

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF FEDEX CUSTOM
CRITICAL, INC., NOTICE OF APPARENT
VIOLATION AND INTENT TO ASSESS
FORFEITURE.

CASE NO. 17-1960-TR-CVF
(CR201509180518)

OPINION AND ORDER

Entered in the Journal on July 17, 2019

I. SUMMARY

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

II. PROCEDURAL HISTORY

{¶ 2} In April 2013, a review of FedEx Custom Critical, Inc.'s (FXCC or Company) operations by Commission Staff revealed potential issues with vehicle maintenance records and post-accident drug and alcohol testing. Commission Staff conducted a focused compliance review of the Company, with special attention to these issues, on September 18, 2015.

{¶ 3} Following his review, Hazmat Specialist Neal Hedrick prepared a report, noting numerous violations. Commission Staff sent FXCC a Notice of Preliminary Determination (NPD) on August 27, 2017, as required and described in Ohio Adm.Code 4901:2-7-12. The NPD cited the following violations:

- 382.303(a) Failing to conduct post accident alcohol testing on driver following a recordable crash.
- 382.303(b) Failing to conduct post accident testing on driver for controlled substances.
- 396.3(b) Failing to keep minimum records of inspection and vehicle maintenance.
- 396.11(a) Failing to require driver to prepare driver vehicle inspection report.

{¶ 4} On September 7, 2017, FXCC's counsel, Timothy Wiseman, requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} On December 21, 2017, the attorney examiner issued an Entry scheduling a settlement conference on January 25, 2018. During the settlement conference, Staff and FXCC were unable to reach a settlement.

{¶ 6} By Entry dated March 9, 2018, the attorney examiner scheduled a hearing in this matter on May 8, 2018.

{¶ 7} At the hearing, Staff presented Mr. Hedrick's testimony in support of the violation and Rod Moser's testimony in support of the forfeiture amount. FXCC presented the testimony of Scott A. McCahan.

{¶ 8} The parties submitted post-hearing briefs on June 26, 2018.

III. LAW

{¶ 9} 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 has adopted several provisions of the Federal Motor Carrier Safety Regulations, including 49 C.F.R. Sections 382 and 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.

IV. ISSUE

{¶ 10} The issue in this case is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that FXCC has failed to comply with drug and alcohol

compliance and inspection and vehicle maintenance compliance under 49 C.F.R. 382.303(a), 382.303(b), 396.3(b) and 396.11(a).

V. SUMMARY OF EVIDENCE

A. *Staff's Arguments*

{¶ 11} Staff states that Mr. Hedrick conducted a compliance review of the Company on September 18, 2015 (Tr. at 48; Staff Ex. 1). Mr. Hedrick testified regarding two separate categories of violations that he uncovered during his review: alcohol and drug and vehicle maintenance.

1. ALCOHOL AND DRUG TESTING VIOLATIONS

{¶ 12} With regard to the drug and alcohol violations, Mr. Hedrick testified that he reviewed the Company's accident records for the preceding 365 days from September 18, 2015, that "involved a fatality, a tow away, or an injury requiring treatment away from the scene in which either a fatality requires testing all of the time or the driver was cited at the time of the accident for causing the accident." Out of seven such incidents, Mr. Hedrick testified that he found three violations. (Tr. at 60-61.) These include:

- The Wyoming Accident: On December 21, 2014, a Company vehicle lost control during icy conditions on Interstate 80 east of westbound Exit 146 in Sweetwater County, Wyoming. The vehicle was towed from the scene and the driver was cited for driving too fast. A drug test was performed, but an alcohol test was not. (Staff Ex. 2 at 7; Tr. at 61-63.)
- The Ohio Accident: On February 4, 2015, a Company vehicle lost control on Interstate 80 just east of the Wyandot Service Plaza. The vehicle was towed from the scene. The driver was cited by the Ohio State Highway Patrol for a violation of R.C. 4511.33 (failure to drive in marked lanes). A drug test was performed, but an alcohol test was not. (Staff Ex. 3 at 2-5; Tr. at 69.)

- The New York Accident: On April 21, 2015, a Company vehicle failed to maintain an assured clear distance ahead on State Route 281 at Madison Street in Cortland, New York. The Company's driver "failed to observe [a] vehicle in front of him stopping and was unable to avoid striking vehicle." The vehicle was towed from the scene. The driver was cited for following the vehicle ahead of him too closely. Neither a drug test nor an alcohol test was performed. (Staff Ex. 4 at 2, 5, 8. Tr. at 71.)

{¶ 13} Staff argues that when a driver is cited for a moving traffic violation, as in the situations above, pursuant to 49 C.F.R. 382.303(a), testing must occur if either one or more of the vehicles involved in the accident is towed from the scene of the accident or if one or more persons involved in the accident immediately receives medical treatment away from the scene of the accident. Staff states that the alcohol test should be conducted within two hours of the accident and if it is not, the employer must continue to make an effort to have the driver tested for up to eight hours and prepare and maintain, on file, a record why the test was not administered. 49 C.F.R. 382.303(d)(1). Staff argues that in each of the three violations identified by Mr. Hedrick, FXCC created and provided a record of the sequence and timing of events; however, this does not exempt FXCC from performing the tests. (Tr. at 64).

{¶ 14} Staff further argues that poor communication cannot justify a failure to perform an alcohol test because drivers are FXCC's agents and have a duty to report accidents and events that trigger the need for alcohol testing to the Company in a timely fashion. Staff states that in the Ohio Accident, FXCC learned that a citation had been issued around 9:40 a.m. the following morning, nearly 12 hours after the accident occurred. In the New York Accident, FXCC learned that the vehicle was towed seven days after the accident because the driver left the scene before the police arrived. According to Staff, in both incidents, the drivers should have notified the Company about the citation immediately. (Tr. 70-73.)

{¶ 15} Although the record does not reflect when the citations in the three incidents were issued, Staff reiterates that communication issues between the drivers and the Company, or its third party agent, and a lack of appropriate follow-up created the issues in this matter. Staff emphasizes that FXCC has indicated that it does not provide training to drivers on accident reporting protocols. As evidence, Staff states that FXCC's witness, Scott McCahan testified, "[i]t's the obligation – again, it's in the owner-operator lease agreement so every owner-operator knows * * * it's their responsibility to ensure their contracted drivers are following those standards." (Tr. at 66). Staff admits that the incident in Wyoming may have been remote; however, Staff states that the accidents in Ohio and New York were not. Furthermore, Staff claims that even in the Wyoming Accident, the accident site was easily within reach of numerous metropolitan areas: 240 miles of Denver, Colorado, 200 miles of Cheyenne, Wyoming, 185 miles of Salt Lake City, Utah, and 100 miles of Laramie, Wyoming. Staff further states that even if FXCC's drivers did not have some sort of portable kit on board for collecting samples when in remote areas, third-party administrators have networks that permit them to either reach drivers with mobile units, or to send them to collection sites within the eight hour time limit. (Tr. at 66.) As such, Staff argues that the Commission should find that FXCC violated 49 C.F.R. 382.303(a).

{¶ 16} Next, Staff states that of the three accidents where Mr. Hedrick found alcohol testing violations, a drug test was not performed in the New York incident. Staff notes that while FXCC created and provided a record listing the sequence and timing of events relating to the New York accident that satisfied the reporting requirements, it failed to demonstrate compliance with the testing requirement. Staff further clarifies that the New York driver was not tested because the driver left the scene of an accident even before the police arrived and consequently, neither the Company nor he knew that the vehicle had been towed. Staff argues that while Mr. Hedrick acknowledged that there was no regulatory obligation for the driver to verify, after the fact, that a tow had occurred, Mr. Hedrick also indicated that the driver should not have left the scene. Staff argues that the Commission cannot absolve a carrier of responsibility simply because its driver determined to neglect his responsibility

to report an accident. Consequently, Staff urges the Commission to find that FXCC violated 49 C.F.R. 382.303(b).

2. VEHICLE MAINTENANCE RECORD VIOLATIONS

a. Maintenance Record Violations

{¶ 17} Staff states that with regard to vehicle maintenance record violations, Mr. Hedrick examined 125 files in the Company records and found three files which contained inadequately documented maintenance performed on vehicles. (Tr. at 75). Specifically, Staff explains that FXCC requires contractors to keep maintenance files on the vehicles they lease out to FXCC. Staff states that the maintenance file for vehicle E10674 contained two vehicle maintenance records, but neither document indicated that maintenance of any kind, such as oil changes, had been performed on the vehicle (Tr. at 77-78; Staff Ex. 5). For vehicle D8665, the file contained a driver/vehicle examination report dated May 12, 2015, finding an inoperative turn signal. However, there was no indication that that defect had ever been repaired (Tr. at 78-79; Staff Ex. 6). Lastly, Staff states that the maintenance file for Vehicle DR8749 contained no vehicle maintenance records (Staff Ex. 7). Mr. Hedrick found a driver/vehicle examination report dated June 2, 2015, finding a number of brake defects, but the file contained no indication that those defects were ever repaired (Tr. at 79).

{¶ 18} Overall, Staff states that out of the of three maintenance files produced in their entirety as Staff Exhibits 5, 6, and 7, none had any “means to indicate the nature and due date of the various inspection and maintenance operations to be performed,” as required by 49 C.F.R. 396.3(b)(2). Further, Staff notes that only one, Staff Exhibit 6, contained any “record of inspection, repairs, and maintenance indicating their date and nature” as required by 49 C.F.R. 396.3(b)(3), but the file failed to contain any repair record for a defect found on a roadside inspection.

{¶ 19} Staff argues that while FXCC may have had a maintenance program policy and internal audits to ensure compliance from contractors and drivers with regard to

maintenance requirements (Tr. at 20-21). However, Staff maintains that FXCC failed to maintain the requisite records for these three vehicles and consequently, requests the Commission to find that FXCC violated § 396.3(b).

b. Driver/Vehicle Inspection Report Violations

{¶ 20} According to Staff, Mr. Hedrick examined 26 vehicle records for the preceding 90 days from the date of the inspection where drivers would have been required to complete a driver/vehicle inspection report (DVIR). Of those, Mr. Hedrick discovered 24 vehicles which did not have completed DVIRs. (Tr. at 80, 83-86; Staff Ex. 8 at 11.) Staff clarifies that drivers of non-passenger-carrying commercial motor vehicles are only required to prepare or submit a DVIR if a defect or deficiency is discovered when inspecting the vehicle prior to the vehicle being operated on a subsequent day. If the defect was repaired prior to the end of the day and there was no accompanying DVIR, Staff notes that Mr. Hedrick would have expected to find maintenance and repair records noting the repair. Staff clarifies that Mr. Hedrick found violations only where defects were found on roadside inspections on vehicles that were operated on subsequent days without either appropriate repair records or a DVIR. Because Mr. Hedrick found 24 instances of missing repair records, Staff urges the Commission to that FXCC violated 49 C.F.R. 396.11(a).

3. FORFEITURE ASSESSMENT

{¶ 21} Staff witness Rod Moser testified that the procedure for determining forfeiture assessments for violations of the Motor Carrier Safety and Hazardous Materials Regulations is consistent with that recommended by the Commercial Vehicle Safety Alliance (Tr. at 109). Staff states that the 49 C.F.R. 382.303(b) violation carries a \$400 forfeiture, doubled in this case since the Company was found to be in violation of the same regulation in its most recent compliance review, for a total of \$800 (Tr. at 106). Next, Staff states the 49 C.F.R. 396.11(a) violations carry a \$975 forfeiture, doubled again for the same reason, for a total of \$1,950 (Tr. 106-107). Lastly, the 49 C.F.R. 382.303(a) violations carry a \$600 forfeiture, doubled for the

reasons above, for a total of \$1,200 (Tr. at 107). The total assessed forfeiture for all violations equals \$3,950.

B. FXCC's Arguments

{¶ 22} Initially, FXCC argues that the initial Notice of Apparent Violation provided by the Commission on October 1, 2015, lacks the specificity required by Ohio Adm.Code 4901:2-7-05. FXCC states that the notice fails to list the date of the violation and person, vehicle, or facility concerning which the violation occurred and a brief description of the event, which are explicitly required by Ohio Adm.Code 4901:2-7-05. FXCC states that this lack of specificity is prejudicial to FXCC, which is exacerbated by the fact that it was forced to present its case-in-chief prior to Staff. Because the notice failed to meet the requirements of Ohio Adm.Code 4901:2-7-05, FXCC requests that the Commission dismiss the violations.

{¶ 23} Next, FXCC argues that while it did not complete alcohol and/or drug testing following the three accidents at issue in this matter, the Company complied with 49 C.F.R. 382.303 by preparing and maintaining records which explain why conducting testing was beyond the Company's control. FXCC states that driver Steven Moreland (Wyoming Accident) was not tested following his December 22, 2014 accident because the accident occurred at 12:40 a.m. and when the driver notified the third-shift accident specialist, he did not indicate that he had been issued a citation. Consequently, the Company's system did not flag the accident as one requiring post-accident testing. FXCC states that it did not become aware of the citation until 7:50 a.m., at which time the driver could not have been tested in time. (FXCC Ex. 1; Tr. at 14-24; 33-36.)

{¶ 24} Additionally, FXCC states that driver Michael Bridgett was not tested for alcohol following the February 4, 2015 incident (Ohio Accident) because he did not inform the Company that he had received a citation until the eight hour threshold set by 49 C.F.R. 382.303 had expired. (FXCC Ex. 1; Tr. at 15-17; 36-38.) FXCC finally states that driver Chaune Duffy did not become aware that Duffy's April 21, 2015 accident involved disabling damage to the other vehicle until the Company and Duffy received the roadside inspection

report a week later, which is well behind the applicable thresholds for drug and alcohol testing. (FXCC Ex. 1; Tr. at 17-18; 38-39.)

{¶ 25} FXCC further argues that the chief safety officer of the Federal Motor Carrier Safety Administration (FMCSA), the agency that promulgated the regulations Ohio has adopted by reference, has specifically held that a motor carrier does not per se violate 49 C.F.R. 382.303 if a required drug or alcohol test is not timely completed, so long as the carrier's negligence did not cause the failure to test. *In the matter of Four Towers Transportation, Inc.*, No. FMCSA-2018-0092, 2018 WL 2296922, at *4 (FMCSA May 18, 2018). FXCC states that it is clear from Mr. Hedrick's testimony that he did not fully appreciate FMCSA's guidance when he assessed the violations (Tr. at 64-65); *Four Towers*, at *5. FXCC argues that it cannot be charged with failing to promptly administer post-accident alcohol and/or drug tests in instances where it complied with the FMCSA's regulation, which explicitly allows it to document why it was not feasible to administer those tests in the first place and where those reasons were not the result of its negligence. FXCC further claims that in instances where the driver tells the Company that it did not receive a citation, like Mr. Bridgett's accident, it runs into the risk of committing a violation for making drivers submit to drug and alcohol testing when it is not required under the regulations (Tr. at 95).

VI. COMMISSION CONCLUSION

{¶ 26} 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. The Commission finds that, based on a preponderance of the evidence, Staff has met its burden of proof that FXCC has violated the Commission's transportations rules.

{¶ 27} Initially, we reject that the Notice of Apparent Violation provided by Staff to FXCC lacks the specificity required by Ohio Adm.Code 4901:2-7-05. We note that FXCC refers to a Notice of Apparent Violation dated October 1, 2015, in its brief; however, no such document is in the record. Furthermore, the NPD dated August 27, 2017, clearly states that Commission Staff conducted a compliance review at FXCC's facility on September 18, 2015,

and uncovered several violations (Staff Ex. 9). The notice then identifies the violation, the appropriate Code of Federal Regulations citation, and the related forfeiture amounts. Per Ohio Adm.Code 4901:2-7-12(C), the NPD must contain the “date of the violation and person, vehicle, *or* facility concerning which the violation occurred” (emphasis added) and a brief description of the event. Because this particular compliance review was conducted at FXCC’s facility due to the Company’s prior unresolved violations related to post-accident testing and vehicle maintenance record-keeping, Staff appropriately indicated the address of the facility as the location where the particular violations at issue were discovered. Moreover, the one sentence statement of each violations satisfies Ohio Adm.Code 4901:2-7-12(C)’s requirement for a brief description.

{¶ 28} Next, with regard to the FXCC’s argument that it was prejudiced in presenting its case-in-chief before Staff, the Commission notes the Supreme Court of Ohio has recognized that the Revised Code grants the Commission broad authority to regulate the mode and manner of its hearings and determine the order in which parties shall present testimony. *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Utilities Comm.*, 2 Ohio St.3d 62, 68, 442 N.E.2d 1288, 1294 (1982); *Elyria Telephone Co. v. Pub. Util. Comm.* 158 Ohio St. 441, 444, 110 N.E.2d 59 (1953); *see also* Ohio Adm.Code 4901-1-27(B)(2). Further, at hearing, FXCC did not raise concerns or objections about presenting its case-in-chief before Staff. As such, we find that FXCC was not prejudiced by presenting its case-in-chief before Staff’s presentation of evidence.

{¶ 29} Finally, we find that FXCC’s reliance on *Four Towers* is misplaced. In that case, the FMSCA held that failure to conduct post-accident testing is not caused by the carrier’s negligence if post-accident alcohol testing was *objectively impracticable*. *Four Towers* at *4 (emphasis added). In that case, the accident in question occurred at 8:00 a.m. and the driver contacted the carrier regarding the resulting citation at 2:00 p.m. The FMSCA held that these facts alone were likely insufficient to find that the carrier made all reasonable efforts to conduct post-accident alcohol testing. However, the FMSCA also detailed the

carrier's attempts to find a post-accident testing facility and other circumstances affecting its ability to conduct the testing and found that conducting post-accident alcohol testing was objectively impracticable in those circumstances. Specifically, the FMSCA noted that the carrier had made reasonable efforts to conduct post-accident testing by contacting several testing facilities or service providers, but they were either too far away, closed, or did not accept walk-in patients. Post-accident testing was also hard to complete due to poor weather conditions such as icy roads and blowing snow. Furthermore, the carrier's driver was unable to travel to a facility due to back pain. Considering the totality of circumstances, the FMSCA found that a post-accident alcohol test was objectively impracticable despite the carrier's reasonable efforts to do so. *Four Towers* at *4-5.

{¶ 30} Here we find no evidence that FXCC's drivers in Wyoming, Ohio, and New York faced weather conditions or other circumstances under which it was objectively impracticable for it to comply with post-accident alcohol and drug testing. In fact, the record does not indicate that the Ohio and New York drivers faced any negative weather conditions (Staff Ex. 3 at 2-5; Staff Ex. 4 at 2, 5, 8; Tr. at 69, 71). While icy conditions were present in the Wyoming Accident, the record reflects that the driver lost control of the vehicle because he was driving too fast. In any case, there is no additional information which would lead us to determine that the icy conditions prevented the Wyoming driver from availing post-accident testing. (Staff Ex. 2 at 7; Tr. at 61-63.) We agree with Staff that a carrier should not be absolved of liability simply because of poor communication or training protocols between the carrier and its drivers. Furthermore, the FMSCA indicated in *Four Towers* that mere communication failures between a carrier and a driver does not absolve the carrier from making all reasonable efforts to conduct post-accident testing. *Four Towers* at *4. As such, the Commission finds that FXCC violated 49 C.F.R. 382.303(a) and (b).

{¶ 31} We also note that FXCC does not dispute the Company violated 49 C.F.R. 396.3(b) and 396.11(a). Due to the reasons noted above, we find that Staff has carried its

burden of proving that FXCC violated 49 C.F.R. 396.3(b) by failing to properly document vehicle maintenance records and 396.11(a) by failing to complete DVIRs.

{¶ 32} Based on these findings, FXCC should be assessed a \$3,950 forfeiture for violations of 49 C.F.R. 382.303(a), 382.303(b), 396.3(b) and 396.11(a) and FXCC 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 17-1960-TR-CVF and inspection number CR201509180518 should be written on the face of the check or money order.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 33} On September 18, 2015, Commission Staff completed a compliance review of FXCC due to prior unresolved issues related with vehicle maintenance record-keeping and post-accident testing.

{¶ 34} FXCC was timely served with an NPD, alleging violations of 49 CFR 382.303(a), 382.303(b), 396.3(b) and 396.11(a), for failure to conduct post-accident alcohol and drug testing; failure to keep minimum vehicle maintenance records; and failure to prepare DVIRs. In the NPD, FXCC was notified that Staff intended to assess a civil monetary forfeiture of \$3,950.

{¶ 35} A prehearing settlement conference was held on January 25, 2018. However, the parties were not able to reach a resolution during the conference.

{¶ 36} An evidentiary hearing was held on May 8, 2018.

{¶ 37} 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.

{¶ 38} Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that FXCC violated 49 C.F.R. 382.303(a), 382.303(b), 396.3(b) and 396.11(a), for failure to conduct post-accident alcohol and drug testing; failure to keep minimum vehicle maintenance records; and failure to prepare DVIRs. Consequently, FXCC should be assessed a \$3,950 forfeiture for these violations and it should pay the forfeiture within 60 days from the date of this Opinion and Order.

VIII. ORDER

{¶ 39} It is, therefore,

{¶ 40} ORDERED, That FXCC pay a civil forfeiture of \$3,950 for violating 49 C.F.R. 382.303(a), 382.303(b), 396.3(b) and 396.11(a) 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 17-1960-TR-CVF and inspection number CR201509180518 should be written on the face of the check or money order. It is, further,

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

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

AS/mef

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Case No(s). 17-1960-TR-CVF

Summary: Opinion & Order that the Commission finds that Staff demonstrated, by a preponderance of the evidence, that FedEx Custom Critical, Inc. violated the Commission's transportation rules. electronically filed by Docketing Staff on behalf of Docketing