

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF SHAWN KIBLER,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.**

**CASE No. 17-1602-TR-CVF
(OH3235003734D)**

OPINION AND ORDER

Entered in the Journal on June 20, 2018

I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated, by a preponderance of the evidence, that Shawn Kibler violated Commission transportation rules by operating a vehicle after it had been placed out of service.

II. PROCEDURAL HISTORY

{¶ 2} On August 17, 2016, Motor Carrier Vehicle Inspectors Steven Morgan and Mark Irmscher of the Ohio State Highway Patrol (OSHP) stopped and inspected a commercial motor vehicle (CMV) operated by Collateral Investigations and Recovery Group Inc. (Collateral Recovery) and driven by Shawn Kibler (Respondent). At the time of the inspection, Inspector Morgan prepared a report that identified violations of the Federal Motor Carrier Safety Regulations (FMCSR), specifically, 49 C.F.R. 393.9(a), inoperable left and right turn signals, as well as inoperable left and right brake lights, on a vehicle that Mr. Kibler was towing. The CMV was placed out of service. Later that same day, Respondent was observed operating the CMV by Inspector Irmscher with the out-of-service conditions still present on the towed vehicle. Respondent was inspected a second time, and a report was prepared indicating a violation of Ohio Adm.Code 4901:2-5-07(D), for operating a CMV after it had been placed out of service. On June 13, 2017, Mr. Kibler was timely served with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-12. In the NPD, Respondent was notified that Staff intended to assess a civil forfeiture of \$2,500 for violating Ohio Adm.Code 4901:2-5-07(D), which prohibits operating an out of service CMV. On July 14, 2017, Mr. Kibler

filed a request for hearing. A prehearing conference was conducted on September 7, 2017, and a hearing was conducted on October 31, 2017. At the hearing, Staff witnesses included Inspectors Morgan and Irmscher. In addition, Rod Moser, Chief of the Transportation Department's Compliance Division, testified on behalf of Staff concerning how the amount of the forfeiture was determined. Mr. Kibler testified on his own behalf.

III. LAW

{¶ 3} Under Ohio Adm.Code 4901:2-5-02(A), the Commission adopted certain provisions of the FMCSR, specifically, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-02(C) requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Further, 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.

{¶ 4} Ohio Adm.Code 4901:2-5-07(D) states that "no person shall operate * * * a motor vehicle that has been declared out of service * * *."

IV. ISSUE

{¶ 5} The issue in this case is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent violated Ohio Adm.Code 4901:2-5-07(D) by operating a CMV that had been placed out of service.

V. SUMMARY OF THE EVIDENCE

{¶ 6} Inspector Morgan was trained through the North American Standard program for CMV inspections (Tr. at 7). He explained that he and Inspector Irmscher stopped Mr. Kibler for inspection in Columbus on State Route 104, as Mr. Kibler approached a stop sign at Frank Road. Inspector Morgan stated that Mr. Kibler was driving a "wrecker" that was towing a vehicle; the towed vehicle did not have operable brake lights and turn signals, resulting in an out-of-service condition (Tr. at 9-10, 13-14, 17).¹ Inspector Morgan stated that turn signals and brake lights on the wrecker must work in conjunction with brake lights and turn signals on the towed vehicle. To do so, the turn signals and brake lights on the wrecker and on the towed vehicle must be hard wired together, or alternatively, a light bar must be attached to the towed vehicle (Tr. at 17-18). Inspector Morgan asserts that he explained to Mr. Kibler that the inoperable brake lights and turn signals must be repaired for the out-of-service condition to no longer apply (Tr. at 14). In Inspector Morgan's opinion, there was no need to move the towed vehicle from the inspection site, because "we do inspections * * * [at that location] periodically and * * * we thought it was a safe place to stop" (Tr. at 16). Nearly two hours after the inspection was complete, Inspector Morgan was notified by Inspector Irmscher that Mr. Kibler had driven to another location with the out of service brake lights and turn signals still inoperable (Tr. at 14-15, 18).

{¶ 7} Inspector Irmscher also was trained through the North American Standard program for CMV inspections (Tr. at 20). He testified that he and Inspector Morgan were at roadside in the same vehicle when Mr. Kibler was initially stopped for inspection (Tr. at 21). According to Inspector Irmscher, a removable light bar should have been attached to the towed vehicle by magnets or by a bungee strap. He explained that a transmitter is

¹ Inspector Morgan explained that a "wrecker" lifts up the wheels on one end of an out of service vehicle and tows the vehicle on wheels at its opposite end (Tr. at 16). A "wrecker" differs from a "roll back," which is longer straight truck with a flatbed that can be raised at an angle, allowing the out of service vehicle to be pulled onto the flatbed and transported in its entirety on the straight truck (Tr. at 39-40).

attached to the rear of the wrecker and a signal is transmitted via an antenna to the light bar, so that turn signals and brake lights on the light bar work simultaneously with turn signals and brake lights on the wrecker. (Tr. at 22-24, 43). Inspector Irmischer added that a light bar enables drivers following the towed vehicle to know when the wrecker and towed vehicle are stopping or turning (Tr. at 23).

{¶ 8} After the inspection of Mr. Kibler, Inspector Irmischer proceeded without Inspector Morgan and stopped a second wrecker for not having operable brake lights and turn signals on a towed vehicle. As Inspector Irmischer was stopping the second wrecker, he observed that Mr. Kibler had moved his wrecker and towed vehicle, and was pulling over nearby; the brake lights and turn signals on the towed vehicle were still inoperable. Inspector Irmischer then contacted Inspector Morgan, who arrived and prepared a second report that indicated a violation of Ohio Adm.Code 4901:2-5-07(D), operating a CMV after it had been placed out of service (Tr. at 26-27).

{¶ 9} Staff witness Mr. Moser testified that the monetary amount assessed for the violation was determined by using a civil forfeiture assessment worksheet and a civil forfeiture violations chart. Mr. Moser added that the amount is consistent with the guidelines issued by the Commercial Vehicle Safety Alliance and concluded that the forfeiture was calculated correctly. (Tr. at 32-34; Staff Ex. 3.)

{¶ 10} Mr. Kibler explained that a light bar was in his possession when he was initially inspected, but he had activated the flashing hazard lights on the towed vehicle, assuming that was sufficient. Upon being informed by Inspector Morgan that the hazard lights were not sufficient to comply with requirements, he attempted to use the light bar, but the transmitter did not work properly and could not send signals to the light bar from the wrecker. (Tr. at 35, 38-39.) Mr. Kibler then contacted his employer, who told him to drive to a towing supply company that could install and calibrate a new transmitter with a new light bar (Tr. at 35-37). It had been raining all day, Mr. Kibler asserted, and he was concerned that if he detached the towed vehicle and drove to the towing supply

company, the towed vehicle might sink further into the wet ground. If that happened, he contended, he might not be able to reattach the disabled vehicle to the wrecker after returning with the new transmitter and new light bar (Tr. at 36-37, 40-41.) After consulting with his employer, it was decided that he would move the towed vehicle "150, 200 feet down the road" to an unused driveway, so that it would be resting on "a flat, hard asphalt surface" until he returned from the towing supply company (Tr. at 36-37). Mr. Kibler stated that he had towed the disabled vehicle to the unused driveway and was detaching it while Trooper Irmscher was nearby stopping the other wrecker that also had no light bar (Tr. at 41).

VI. COMMISSION CONCLUSION

{¶ 11} Ohio Adm.Code 4901:2-7-20 requires, at hearing, that Staff prove the occurrence of a violation by a preponderance of the evidence. In addition, OhioAdm.Code 4901:2-7-21 states that: "If justified by the evidence in any hearing, the commission may order payment of a forfeiture greater than, less than, or equal to the forfeiture requested in the notice of intent to assess forfeiture or the notice of preliminary determination. The commission is not restricted in the making of any compliance order by the order proposed in the notice of intent to make compliance order or the notice of preliminary determination, if another order is justified by the evidence."

{¶ 12} The record reflects Inspector Irmscher's contention that Mr. Kibler had driven after the initial inspection without having operable brake lights and turn signals on the towed vehicle (Tr. at 26-27). Mr. Kibler did not disagree with this assertion made by Inspector Irmscher (Tr. at 36-37, 41). We find, therefore, that Staff has proven the occurrence of an Ohio Adm.Code 4901:2-5-07(D) violation by a preponderance of the evidence. However, while Mr. Kibler admitted to driving with the out-of-service violations still present, the Commission finds that it is appropriate to consider Ohio Adm.Code 4901:2-7-21 in light of the evidence and reduce the forfeiture. First, regarding the circumstances and the gravity of the violation, we take into account Mr. Kibler's

concern that it had been raining all day, and that the soil at the initial inspection site might be too wet to detach the towed vehicle, as it could sink into the ground and be difficult to reattach to the wrecker for later removal (Tr. at 36-37, 40-41). We note that Inspector Morgan had asserted that there was no need to move the towed vehicle from the initial inspection site because it was “a safe place to stop” (Tr. at 16). Mr. Kibler never disagreed that the initial inspection site was safe; rather, his concern focused on moving to a nearby location for detaching the towed vehicle, so that it could rest on a firm surface and be more easily reattached for towing later. Staff did not refute Mr. Kibler’s reasons for moving the towed vehicle to the unused, paved driveway. (Tr. at 36-37, 41). We note that the forfeiture typically recommended for operating a vehicle designated out-of-service is substantial because it involves a driver deliberately contradicting directives and putting an unsafe vehicle on the roadways. Here, however, the Commission finds mitigating circumstances exist to warrant reducing the recommended fine. Of note, Mr. Kibler only moved his vehicle approximately 150-200 feet and was not on the roadway when cited by Inspector Morgan (Tr. at 15, 37). Further, we find Mr. Kibler’s testimony credible that he only moved his vehicle to a location within sight where he could safely leave the detached towed vehicle and correct the initial violation (Tr. at 40). Additionally, Staff did not offer evidence or testimony indicating that Mr. Kibler was involved in any prior violations. In sum, while Mr. Kibler admitted to driving with the out-of-service conditions still present, and thus was in violation of Ohio Adm.Code 4901:2-5-07(D), we find that it is appropriate based on the circumstances of this case to reduce the forfeiture. We, therefore, conclude that Mr. Kibler should be assessed \$100 for violating Ohio Adm.Code 4901:2-5-07(D), operating a CMV after it had been placed out of service. The citation for violating Ohio Adm.Code 4901:2-5-07(D) should remain in Mr. Kibler’s history of violations in the Commission’s records.

{¶ 13} Accordingly, the Commission finds Respondent should be assessed a \$100 forfeiture for violating Ohio Adm.Code 4901:2-5-07(D). Mr. Kibler is directed to make payment of the \$100 civil forfeiture within 60 days of this Opinion and Order by

certified 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. Inspection number OH3235003734D and Case Number 17-1602-TR-CVF should be written on the face of the certified check or money order to ensure proper credit.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 14} On August 7, 2016, Inspector Steven Morgan conducted a second inspection of a CMV driven by Shawn Kibler. Mr. Kibler was alleged to be in violation of Ohio Adm.Code 4901:2-5-07(D), for operating a CMV after it had been placed out of service.

{¶ 15} Respondent was timely served with an NPD, alleging a violation of Ohio Adm.Code 4901:2-5-07(D). In the NPD, Respondent was notified that Staff intended to assess a civil monetary forfeiture of \$2,500.

{¶ 16} A prehearing conference was convened on September 7, 2017, and a hearing was conducted on October 31, 2017.

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

{¶ 18} Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Mr. Kibler violated Ohio Adm.Code 4901:2-5-07(D), for operating a CMV after it had been placed out of service. In addition, when considering the circumstances and gravity of the violation, as well as no prior violations by Respondent, we find it appropriate pursuant to Ohio Adm.Code 4901:2-7-21 to reduce the \$2,500 forfeiture to \$100. Accordingly, Mr. Kibler should be assessed a \$100 forfeiture, and should pay the forfeiture within 60 days from the date of this Opinion and Order.

VIII. ORDER

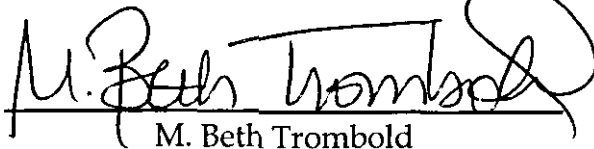
{¶ 19} It is, therefore,

{¶ 20} ORDERED, That Shawn Kibler pay a civil forfeiture of \$100 for violating Ohio Adm.Code 4901:2-5-07(D) within 60 days of this Opinion and Order. 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 17-1602-TR-CVF and inspection number OH3235003734D should be written on the face of the check or money order. It is, further,

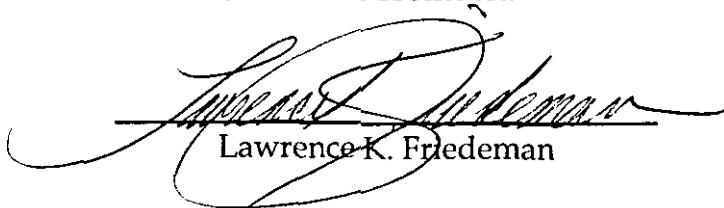
{¶ 21} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

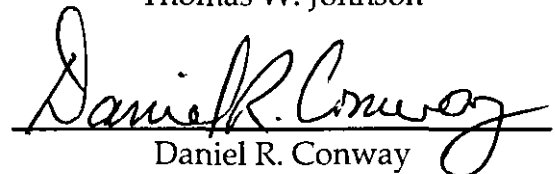
THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman


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Secretary