

FILE

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THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Richard Hess, Notice
of Apparent Violation and Intent to Assess
Forfeiture

CASE NO: 06-1141-TR-CVF
(OH3274004435D)

TRIAL BRIEF

PUCO

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RECEIVED-DOCKETING DIV

A hearing was held on this matter February 8, 2007, for an alleged violation occurring on January 31, 2006.

Mr. Hess was allegedly stopped for having a light out on his trailer. After an inspection, the vehicle was placed out of service until the repairs were made to the brakes. The repairs were made and an acknowledgment of said repairs was signed by the repairman. (See attached Exhibit A). Some hours later the same inspector said he "recognized" the vehicle, pulled it over, and noted that on the second inspection that all out of service violations previous noted had been remedied but one. The repairman signed off that he did all repairs but apparently did not complete the final repair satisfactorily.

The driver upon being stopped and reinspected was cited for the one remaining repair.

- 1.) Hess made a good faith attempt to have the brakes repaired. He paid for all repairs and the repairman had signed off as correcting all out of service violations. Driver should not be punished for driving with a single problem the repairman overlooked especially when he paid for the repair and received the written correction certificate from the repairman (see Exhibit A). Accordingly, the charges must be dismissed.
- 2.) No party at any time during the hearing had been able to identify Hess as the person driving the vehicle on the dates and time in question. The inspector said he could not positively identify Hess as the driver. Accordingly, all charges must be dismissed.
- 3.) The inspector stated on the first stop that day that he had probable cause to stop and inspect the vehicle because a light was out. The assistant Attorney General elicited that testimony because it was necessary to establish probable cause for the

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stop. Also the Attorney General elicited testimony that the inspector was in the uniform of the day and in a marked vehicle. Again the Attorney General elicited that testimony because it is the statutory requirement that, such testimony must be on the record or the inspectors testimony must be considered by statute to be incompetent and excluded. O.R.C 4549.14 and 4549.15 (Also see attached partial transcript to show Motions to Dismiss were timely made Exhibit C).

- 4.) Finally while the charges should be dismissed immediately for all of the foregoing reasons, in the event of a finding of a violation exists the penalties are limited to those given to driver on his notices. Those penalties list only a fine of up to \$1,000.00. (See 2 Notices of Maximum penalties attached hereto as Exhibit D & E).

For all the above reasons the charges should be dismissed.

Respectfully Submitted,



Kenneth L. Turowski
88 S. Portage Path, Suite 306
Akron, Ohio 44303
(330) 836-2292
(330) 865-4440 FAX

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Trial Brief was sent regular mail this 20 day of March, 2007, to Assistant Attorney General John Jones at 180 East Broad, 9th Floor, Columbus, Ohio 43215 and to the Attorney Examiner Kerry Sheets at 180 East Broad, 9th Floor, Columbus, Ohio 43215.



Kenneth L. Turowski

Joint Ex. A

2 #1



OHIO STATE HIGHWAY PATROL
MOTOR CARRIER ENFORCEMENT
MASSILLON DISTRICT 3 HEADQUARTERS
TELEPHONE: (330) 833-1056
Return certification to agency listed below

DRIVER/VEHICLE EXAMINATION REPORT
Report Number: OH3274004432
Inspection Date: 01/31/2006
Start Time: 11:20 AM End Time: 12:31 PM
Insp. Level: 1-Full.

ELMER DRUM
8855 ROUTE 405 HIGHWAY
MONTGOMERY, PA 17752
Phone#: (800)324-8903
USDOT#: 00605255
State#:

Fax#:
ICC#: 289745

Driver: HESS, RICHARD E
License#: 24111482
Date of Birth: 09/18/1945
CoDriver:
License#:
Date of Birth:

State: PA

State:

Location: RICHFIELD
Highway: 271
County: SUMMIT

MilePost: 8
Origin:
Destination:

Shipper:
Bill of Lading:
Cargo: EMPTY

VEHICLE IDENTIFICATION

Unit	Type	Make	Year	State	License #	Company #	Vin #	GVWR	CVSA #	OOS#
1	TT	FRHT	2001	PA	AE52981	93	1FUJAPCK61LH03458	80,000		Y
2	ST	GDAN	1986	ME	A305423	822	1GRAA9627GS035802			Y

BRAKE ADJUSTMENTS: Highlighted brake measurements are out of adjustment.

Axle #	1	2	3	4	5
Right	2 1/4	1 3/8	1	1 5/8	1 1/2
Left	0	1 6/8	1 1/2	2	2 1/2
Chamber	C-20	C-30	C-30	C-30	C-30

VIOLATIONS

Section Code	St	Unit	OOS	Citation #	Verify	Crash	Violations Discovered
396.3A1BA		1	Y		U	N	Brake(s) out of adjustment - see chart above, right steer brake 1R
393.48(a)		1	Y		U	N	Inoperative/defective brake, left steer brake, absence of effective braking action upon application of service brake, brake lining failing to move 1L
393.47		1	Y		U	N	Inadequate brake lining for safe stopping, left steer brake lining worn below 1/4 inch, worn to 1/8th inch 1L
393.48(a)		2	Y		U	N	Inoperative/defective brake, left rear trailer brake, linings failing to contacting braking surface upon application 5L
396.3A1BA		2	N		N	N	Brake(s) out of adjustment - see chart above, left rear trailer brake 5L
393.9T		1	N		N	N	Inoperable tail lamp, left rear tractor
393.9T		1	N		N	N	Inoperable tail lamp, right rear tractor
393.9		1	N		N	N	Inoperable lamp (other than head/tail) left rear tractor turn signal
393.9		1	N		N	N	Inoperable lamp (other than head/tail) left rear tractor brake light
393.95(a)		1	N		N	N	Unsecured fire extinguisher, extinguisher sitting on the floor next to the drivers seat not secured
393.48(b)		2	N		N	N	Brake connections with leaks, emer. line leaking at the front trailer glad hand connection
393.9		2	N		N	N	Inoperable lamp (other than head/tail) left front trailer clearance light
393.9		2	N		N	N	Inoperable lamp (other than head/tail) license plate light on the rear of the trailer
393.45(a)(4)		2	N		N	N	Brake hose/tubing chaffing, left front trailer brake hose rubbing the brake hose mounting bracket, missing rubber gromet
393.45(a)(4)		2	N		N	N	Brake hose/tubing chaffing, right rear trailer brake hose rubbing the brake hose mounting bracket, missing rubber gromet
393.75(c)		1	N		N	N	Tire-other tread depth less than 2/32 of inch 0/32 tread depth across 1 major tread groove, left front inside drive tire 2LI
393.75(c)		1	N		N	N	Tire-other tread depth less than 2/32 of inch 0/32 tread depth across 1 major tread groove, left rear inside drive tire 3LI

Report Prepared By:

BELL, D. A.

Badge #:

3274

Copy Received By:

HESS, RICHARD E

Page 1 of 2



X *Doug Bell*

X *R Hess*

Joint Ex A

#1



OHIO STATE HIGHWAY PATROL
MOTOR CARRIER ENFORCEMENT
MASSILLON DISTRICT 3 HEADQUARTERS
TELEPHONE: (330) 833-1056
Return certification to agency listed below

DRIVER/VEHICLE EXAMINATION REPORT
Report Number: OH3274004132
Inspection Date: 01/31/2006
Start Time: 11:20 AM End Time: 12:31 PM
Insp. Level: 1-Full

ELMER DRUM
8855 ROUTE 405 HIGHWAY
MONTGOMERY, PA 17752
Phone#: (800)324-8903 Fax#:
USDOT#: 00605255 ICC#: 289745
State#:

Driver: HESS, RICHARD E
License#: 24111482
Date of Birth: 09/18/1945
CoDriver:
License#:
Date of Birth:

State: PA

State:

Haz Mat: No HM Transported.

Placard: No Cargo Tank:

Special Checks: No Data for Special Checks.

State Information:

For-Hire Carrier: Y; Driver Address: 8350 RT 405 N PO BOX 56; Driver City: MILTON; Driver State: PA; Driver Zip: 17847; RSN Code: OBVI;

* Pursuant to authority contained in Title 49, Code of Federal Regulations, Section 396.9, I hereby declare vehicles with defects followed by an "Y" in the "Out of Service" column in the violations discovered section of this report OUT OF SERVICE. No person shall remove the out of service stickers applied to these vehicles, or operate such vehicles until the out of service defects have been repaired and the vehicles have been restored to safe operating condition.

NOTE TO DRIVER: This report must be furnished to the motor carrier whose name appears at the top of this report.

NOTE TO MOTOR CARRIERS: Please sign the below certification and return this report to the address which appears on the reverse side of this report within fifteen (15) days. Failure to return this report with the required certification can result in penalties up to \$500.

RETURN SIGNED CERTIFICATIONS TO THE AGENCY LISTED AT THE BOTTOM OF THIS INSPECTION.

Signature Of Repairer: [Signature] Facility: 2K5 Date: 1/31/06

CARRIER CERTIFICATION: The undersigned certifies that all violations noted on this report have been corrected and action taken to assure compliance with the Federal Motor Carrier Safety and Hazardous Materials Regulations insofar as they are applicable to motor carriers and drivers. False certifications of the required repairs are required to be prosecuted with penalties up to \$10,000.

RETURN SIGNED CERTIFICATIONS TO THE AGENCY LISTED AT THE BOTTOM OF THIS INSPECTION.

Signature Of Motor Carrier X: _____ Date: _____

Report Prepared By:

BELL, D. A.

Badge #:

3274

Copy Received By:

HESS, RICHARD E

Page 2 of 2



ASPEN v2.5.1 1/31/06 12:21 PM

Joint Ex. A

Q #1

Ohio State Highway Patrol
Vehicle Inspection Report
INFORMATION AND INSTRUCTIONS TO DRIVER AND CARRIER

The vehicle listed on the reverse side of this form has been inspected by the Ohio State Highway Patrol (OSHP). The following explanations pertain to sections which may not be self-evident.

Citation Number: A number on this line refers to a separate court citation document (the citation will indicate the cited violation) which has been issued as a result of this inspection. These citations are issued into the Municipal or County Court nearest the inspection site, and any follow-up action regarding the citation will be indicated on the citation form. Citations may be issued only on violations including, but not limited to, speeding, overweight, fuel permit, etc. All other safety violations and hazardous materials violations are handled by the PUCO as explained below.

Violation Code: Numbers in a 170 or 300 series (for example, 173.24 or 395.8) refer to section numbers in Title 49 of the Code of Federal Regulations (CFR), commonly known as the Federal Hazardous Materials Regulations (FHMR) and the Federal Motor Carrier Safety Regulations (FMCSR). Copies of these regulations may be obtained from various trade associations and commercial supply firms. Some section numbers may have suffixes beyond those in the CFR; these are used for data collection purposes. Numbers in a format such as 2-5-11 refer to rules of the PUCO contained in Chapter 4901 of the Ohio Administrative Code. Numbers in a format such as 4919.78 OR 4511.19 refer to sections in the Ohio Revised Code.

OOS: Indicates whether the vehicle or driver was placed out-of-service (Yes or No) at the time of inspection, in accordance with criteria of the Federal Highway Administration. An out-of-service vehicle may not be driven until repairs have been made. A driver is out-of-service for a specified time or until certain problems are corrected. This may be determined from the nature of the violation or annotations in the "declaration of out-of-service" section of this form.

VERIFY: Indicates the status of the out of service vehicle at the completion of the inspection. "A" indicates the out-of-service violations were corrected during the inspection; "B" indicates the out-of-service vehicle was towed/escorted to a facility for repairs; and "U" indicates that the out-of-service violations still existed at the completion of the inspection and it was "unknown" to the Inspector what actions were to be taken to make repairs.

VIOLATIONS DISCOVERED: A brief description of the violation may be included. Abbreviations may be used to show the location of brake, tire, and light violations.

ACTION REQUIRED

DRIVER:

If your vehicle has been placed "out-of-service" it may not be driven until required repairs have been made. You are required to return this form to the carrier responsible for this shipment within 24 hours of inspection, even if that requires you to mail the form to them. Unless advised otherwise by the carrier, the person making any required repairs should complete the certification below before returning this form to the carrier.

CARRIER AND DRIVER:

(1) If a citation number is listed on the Citation Number line above the "Violations" section, any follow-up action required will be shown on the separate court citation document which has been issued. All communications regarding the citation should be with the Court listed.

(2) All violations of the FHMR and FMCSR or Title 49 of the Ohio Revised Code will be reviewed by the PUCO's Transportation Department to determine whether civil forfeitures should be assessed against any responsible parties in accordance with the penalty provisions of Title 49 of the Ohio Revised Code. If civil forfeitures are assessed, you will receive a separate notice by mail. These penalties may be assessed to carriers and/or drivers.

(3) If any entries in the "Violations" section show a number in the "Unit" column (referring to the tractor or one of the trailers), the Certificate of Repair shown below must be completed and returned by the carrier to the address indicated below within 15 days following inspection. This is required even if the driver or a mechanic made the repairs at the time of the inspection.

(Do Not Detach)

CERTIFICATION OF COMPLETED REPAIRS

"I certify that each mechanical defect for which a violation is listed on this inspection report has been repaired satisfactorily."

Burt T. Adams
Signature of Person Making Repairs
Burt T. Adams
Printed Name

11/31/06
Date Repairs Made
2958 BRACKSVILLE RD
Address

"I certify that all violations listed on this inspection report have been satisfactorily corrected."

Signature of Carrier's Officer/Agent

Printed/Typed Name

Date Signed

Title

Name of Carrier

Any intentional false statement on this inspection form or willful misrepresentation relative thereto may be a violation of Federal Law punishable by a fine not more than \$10,000 or imprisonment of not more than five years or both (18 U.S.C. 1001).

RETURN THIS FORM TO:
PUBLIC UTILITIES COMMISSION OF OHIO - TRANSPORTATION DEPARTMENT
DATA MANAGEMENT DIVISION
180 E BROAD ST
COLUMBUS, OH 43215-3793

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of: :
Richard Hess, a Civil : Case No. 06-1141-TR-CVF
Forfeiture Violation. :

- - -

EXCERPT OF PROCEEDINGS

before Mr. Kerry K. Sheets, Hearing Examiner, at the
Public Utilities Commission of Ohio, 180 East Broad
Street, Room 11-B, Columbus, Ohio, called at 10 a.m.
on Thursday, February 8, 2007.

- - -

ARMSTRONG & OKEY, INC.
185 South Fifth Street, Suite 101
Columbus, Ohio 43215-5201
(614) 224-9481 - (800) 223-9481
Fax - (614) 224-5724

- - -

ORIGINAL

1 APPEARANCES:

2 Marc Dann, Ohio Attorney General
3 By Duane W. Luckey,
4 Senior Deputy Attorney General
5 Public Utilities Section
6 Mr. John Jones
7 And Ms. Anne Hammerstein
8 Assistant Attorneys General
9 180 Est Broad Street, 9th Floor
10 Columbus, Ohio 43215

11 On behalf of the Staff of the PUCO.

12 Mr. Ken Turowski
13 88 South Portage Path
14 Akron, Ohio 44303

15 On behalf of the Respondent.

16 - - -

1 Thursday Morning Session,
2 February 8, 2007.

3 - - -

4 ATTORNEY EXAMINER SHEETS: Okay. The
5 Public Utilities Commission of Ohio has set for
6 hearing at this time and place Case No.
7 06-1141-TR-CVF, in the Matter of Richard Hess, a
8 Civil Forfeiture Violation.

9 * * * * *

10 MR. TUROWSKI: I have a number of motions
11 to make at this time. First and foremost, I am going
12 to again request a complete dismissal at this point
13 per the anyone -- any witness from the Staff's side
14 being able to identify the defendant. There's been
15 absolutely no identification whatsoever. The case
16 should be thrown out on that.

17 Secondly -- and this is a unique point in
18 that there are two separate stops. If you recall as
19 far back as this was today, the officer testified
20 that the reason for the original stop was that he saw
21 a ground light was out and, of course, at that time
22 he testified that he was in a marked vehicle and in
23 uniform of the day. For the second stop no such
24 testimony was elicited as to any violation. He said

1 he recognized the vehicle. That is not sufficient
2 culpable cause to make a stop nor was there testimony
3 at that stop that he was still in the uniform of the
4 day and marked vehicle.

5 Absent those items the case has to be
6 thrown out on probable cause issues. The Staff
7 brought it up initially on the first charge because
8 they know they have to have that. They have to have
9 probable cause. There has to be a uniform and a
10 marked vehicle. They neglected to do that on the
11 second charge, and obviously we're here based upon
12 that second charge, so everything involving the
13 second report has to be thrown out at this point.

14 ATTORNEY EXAMINER SHEETS: I disagree. I
15 overrule your motions.

16 * * * * *

17 - - -

1 CERTIFICATE

2 I do hereby certify that the foregoing is
3 a true and correct excerpt of the proceedings taken
4 by me in this matter on Thursday, February 8, 2007,
5 and carefully compared with my original stenographic
6 notes.

7
8 Karen Sue Gibson /sd
9 Karen Sue Gibson, Registered
Merit Reporter.

10 (KSG-4619)

11 - - -



The Public Utilities Commission of Ohio

*Monitoring marketplaces and enforcing rules to assure
safe, adequate, and reliable utility services.*

Bob Taft, Governor
Alan R. Schriber, Chairman

Commissioners

Ronda Hartman Fergus
Judy A. Jones
Valerie A. Lemmie
Donald L. Mason, Esq.

AUGUST 16, 2006

MR RICHRD HESS

8350 RT 405 N
MILTON, PA 17847

RE: NOTICE OF PRELIMINARY DETERMINATION

Case No. OH3274004435D

Officer: WW

Dear MR HESS:

On January 31, 2006, a vehicle operated by ELMER DRUM, and driven by RICHARD E HESS, was inspected within the State of Ohio. As the result of discovery of the following apparent violation the Staff timely notified Respondent pursuant to Rule 4901:2-7-07, O.A.C., that it intended to make a civil monetary assessment against Respondent in the following amount:

Code	Violation
2-5-07D	Operating out of service vehicle without fixing al

Total Forfeiture Assessed : \$1000.00

A conference was conducted pursuant to Rule 4901:2-7-10(B), O.A.C., at which the Respondent had a full opportunity to present any reasons why the violation did not occur as alleged, mitigating circumstances regarding the amount of any forfeiture, and any other information relevant to the action proposed to be taken by Staff.

(continued)



The Public Utilities Commission of Ohio

Monitoring marketplaces and enforcing rules to assure
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Bob Taft, Governor
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Judy A. Jones
Valerie A. Lemmie
Donald L. Mason, Esq.

AUGUST 16, 2006
MR RICHRD HESS

OH3274004435D

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As a result of the conference, Staff has made a Preliminary Determination that the Commission should make a civil monetary assessment against RICHARD E HESS in the following forfeiture:

Code	Violation
2-5-07D	Operating out of service vehicle without fixing al

Total Forfeiture Agreed : \$1000.00

Please include a certified check or money order for the total forfeiture Agreed, made payable to "Treasurer State of Ohio," and mail to: PUCO FISCAL, 180 E. Broad St, 13th floor, Cols. OH 43215-3793. FOR PROPER CREDIT, BE SURE TO PUT THE CASE NUMBER ON THE FACE OF THE CHECK.

Please consult the enclosed additional information concerning this Notice of Preliminary Determination.

Robert E. Marvin, Director
Transportation Department
Public Utilities Commission of Ohio