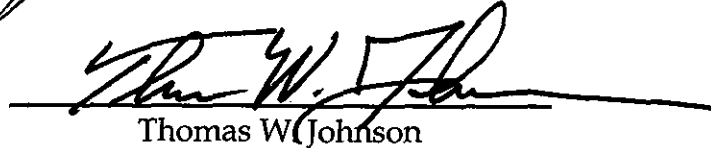
Asim Z. Haque, Chairman



Lynn Slaby



M. Beth Trombold

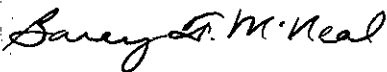


Thomas W. Johnson

MJA/sc

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FEB 23 2017



Barcy F. McNeal
Secretary