

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF MARK THURMAN,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE NO. 19-2233-TR-CVF
(OH3226010278D)

OPINION AND ORDER

Entered in the Journal on January 12, 2022

I. SUMMARY

{¶ 1} The Commission finds that Staff has demonstrated, by a preponderance of the evidence, that Mark Thurman violated 49 C.F.R. 395.8(e)(1) (false report -- driver's record of duty status).

II. PROCEDURAL HISTORY

{¶ 2} On September 5, 2019, Motor Carrier Enforcement Supervisor Brian Wilson (Supervisor Wilson) of the Ohio State Highway Patrol stopped and inspected a commercial motor vehicle (CMV) operated by Haris Hergic and driven by Mark Thurman (Mr. Thurman or Respondent). At the time of the inspection, Supervisor Wilson prepared a report indicating a violation of the Federal Motor Carrier Safety Regulations (FMCSR), specifically, 49 C.F.R. 395.8(e) (false report of driver's record of duty status (logbook)). (Tr. at 9; Staff Ex. 1.)

{¶ 3} On December 9, 2019, Staff served a notice of preliminary determination (NPD) upon Respondent in accordance with Ohio Adm.Code 4901:2-7-07, alleging a violation of the Commission's Transportation regulations.

{¶ 4} On December 23, 2019, as supplemented on December 27, 2019, Respondent requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} On January 7, 2020, an Entry was issued scheduling a January 31, 2020 settlement conference. The parties participated as scheduled but did not resolve the matter. A hearing that was scheduled for March 3, 2020, was at Respondent's request rescheduled

to April 21, 2020; the hearing was ultimately postponed because of the ongoing COVID-19 pandemic.

{¶ 6} On August 5, 2021, the attorney examiner scheduled a hearing for September 13, 2021.

{¶ 7} At the hearing on September 13, 2021, Supervisor Wilson and Rod Moser, Chief of Compliance and Registration in the Commission's Transportation Department (Mr. Moser), testified in support of the violations identified by Staff. Mr. Thurman was not present for the hearing but was represented by his counsel.

III. LAW

{¶ 8} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the FMCSR, specifically, 49 C.F.R. Sections 40, 367, 380, 382, 383, 385, 386, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Through the same rule, the Commission also adopted those portions of the regulations contained in 49 C.F.R. 107, Subparts F and G, and 49 C.F.R. 171 to 180, as are applicable to transportation of hazardous materials by motor vehicle. Ohio Adm.Code 4901:2-5-03(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, 395.8(e) (false report of driver's record of duty status). 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.

IV. ISSUES IN THE CASE

{¶ 9} Staff has the burden to prove, by a preponderance of the evidence, that Mr. Thurman violated 49 C.F.R. 395.8(e)(1) (false report of driver's record of duty status). Mr. Thurman disputes the validity of the violation.

V. SUMMARY OF THE EVIDENCE

{¶ 10} During his testimony, Supervisor Wilson referred to Respondent's Driver/Vehicle Examination Report (Staff Ex. 1) and Respondent's Electronic Record of Duty Status (ELD) (Staff Ex. 2). The ELD consists of a graph and a chart. The ELD graph indicates, day by day, the time of day for off-duty, sleeper berth, driving, and on-duty time. The same daily information is indicated in the ELD chart, which also indicates information such as geographic location and odometer mileage.

{¶ 11} Supervisor Wilson first noted that the August 28, 2019 ELD graph indicates that Mr. Thurman was in the sleeper berth at approximately 11:34 p.m. (Tr. at 10; Staff Ex. 2 at 1). Supervisor Wilson also observed that the August 28, 2019 ELD chart shows that Mr. Thurman was in Gallup, New Mexico, while in the sleeper berth. (Tr. at 10; Staff Ex. 2 at 5). Next, Supervisor Wilson observed that the ELD graph for August 29, 2019, shows Mr. Thurman remained in the sleeper berth until approximately 10:15 a.m., followed by off-duty time until approximately 12:15 p.m., when Mr. Thurman starts driving (Tr. at 14; Staff Ex. 2 at 6). However, observed Supervisor Wilson, the ELD chart for August 29, 2019, indicates that at 12:13 p.m. Respondent started driving from Edgewood, NM, not his August 28, 2019, overnight location of Gallup, NM (Tr. at 14; Staff Ex. 2 at 7). Further, Supervisor Wilson noted, when Respondent indicated sleeper berth time at 11:34 p.m. on August 28, 2019, the ELD chart indicates the CMV's odometer at 803,147 miles; when Mr. Thurman began driving at 12:13 p.m. on August 29, 2019, the CMV's odometer was 803,320 miles (Tr. at 15; Staff Ex. 2 at 5, 7). In sum, a comparison of the ELD charts for August 28, 2019, and August 29, 2019, indicates a change from Respondent's overnight location and an increase in CMV odometer mileage; in contrast, the ELD graph for August 29, 2019, indicates that, until

shortly after 12:00 noon, there was no driving that would have caused a change of overnight location and increase in odometer mileage. This discrepancy, contends Supervisor Wilson, indicates falsification of the logbook and an August 29, 2019 violation of 49 C.F.R 395.8(e)(1). (Staff Ex. 1; Tr. at 14-15.)

{¶ 12} Supervisor Wilson next discussed the August 30, 2019 false logbook violation. Supervisor Wilson observed that Mr. Thurman's August 29, 2019 ELD chart indicates that Respondent went off-duty at 11:59 p.m. in an undisclosed location, with the odometer at 803,902 miles; Supervisor Wilson added that the immediately prior entry in the ELD chart indicates Cromwell, OK as the location (Tr. at 16; Staff Ex. 2 at 8.) Next, Supervisor Wilson notes that the August 30, 2019, ELD graph shows that Mr. Thurman remained in the sleeper berth until 8:00 a.m., and was off-duty until approximately 12:21 p.m., when he began driving. The August 30, 2019 ELD chart, however, indicates that Respondent began driving from Duquesne, MO, with the CMV's odometer at 804,158 miles, rather than the presumed overnight location of Cromwell, OK, with the CMV's odometer at 803,902 miles. (Tr. at 16-17; Staff Ex. 2 at 8, 11.) Supervisor Wilson asserts that the inconsistency between the August 29, 2019, and August 30, 2019 ELD information regarding odometer mileage and starting location for August 30, 2019 driving constitutes a false logbook violation (Staff Ex. 1; Tr. at 17).

{¶ 13} Finally, addressing the third logbook violation, Supervisor Wilson observes that the September 2, 2019 ELD chart indicates that Mr. Thurman arrived at 8:35 p.m. in Brookside, DE and went off-duty at an undisclosed location at 8:52 p.m., with an odometer reading of 805,778 miles (Tr. at 19; Staff Ex. 2 at 21). On September 3, 2019, Supervisor Wilson notes, the ELD graph shows Respondent off-duty for the entire day (Tr. at 19; Staff Ex. 2 at 21). On September 4, 2019, Supervisor Wilson observes that the ELD chart indicates that Respondent began driving from Ramsey, NJ at 2:22 p.m., with the odometer at 806,001 miles, not from the presumed overnight location of Brookside, DE with the odometer at 805,778 miles (Tr. at 19; Staff Ex. 2 at 26). In sum, a comparison of ELD graphs and charts from September 2, 2019, through September 4, 2019, indicates an inconsistency in CMV

location and odometer mileage when Respondent began driving on September 4, 2019, after off-duty time that started in mid-evening on September 2, 2019, continued through September 3, 2019, and did not end until early afternoon September 4, 2019. This discrepancy, contends Supervisor Wilson, indicates falsification of the logbook and a September 2, 2019 violation of 49 C.F.R 395.8(e)(1) (Tr. at 19-21; Staff Ex.1.)

{¶ 14} Supervisor Wilson testified that, during the inspection, he requested the driver to send ELD data to the Federal Motor Carrier Safety Administration (FMCSA), after which Supervisor Wilson examined the data at the inspection site immediately (Tr. at 24, 29, 31). According to Supervisor Wilson, a driver can manipulate ELD data before sending it to FMCSA by turning off Bluetooth. With Bluetooth inoperable, Supervisor Wilson stated, the ELD essentially is an automatic onboard recording device, and data can be manipulated. (Tr. at 27-29.) Supervisor Wilson did not know if the carrier sees the ELD data or has any control over the ELD data, as he does not conduct compliance reviews (Tr. at 30).

{¶ 15} Staff witness Rod Moser testified that, although the roadside inspection found three false logbook violations, the \$100 forfeiture was assessed as if there was only one such violation. He added that the fine is consistent with the fine schedule adopted by the Commercial Vehicle Safety Alliance. (Tr. at 33-36; Staff Ex. 4.)

{¶ 16} Counsel for Mr. Thurman reemphasized her client's objection to the violations but said that Respondent did not provide her with any evidence to be introduced at the hearing (Tr. at 39).

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. The Commission finds that, based on a preponderance of the evidence, Staff has met its burden of proving that Mr. Thurman has violated the Commission's transportation rules, specifically, a violation of 49 C.F.R. 395.8(e)(1) (false report – driver's record of duty status).

{¶ 18} First, a comparison of the ELD charts for August 28, 2019, and August 29, 2019, indicates a change from Respondent's August 28, 2019 overnight location and an increase in CMV odometer mileage, while the ELD graph for August 29, 2019, indicates no driving occurred until shortly after 12:00 p.m. that would have caused a change of overnight location and an increase in odometer mileage (Tr. at 10, 14-15; Staff Ex. 1; Staff Ex. 2 at 1, 5, 7). This is a falsification of the August 29, 2019 logbook and a violation of 49 C.F.R. 395.8(e)(1).

{¶ 19} Second, the August 29, 2019 ELD chart indicates that Respondent went off-duty at 11:59 p.m. in Cromwell, NM, with the odometer at 803,902 miles (Tr. at 16; Staff Ex. 2 at 8). The August 30, 2019, ELD graph indicates sleeper berth time until 8:00 a.m. and off-duty until approximately 12:20 p.m., when Respondent began driving again. The August 30, 2019 ELD chart, however, indicates that Respondent began driving from Duquesne, MO, with the CMV's odometer at 804,158 miles, not Cromwell, NM, with the odometer at 803,902 miles (Tr. at 16-17; Staff Ex. 2 at 8, 11). This is a falsification of the August 30, 2019 logbook and a violation of 49 C.F.R. 395.8(e)(1).

{¶ 20} Third, the September 2, 2019 ELD chart indicates that Mr. Thurman arrived at 8:35 p.m. in Brookside, DE and went off-duty at 8:52 p.m., with an odometer reading of 805,778 miles. On September 3, 2019, the ELD graph shows Respondent off-duty for the entire day. (Tr. at 19; Staff Ex. 2 at 21.) The September 4, 2019, ELD chart indicates that Respondent began driving from Ramsey, NJ at 2:22 p.m., with the odometer at 806,001 miles, not Brookside, DE with the odometer at 805,772 miles (Tr. at 19; Staff Ex. 2 at 26). The discrepancy in odometer miles and the September 4, 2019 point of origin for driving indicates falsification of the logbook and a September 2, 2019 violation of 49 C.F.R. 395.8(e)(1) (Tr. at 19-21; Staff Ex. 1). No evidence was presented to dispute any of the violations.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 21} On September 5, 2019, Supervisor Wilson stopped and inspected a CMV operated by Haris Hergic and driven by Mr. Thurman. At the time of the inspection,

Supervisor Wilson prepared a report indicating a violation of the FMCSR, specifically, 49 C.F.R. 395.8(e) (false report of driver's record of duty status). (Tr. at 9; Staff Ex. 1.)

{¶ 22} On December 9, 2019, Staff served an NPD upon Respondent in accordance with Ohio Adm.Code 4901:2-7-07, alleging a violation of the Commission's Transportation regulations. In the NPD, Respondent was notified that Staff intended to assess a total civil forfeiture of \$100 for the violation.

{¶ 23} On January 7, 2020, an Entry was issued scheduling a January 31, 2020 settlement conference. The parties participated as scheduled but did not resolve the matter.

{¶ 24} An evidentiary hearing was held on September 13, 2021.

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

{¶ 26} Based on the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Mr. Thurman violated 49 C.F.R. 395.8(e)(1) (false report – driver's record of duty status).

{¶ 27} Mr. Thurman should be assessed a \$100 forfeiture for violating 49 C.F.R. 395.8(e)(1) (false report – driver's record of duty status) and should pay the forfeiture within 60 days from the date of this Opinion and Order.

VIII. ORDER

{¶ 28} It is, therefore,

{¶ 29} ORDERED, That Mark Thurman pay a civil forfeiture of \$100 within 60 days of this Opinion and Order. Payment shall be made via the Commission website or 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 19-2233-TR-CVF and inspection number OH3226010278D 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 all parties of record.

COMMISSIONERS:

Approving:

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

JML/hac

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

1/12/2022 2:30:04 PM

in

Case No(s). 19-2233-TR-CVF

Summary: Opinion & Order finding that Staff has demonstrated, by a preponderance of the evidence, that Mark Thurman violated 49 C.F.R. 395.8(e)(1) (false report -- driver's record of duty status). electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio