

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF REX FROEDGE,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE NO. 16-869-TR-CVF
(OH1651010034C)
(OH1651010034D)

OPINION AND ORDER

Entered in the Journal on March 8, 2017

I. SUMMARY

{¶ 1} The Commission finds that Staff has proven, by a preponderance of evidence, that Rex Froedge violated 49 C.F.R. 392.9(a) (insecure load -- loose parts on CMV being towed), 49 C.F.R. 393.9(a) (inoperable front and rear turn signals), 49 C.F.R. 393.95(a) (unsecured fire extinguisher), 49 C.F.R. 385.337(b) (operating CMV after failing a carrier safety audit), 49 C.F.R. 392.2UCR (failure to pay Unified Carrier Registration fee) and 49 C.F.R. 395.8(k)(2) (failure to retain prior seven days' record of duty status), and finds that Mr. Froedge should be assessed a \$3,400 forfeiture.

II. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} Following a February 4, 2016 inspection of a commercial motor vehicle (CMV) owned and driven by Rex Froedge, Staff timely served him with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-02. Mr. Froedge was cited in the NPD for the following motor carrier violations: 49 C.F.R. 392.9(a) (insecure load -- loose parts on CMV being towed), \$0; 49 C.F.R. 393.9(a) (inoperable front and rear turn signals), \$50; 49 C.F.R. 393.95(a) (unsecured fire extinguisher), \$0; 49 C.F.R. 385.337(b) (operating CMV after failing a carrier safety audit), \$2,750; 49 C.F.R. 392.2UCR (failure to pay Unified Carrier Registration (UCR) fee), \$500. The NPD also notified Mr. Froedge that Staff intended to assess a \$3,300 civil monetary forfeiture for violating the motor carrier rules. In a separate NPD, Mr. Froedge was cited for the following driver violation: 49 C.F.R. 395.8(k)(2) (failure to retain prior seven days' record of duty status), \$100.

{¶ 3} On April 22, 2016, Mr. Froedge filed a request for hearing concerning the motor carrier and driver violations. A prehearing conference was convened on May 16, 2016, and a hearing was held on September 15, 2016. Trooper Brian Hann of the Ohio State Highway Patrol, and Tom Persinger of the Commission's Transportation Department/Compliance Division, testified on behalf of Staff. Mr. Froedge testified on his own behalf. No briefs were filed by either party.

III. DISCUSSION

A. *Applicable Law*

{¶ 4} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Rules (FMCSR), specifically, 49 C.F.R. Sections 40, 42, 383, 387, and 390-397, to govern the transportation of persons or property within Ohio. Ohio Adm.Code 4901:2-5-03(B) and (C) require all motor carriers engaged in intrastate and interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Ohio Adm.Code 4901:2-7-20(A) requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

B. *Issue*

{¶ 5} Mr. Froedge, a dealer of scrap parts from CMVs, asserts that he is exempt from the FMCSR because his CMV is registered in Indiana for dealer sequential transport license plates. Mr. Froedge also asserts that he is exempt from the FMCSR because he is a private, not-for-hire carrier. Staff contends that Mr. Froedge's operation of a CMV in interstate commerce makes him subject to the FMCSR and the violations indicated in Paragraph 2.

C. *Summary of the Evidence Presented at the Hearing*

{¶ 6} According to Trooper Hann, Mr. Froedge stated that his business consists of buying CMVs for scrap and selling the parts (Tr. at 32). Trooper Hann explained that he stopped Mr. Froedge after receiving reports of a towed CMV with loose parts that could fall off (Tr. at 9-10). During the Level II walk-around inspection, Trooper Hann found that an exhaust pipe on the towed CMV was barely secured and was "sitting there flopping," in

violation of 49 C.F.R. 392.9(a) (Tr. at 10, 14-15; Staff Ex. 2, p. 6). In addition, on the CMV that Mr. Froedge was driving, the left rear turn signal and left front turn signal were both inoperable, in violation of 49 C.F.R. 393.9(a), and the fire extinguisher was not secured, in violation of 49 C.F.R. 393.95(a) (Tr. at 18-20). Trooper Hann added that any for-hire or private carrier operating in interstate commerce must have a U.S. Department of Transportation (USDOT) number (Tr. at 68-69). By using Mr. Froedge's USDOT number to check a federal database, Trooper Hann determined that Mr. Froedge had violated 49 C.F.R. 385.337(b) by operating a CMV in interstate commerce after failing a carrier safety audit at his place of business, and also had violated 49 C.F.R. 392.2UCR (failure to pay UCR fee) (Tr. at 12-14, 16-17). Finally, by examining Mr. Froedge's record of duty status, Trooper Hann concluded that the record was not current for the prior seven days (Tr. at 17-18; Staff Ex. 2, pgs. 1 and 2).

{¶ 7} Tom Persinger testified that the forfeitures for the violations are appropriate and consistent with the fine schedule that Staff maintains (Tr. at 23-24). He noted that Mr. Froedge received all the notices that are required to be provided under Commission rules (Tr. at 29). Mr. Persinger explained that when for-hire and private carriers initially obtain a USDOT number, they are entered into the FMCSR New Entrant Program and must undergo a safety audit (Tr. at 29-30). According to Mr. Persinger, dealer transport license plates do not exempt a carrier from the FMCSR; rather, because Mr. Froedge was engaged in interstate commerce, he is subject to the FMCSR. Mr. Persinger added that, by towing a CMV, Mr. Froedge was transporting class 9 hazardous material, which requires \$1,000,000 insurance coverage, as specified in 49 C.F.R. 387.303. (Tr. at 63-64.)¹ Mr. Persinger stated that paying the UCR fee is required for all for-hire and private CMVs operating in interstate commerce (Tr. at 65-66).

{¶ 8} Mr. Froedge conceded that he was operating in interstate commerce as a dealer of parts from damaged CMVs, and that some parts of the CMV that he was towing from Ohio to Indiana were not properly secured (Tr. at 49, 51-52, 55). Mr. Froedge disagrees with the

¹ The hazardous materials table in 49 C.F.R. 172.101 indicates that an internal combustion engine, when fitted in a vehicle, is a class 9 hazardous material.

USDOT auditor who determined, during a carrier safety audit, that Mr. Froedge needed \$1,000,000 insurance coverage, instead of the \$750,000 coverage that he was carrying, because he failed to drain oil from the engine of the towed CMV (Tr. at 34-37, 50, 55, 58-59). He agreed that the front and rear turn signals on the CMV he was driving were inoperable and that the fire extinguisher was not secure (Tr. at 52-53). Mr. Froedge asserted that he does not have to pay the UCR fee; he did not clearly state whether he agreed that the record of duty status was not current (Tr. at 52).

{¶ 9} While admitting to some of Trooper Hann's findings, Mr. Froedge contends that he was exempt from the FMCSR, because he was not operating for-hire, and also because he was driving a CMV registered for dealer transport license plates (Tr. at 38-41, 43-44, 46-47, 50, 52, 57-58). Mr. Froedge noted that, during the inspection, he was carrying his Indiana CMV registration indicating dealer transport license plates; further, he added, dealer transport license plates were displayed in the window of the CMV that he was driving (Tr. at 38-39, 59-60). Mr. Froedge submitted, as Froedge Ex. 1, his Indiana certificate of vehicle registration, which indicates registration for "dealer sequential transport" license plates. (Tr. at 40, 47-49.) Mr. Froedge explained that he had obtained a USDOT number only because he might "pull semi-trailers or something," and also because inspectors at weigh stations insisted that he needed a USDOT number (41, 45-46).

D. Commission Conclusion and Order

{¶ 10} Ohio Adm.Code 4901:2-7-20 requires, at hearing, that Staff prove the occurrence of a violation by a preponderance of the evidence. The Commission finds, based on a preponderance of the evidence, that Staff has proven that Mr. Froedge violated the FMCSR.

{¶ 11} The evidence presented by Staff relies on Trooper Hann's testimony and the driver/vehicle examination report that he prepared. During a Level II walk-around inspection, Trooper Hann checked the condition of the CMV, as well as fire safety measures taken by the driver, load securement, driver's record of duty status, CMV registration, and operating authority of the carrier. The evidence shows that the exhaust pipe on the towed

CMV was not properly secured, in violation of 49 C.F.R. 392.9(a); the left rear turn signal and left front turn signal were both inoperable on the CMV that Mr. Froedge was driving, in violation of 49 C.F.R. 393.9(a); and the fire extinguisher was not secured, in violation of 49 C.F.R. 393.95(a) (Tr. at 10, 14-15, 18-20; Staff Ex. 2, p.6). In addition, by using Mr. Froedge's USDOT number to check a federal database, Trooper Hann determined that Mr. Froedge violated 49 C.F.R. 385.337(b) by operating a CMV in interstate commerce after failing a carrier safety audit, and violated 49 C.F.R. 392.2UCR (failure to pay UCR fee) (Tr. at 12-14), 16-17). Finally, by examining Mr. Froedge's record of duty status, Trooper Hann concluded that the record was not current for the prior seven days, in violation of 49 C.F.R. 395.8(k)(2) (Tr. at 17-18; Staff Ex. 2, pgs. 1 and 2). Indeed, we note that Mr. Froedge agreed that he was transporting an insecure load, the front and rear turn signals on the CMV he was driving were inoperable, and the fire extinguisher was not properly secured (Tr. at 51-55).

{¶ 12} We next address Mr. Froedge's assertions that he was exempt from the FMCSR because his CMV registration for dealer sequential transport license plates provides such an exemption. We initially observe that, although 49 C.F.R. 390.3(f) specifies exemptions to the FMCSR, there is no exemption for CMVs registered for dealer sequential transport license plates. We also note that, pursuant to 49 C.F.R. 390.3(a), the FMCSR "are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce," while 49 C.F.R. 390.5 defines a CMV as "any motor vehicle used on a highway in interstate commerce to transport * * * property when the vehicle (1) has a gross vehicle weight rating * * * of 4,536 kg (10,000 pounds) or more * * *." Mr. Froedge testified that he was towing a CMV from Ohio to Indiana that he had purchased for his scrap parts business; therefore, he was transporting property in interstate commerce. In addition, Staff Ex. 1 indicates that he was driving a CMV with a gross vehicle weight rating of 52,000 lbs., well beyond the 10,000 lbs. minimum specified for CMVs. (Tr. at 38-39, 40-41, 55-56; Staff Ex. 1.)

{¶ 13} We also examine Mr. Froedge's contention that his operation as a private, not-for-hire carrier exempts him from the FMCSR (Tr. at 43-44, 52, 67). First, we note that

49 C.F.R. 390.19(a) requires "each motor carrier" to file Form MCS-150, under which a USDOT number is issued; 49 C.F.R. 390.5 defines a motor carrier to include "a for-hire carrier or a private motor carrier." Second, 49 U.S.C. 31134 states that a "person may operate a commercial motor vehicle in interstate commerce only if the * * * person is registered by the Secretary [of Transportation] and receives a USDOT number." Finally, as discussed above in Paragraph 12, 49 C.F.R. 390.3(a) states that the FMCSR apply to all CMVs transporting property in interstate commerce. Thus, Mr. Froedge's driving from Indiana to Ohio as a private carrier, while operating a CMV, makes him subject to the FMCSR; there is no exemption.

{¶ 14} In sum, after consideration of Staff's testimony and exhibits, we conclude that Staff has proven, by a preponderance of the evidence, that Mr. Froedge violated 49 C.F.R. 392.9(a), 49 C.F.R. 393.9(a), 49 C.F.R. 393.95(a), 49 C.F.R. 385.337(b), 49 C.F.R. 392.2UCR, and 49 C.F.R. 395.8(k)(2). Accordingly, the Commission finds that Mr. Froedge should be assessed the \$3,300 civil monetary forfeiture for violating FMCSR motor carrier rules and the \$100 civil forfeiture for violating FMCSR driver rules.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 15} On February 4, 2016, Trooper Brian Hann stopped and inspected a CMV owned and driven by Rex Froedge, and found the following motor carrier and driver violations: 49 C.F.R. 392.9(a) (insecure load -- loose parts on CMV being towed), 49 C.F.R. 393.9(a) (inoperable front and rear turn signals), 49 C.F.R. 393.95(a) (unsecured fire extinguisher), 49 C.F.R. 385.337(b) (operating CMV after failing a carrier safety audit), 49 C.F.R. 392.2UCR (failure to pay UCR fee), and 49 C.F.R. 395.8(k)(2) (failure to retain prior seven days' record of duty status).

{¶ 16} Mr. Froedge was timely served with an NPD concerning the FMCSR motor carrier rules, alleging violations of 49 C.F.R. 392.9(a), 49 C.F.R. 393.9(a), 49 C.F.R. 393.95(a), 49 C.F.R. 385.337(b), 49 C.F.R. 392.2UCR, and indicating that Staff intended to assess a civil monetary forfeiture of \$3,300. In a separate NPD concerning FMCSR driver requirements,

Mr. Froedge was timely served with an NPD alleging a violation of 49 C.F.R. 395.8(k)(2), and indicating that Staff intended to assess a civil monetary forfeiture of \$100.

{¶ 17} A prehearing conference was conducted on May 16, 2016, and a hearing was held on September 15, 2016.

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

{¶ 19} Staff has proven, by a preponderance of the evidence, pursuant to Ohio Adm.Code 4901:2-7-20, that Mr. Froedge violated 49 C.F.R. 392.9(a) (loose parts on CMV being towed), 49 C.F.R. 393.9(a) (inoperable front and rear turn signals), 49 C.F.R. 393.95(a) (unsecured fire extinguisher), 49 C.F.R. 385.337(b) (operating CMV after failing a carrier safety audit), 49 C.F.R. 392.2UCR (failure to pay UCR fee), and 49 C.F.R. 395.8(k)(2) (failure to retain prior seven days' record of duty status).

{¶ 20} Rex Froedge should be assessed a total forfeiture of \$3,400 for the motor carrier violations and the driver violation.

V. ORDER

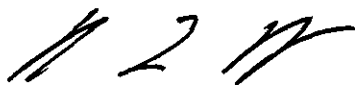
{¶ 21} It is, therefore,

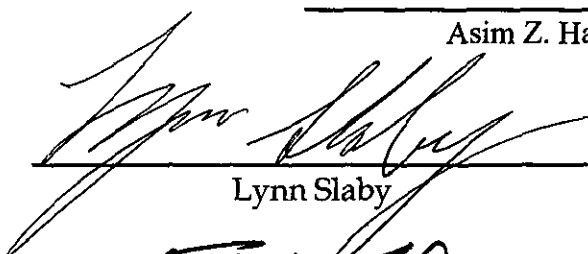
{¶ 22} ORDERED, That within 60 days of this Opinion and Order, Rex Froedge must pay a total of \$3,400 for the alleged violation of 49 C.F.R. 392.9(a), 49 C.F.R. 393.9(a), 49 C.F.R. 393.95(a), 49 C.F.R. 385.337(b), 49 C.F.R. 392.2UCR and 49 C.F.R. 395.8(k)(2). It is, further,

{¶ 23} ORDERED, That Payment shall be made by check or money order payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case Number 16-869-TR-CVF and inspection numbers OH1651010034C and OH1651010034D should be written on the face of the \$3,400 check or money order. It is, further,

{¶ 24} 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

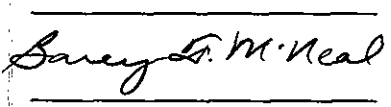

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Barcy F. McNeal
Secretary