

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Request of)
Aboullahi G. Hussein for an) Case No. 05-722-TR-CVF
Administrative Hearing.)

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, and being otherwise duly advised, hereby issues its opinion and order.

APPEARANCES:

Marc Dann, Attorney General of the state of Ohio, by Duane W. Luckey, Chief, Public Utilities Section, by Werner L. Margard, III, and John H. Jones, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Mills Law Office, by Luther Mills, 1935 West Schrock Road, Westerville, 43081 on behalf of Aboullahi G. Hussein.

OPINION:

I. Background

On November 10, 2004, Mark Irmischer, a motor carrier investigator employed by the Ohio State Highway Patrol, inspected a commercial motor vehicle owned by Global Freight Express, Inc., and driven by Osman Noor (Tr. at 9-13; Staff Ex. I). At the time Mr. Irmischer stopped the vehicle for inspection, the vehicle was traveling east on Interstate 70 in Madison County (Tr. at 12; Staff Ex. 1). During the inspection, Mr. Irmischer observed that the vehicle had a flat tire. Because of the severity of the flat tire, Mr. Irmischer placed the vehicle out-of-service (Tr. at 13-15). Mr. Irmischer instructed the driver to place emergency triangles behind the vehicle. After the emergency triangles were placed, Mr. Irmischer left the scene (Tr. at 15).

Approximately 45 minutes after he completed the inspection, Mr. Irmischer drove by the location where he had placed the vehicle out-of-service and noticed that the emergency triangles had been removed (Tr. at 16, 18-19). He proceeded down the road until he could turn around. As he approached the vehicle, the vehicle had resumed traveling east on the highway. He observed that the flat tire has not been repaired (Tr. at 19). Mr. Irmischer pulled the vehicle over and completed another inspection of the vehicle

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(Tr. at 15-16, 19; Staff Ex. 2). This inspection was performed approximately four miles from the location of the first inspection (Tr. at 30). At this time, the vehicle was being driven by Aboullahi G. Hussein (Tr. at 17, 19). Mr. Irmischer completed a second inspection report and noted an apparent violation of 49 C.F.R. 396.9(c)(2) (operating an out-of-service vehicle)(Staff Ex. 2).

Subsequently, on May 10, 2005, Staff issued a Notice of Preliminary Determination to Mr. Hussein proposing a civil forfeiture of \$1,000.00 for the apparent violation of 49 C.F.R. Section 396.9(c)(2). On May 31, 2005, Mr. Hussein requested an administrative hearing regarding the apparent violation and proposed forfeiture. A prehearing conference was held on June 30, 2005, and a hearing was held on September 12, 2005. At the hearing, Mr. Irmischer and John Canty testified on behalf of the Staff, and Mr. Hussein testified on his own behalf. Staff filed post-hearing and reply briefs while Mr. Hussein filed a post-hearing brief.

II. The Law

Pursuant to the provisions of Rule 4901:2-5-02, Ohio Administrative Code (O.A.C.), the Commission has adopted the provisions of the Federal Motor Carrier Safety Rules, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the intrastate transportation of persons or property within this state. Further, Section 4921.99, Revised Code, authorizes the Commission to assess a civil forfeitures of up to \$1,000 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 this state.

III. Discussion And Conclusion

The provisions of 49 C.F.R. Section 396.9(c)(2) state that no person may operate a motor vehicle declared and marked as "out of service" until all repairs have been satisfactorily completed. In this case, it is undisputed that Mr. Irmischer had placed the vehicle out of service. It is undisputed that Mr. Hussein was operating the vehicle at the time of the second inspection and that repairs to the vehicle had not been completed. The only question for the Commission to resolve is whether Mr. Hussein is responsible for the violation.

In its brief, Staff argues that Mr. Hussein was on notice that the vehicle had been placed out of service. Staff notes that Respondent's co-driver, Mr. Noor, was informed that the vehicle had been placed out of service both verbally and through the inspection report (Staff Ex. 2). Staff contends that Mr. Hussein and Mr. Noor were part of a team employed to drive this motor vehicle and that it was their joint duty to keep each other informed of safety issues. Thus, the procedure for relaying the fact that the vehicle had been placed out of service is the responsibility of the two drivers.

Further, Staff argues that the fact that the vehicle was pulled over on the side of Interstate 70 and emergency triangles had been placed behind the vehicle should have provided notice to Mr. Hussein. Staff concludes that these circumstances should have caused Mr. Hussein to ask Mr. Noor whether the vehicle was safe to drive.

Further, Staff argues that Respondent did not conduct a reasonable inspection before operating the motor vehicle. Staff notes that 49 C.F.R. Section 392.7 states that no commercial motor vehicle shall be driven unless the driver is satisfied that, among other parts and accessories, the tires are in good working order. The Staff notes that the flat tire was obvious. Thus, Staff concludes that the Respondent failed to conduct a reasonable inspection and this failure should not excuse Respondent from responsibility for the violation.

Respondent argues that he had no knowledge of the fact that the vehicle had been placed out of service. Respondent notes he was asleep during the first inspection (Tr. at 37-38) and that all communications regarding the first inspection were with Mr. Noor (Tr. at 28). Respondent notes that, at hearing, Mr. Irmscher testified that he had no knowledge of whether Mr. Hussein had notice that the vehicle had been placed out of service (Tr. at 24).

Rule 4901:2-7-20, O.A.C., requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence. At the hearing, Staff presented undisputed evidence that the tire was obviously flat and posed a potential safety hazard (Tr. at 24). Based upon this testimony, we conclude that Mr. Hussein would have noticed the flat tire if he had performed the basic inspection required by 49 C.F.R. Section 392.7 before operating the motor vehicle.

In addition, Mr. Irmscher testified at the hearing that he observed Mr. Noor set the emergency triangles after the first inspection (Tr. at 14, 15, 25). He further testified that, within 45 minutes, he observed that the emergency triangles had been removed (Tr. at 19, 26-27) and that Mr. Hussein was driving the motor vehicle (Tr. at 17). The Commission notes that Mr. Hussein never offered a plausible explanation as to how the emergency triangles had been removed.

Finally, at the hearing, Mr. Irmscher testified that, when he asked Mr. Hussein why they were driving the vehicle even though the flat tire had not been repaired, Mr. Hussein stated that they were going to the truck stop to get something to eat (Tr. at 19). At the hearing, Mr. Hussein did not dispute that he had made this statement to Mr. Irmscher. Accordingly, based upon the record in this proceeding, we find that Mr. Hussein knew or should have known that the commercial motor vehicle had been placed out of service and that he is responsible for the violation of 49 C.F.R. Section 396.9(c)(2).

With respect to the forfeiture proposed by Staff, Rule 4901:2-7-06(A), O.A.C., states that, in assessing civil forfeiture, the Commission shall consider: the nature and circumstances of the violation, the extent and gravity of the violation, the degree of the Respondent's culpability, the Respondent's prior violations, the Respondent's ability to pay, and all other matters as justice requires. At the hearing, the Staff presented testimony from John Canty, the Assistant Chief of the Compliance Division of the Transportation Department regarding the proposed civil forfeiture. Mr. Canty testified that the forfeiture of \$1,000.00 originally proposed by Staff was consistent with the forfeiture set forth under the guidelines developed by the Commercial Vehicle Safety Alliance (Tr. at 33). Based upon the testimony of Mr. Canty at the hearing, the Commission finds that, considering these factors, the amount of the proposed forfeiture in this case of \$1,000.00 is fair and reasonable.

However, although the Commission found above that Mr. Hussein is responsible for this violation, we believe, in assessing the degree of the Respondent's culpability, that culpability for this violation is equally shared by Mr. Hussein and by Mr. Noor, the other driver in the events leading up to the violation; and we will mitigate the proposed forfeiture by reducing the proposed forfeiture in half. Accordingly, the Commission will assess a civil forfeiture of \$500.00 against the Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On May 31, 2005, Aboullahi G. Hussein filed a request for an administrative hearing regarding an apparent violation of 49 C.F.R. Section 396.9(c)(2) and a civil forfeiture of \$1,000.00 proposed by the Staff.
- (2) A prehearing conference was held on June 30, 2005.
- (3) A hearing was held on September 12, 2005.
- (4) Rule 4901:2-7-20, O.A.C., requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.
- (5) Based upon the record in this proceeding, Staff has proven that the Respondent violated 49 C.F.R. Section 396.9(c)(2).
- (6) Considering the nature and circumstances of the violation, the extent and gravity of the violation, the degree of the Respondent's culpability, the Respondent's prior violations, the Respondent's ability to pay, and all other matters as justice requires, forfeiture of \$500.00 would be fair and reasonable.

ORDER:

It is, therefore,

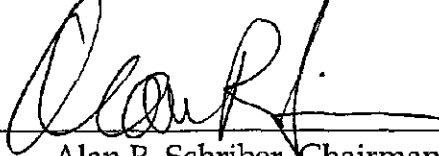
ORDERED, That Aboullahi G. Hussein be assessed a civil forfeiture of \$500.00 for violation of 49 C.F.R. Section 396.9(c)(2), as adopted by the Commission. It is, further,

ORDERED, That Respondent pay the assessed amount to the State of Ohio within 30 days. Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793. It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,


ORDERED, That a copy of this opinion and order be served upon all parties of record.

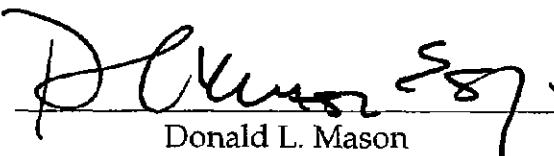
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Paul A. Centolella

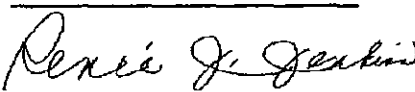
Ronda Hartman Fergus

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Donald L. Mason

GAP:ct

Entered in the Journal
AUG 22 2007



Renee J. Jenkins
Secretary