

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE VASYL BIGUN,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE NO. 18-558-TR-CVF
(OH3260013260D)

OPINION AND ORDER

Entered in the Journal on December 12, 2018

I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated, by a preponderance of the evidence, that Respondent violated the Commission's transportation rules.

II. PROCEDURAL HISTORY

{¶ 2} Staff served notices of preliminary determination (NPD) upon Vasyl Bigun (Respondent) in accordance with Ohio Adm.Code 4901:2-7-07, alleging a violation of the Commission's transportation regulations.

{¶ 3} On April 2, 2018, Respondent requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 4} On May 15, 2018, the attorney examiner scheduled a prehearing conference on June 26, 2018, pursuant to Ohio Adm.Code 4901:2-7-16(B). During the prehearing conference, the parties were unable to resolve the matter.

{¶ 5} By Entry dated July 18, 2018, the attorney examiner scheduled a hearing in this matter. Additionally, upon Respondent's request, the Commission arranged for a Ukrainian interpreter to interpret for Respondent during the hearing.

{¶ 6} A hearing in this matter was held on August 27, 2018. At the hearing, Staff witnesses Thomas Persinger and Matthew Leite testified in support of the violation and forfeiture amount. Respondent appeared pro se and submitted testimony on his own behalf.

III. LAW

{¶ 7} R.C. 4923.04 provides that the Commission shall adopt rules applicable to the transportation of persons or property by motor carriers operating in interstate and intrastate commerce. Pursuant to Ohio Adm.Code 4901:2-5-03(A), the Commission adopted the Federal Motor Carrier Safety Regulations, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, for the purpose of governing transportation by motor vehicle in the state of Ohio. 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. 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.

{¶ 8} 49 C.F.R. 390.17 provides that “nothing in this subchapter shall be construed to prohibit the use of additional equipment and accessories * * * provided such equipment and accessories do not decrease the safety of operation of the commercial motor vehicles on which they are used.”

IV. ISSUE

{¶ 9} The issue in this case is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent was using additional equipment, namely a cellphone, in a manner that decreased the safety of the operation of the commercial motor vehicle (CMV) driven by Respondent in violation of 49 C.F.R. 390.17.

V. SUMMARY OF EVIDENCE

{¶ 10} At the hearing on August 27, 2018, Staff presented the testimony of Tom Persinger, who testified regarding the fine that was assessed to Respondent. Mr. Persinger testified that his primary responsibility is receiving inspection reports, reviewing them, and determining fines resulting from violations noted on the inspection reports. Mr. Persinger identified Staff Exhibits 2 and 3 as notices of preliminary determination. Mr. Persinger stated that each of these notices list a violation of 40 C.F.R.390.17, which is operating a CMV

while using additional equipment which decreases the safety of operation. Based upon guidance provided by the Commercial Motor Vehicle Safety Alliance and a uniform fine structure, Mr. Persinger recommended a forfeiture of \$250. Finally, Mr. Persinger clarified that though Staff sent two notices of preliminary determination to Respondent due to confusion over his home address, Staff is only recommending one forfeiture in this case. (Tr. at 6-14.)

{¶ 11} Next, Staff presented the testimony of Matthew Leite, a motor carrier enforcement inspector with the Ohio State Highway Patrol. Inspector Leite identified Staff Exhibit 1 as the driver/vehicle examination report, which was generated after he conducted an inspection of Respondent's vehicle on January 19, 2018, around 1:01 p.m. Inspector Leite testified that he was located at the top of the eastbound entrance ramp from State Route 260 south on to Route 2. He indicated that he was selectively pulling over CMVs for inspection and activated his lights to pull over and inspect Respondent's vehicle. However, Respondent failed to pull over his vehicle. Inspector Leite testified that he observed Respondent drive the vehicle off the right side of the road and the right side tires went past the white fog line at least three separate times. (Tr. at 22-24.)

{¶ 12} Inspector Leite testified that he pulled his vehicle up beside the cab of Respondent's vehicle and observed Respondent holding a cell phone in his right hand, looking down at it, and moving his thumb over the screen. Inspector Leite testified that after Respondent finally looked up from the cell phone, he motioned to Respondent to pull over. According to Inspector Leite, when Respondent pulled over to the berm for the US 6 westbound exit ramp, Respondent was a mile and half beyond where Inspector Leite had initially activated his lights. (Tr. at 24-25.)

{¶ 13} Inspector Leite testified that upon asking whether Respondent was texting, Respondent indicated that he was using his cell phone to look up directions to a truck stop. Inspector Leite then informed Respondent that he should have pulled over to the side of the road to safely use his cell phone to make a call, text, or look up directions. He also informed

Respondent that driving for one and a half miles and driving outside a marked lane repeated times created an unsafe situation. (Tr. at 25.)

{¶ 14} Finally, Inspector Leite testified that he charged Respondent with a violation of 49 C.F.R. 390.17 because he observed Respondent create an unsafe driving situation by using an electronic device while operating a CMV on an Ohio highway. Inspector Leite specified that this is because he observed Respondent looking down at his phone for at least three to five seconds, during which time he crossed over the far most right lane marker at least three separate times. (Tr. at 31-33.)

{¶ 15} Mr. Bigun testified that prior to using his cell phone, he looked ahead and checked his side view mirrors to ensure that he was safely operating his CMV on the highway. Mr. Bigun also noted that he looked at his cell phone for a few seconds to find the closest truck stop to his location, which he considered to be work-related. Mr. Bigun testified that he was not texting and driving. Mr. Bigun produced his cell phone bill from T-Mobile to prove that on the day of the inspection, January 19, 2018, he did not receive or send any text messages. (Tr. at 37-40; Respondent's Ex. 1.)

{¶ 16} On cross-examination by Staff, Mr. Bigun admitted that he was not charged with a violation under 40 C.F.R. 390.17 because he was texting while driving, or receiving a phone call while driving. He also admitted that he was using his cell phone to look up directions instead of utilizing a GPS device because his cellphone was more accurate in locating different routes to avoid accidents and truck stops. (Tr. at 40-46.)

VI. COMMISSION CONCLUSION

{¶ 17} Ohio Adm.Code 4901:2-7-20 requires that Staff, at a hearing, prove the occurrence of a violation by a preponderance of the evidence. 49 C.F.R. 390.17 provides that additional equipment and accessories are not prohibited in a CMV, provided such equipment and accessories do not decrease the safety of operation of a CMV in which they

are used. The Commission finds, based on a preponderance of the evidence, that Staff proved that Respondent violated 49 C.F.R. 390.17.

{¶ 18} Initially, the Commission admits Respondent's Exhibit 1, which is his cell phone bill from T-Mobile. During the hearing, Staff objected to the admission of this exhibit due to authentication and relevance issues. (Tr. at 46-48.) The Commission denies Staff's objections regarding the admission of this exhibit and admits it for the limited purpose of establishing that Respondent did not receive or send any text messages on January 19, 2018, the day of the inspection.

{¶ 19} Next, the Commission notes that Respondent did not refute Inspector Leite's testimony that Respondent looked away from the road for at least three to five seconds while utilizing his cell phone as a GPS device to locate the closest truck stop. Furthermore, during cross-examination, Respondent admitted that he utilized his cell phone as a GPS device while operating a CMV. Additionally, both parties are in agreement that Respondent was charged with a violation of 40 C.F.R. 390.17 because he was using his cell phone as a GPS and not because he was texting while driving. (Tr. at 31-33; 45-46.)

{¶ 20} Considering the evidence, the Commission finds that Respondent was using his cell phone as an additional piece of equipment or accessory under 40 C.F.R. 390.17 in an unsafe manner while operating a CMV. While utilizing his cell phone as a GPS device, Respondent looked away from the road for at least three to five seconds. This caused him to swerve over the white lane marker on the right-most lane of Route 2. (Tr. at 31-33.) Consequently, the manner in which Respondent utilized his cell phone as an accessory created an unsafe driving situation as he operated his CMV.

{¶ 21} Based on this finding, Respondent should be assessed a \$250 forfeiture for a violation of 49 C.F.R. 390.17 and he should pay the forfeiture within 60 days from the date of this Opinion and Order. Payment shall be made by check or money order payable to the "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of

Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 18-558-TR-CVF and inspection number OH3260013260D should be written on the face of the check or money order.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 22} On January 19, 2018, an inspector for the Ohio State Highway Patrol stopped and inspected a CMV driven by Vasyl Bigun in the State of Ohio. The Highway Patrol found the driver to be in violation of 49 C.F.R. 390.17, for operating a CMV while using an accessory that decreased the safety of operation.

{¶ 23} Respondent was timely served with an NPD, alleging a violation of 49 CFR 390.17, for operating a CMV while using an accessory that decreased the safety of operation. In the NPD, Respondent was notified that Staff intended to assess a civil monetary forfeiture of \$250.

{¶ 24} A prehearing settlement conference was held on June 26, 2018. However, the parties were not able to reach a resolution during the conference.

{¶ 25} An evidentiary hearing was held on August 27, 2018.

{¶ 26} 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.

{¶ 27} Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Respondent violated 49 C.F.R. 390.17 by utilizing an accessory, namely a cell phone as a GPS device, in a manner creating an unsafe situation while he was operating a CMV. Consequently, Respondent should be assessed a \$250 forfeiture for a violation of 49 C.F.R. 390.17 and he should pay the forfeiture within 60 days from the date of this Opinion and Order.

VIII. ORDER

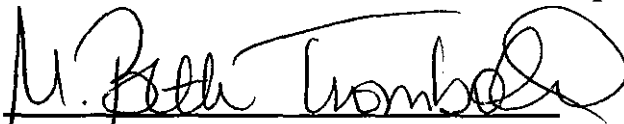

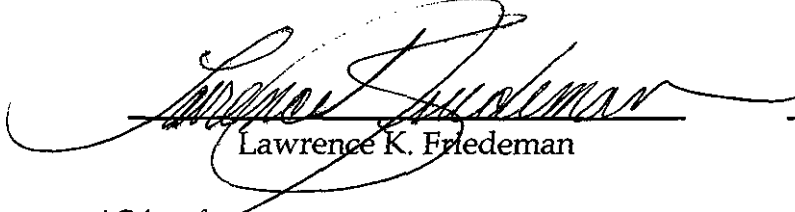
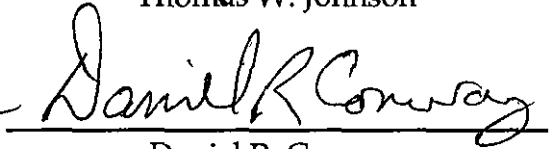
{¶ 28} It is, therefore,

{¶ 29} ORDERED, That Respondent pay a civil forfeiture of \$250 for violating 49 C.F.R. 390.17 within 60 days of this Opinion and Order. Payment shall be made by check or money order payable to the "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 18-558-TR-CVF and inspection number OH3260013260D should be written on the face of the check or money order. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

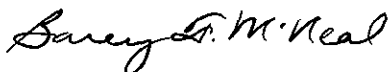
Asim Z. Haque, Chairman


M. Beth Trombold
Thomas W. Johnson
Lawrence K. Friedeman
Daniel R. Conway

AS/mef

Entered in the Journal

DEC 12 2018



Barcy F. McNeal
Secretary