

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Request of Paul E.)
Hodgson for an Administrative) Case No. 05-684-TR-CVF
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.

Law Offices of John L. Alden, by Benjamin Edwards, One East Livingston Avenue, Columbus, Ohio, 43215-5700 on behalf of Paul E. Hodgson.

OPINION:

I. Background

On June 29, 2004, Philip Haskins, a Hazardous Materials Specialist employed by the Commission's Transportation Department staff (Staff), inspected a commercial motor vehicle owned by Landstar Inway, Inc., and driven by Paul E. Hodgson (Respondent) (Tr. at 12-14; Staff Ex. I).

Prior to the inspection, Mr. Haskins was parked on a township road parallel to the railroad crossing at a distance of approximately 50 yards from the crossing and had an unobstructed view of the crossing (Tr. 19). Mr. Haskins observed the vehicle travel south on U.S. Route 42, enter the grade crossing and travel through the grade crossing without stopping (Tr. at 18). The vehicle contained eight bulk containers, four of which contained a Class 3 (flammable liquid) hazardous material, according to the shipping papers (Staff Ex. I).

Among other violations, Mr. Haskins noted an apparent violation of Title 49, Code of Federal Regulations (C.F.R.), Section 392.10(a)(3)(failure to stop at railroad grade crossing) (Staff Ex. I). Subsequently, on September 3, 2004, the Staff issued a Notice of

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Apparent Violation and Intent to Assess Forfeiture to Paul E. Hodgson, proposing a forfeiture of \$127.50 for the apparent violation of 49 C.F.R. Section 392.10(a)(3) (Tr. at 59-60; Staff Ex. II).

On May 24, 2005, Mr. Hodgson requested an administrative hearing regarding the apparent violation and proposed forfeiture. A prehearing conference was held on June 23, 2005, and a hearing was held on September 28, 2005. At the hearing, Mr. Haskins and Jonathan Frye testified on behalf of the Staff, and Mr. Hodgson testified on his own behalf.

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 transportation of hazardous materials into, through or within this state. Further, Section 4905.83, Revised Code, authorizes the Commission to assess a civil forfeitures of up to \$10,000 per day per violation against any person who violates the safety rules adopted by the Commission when transporting hazardous materials.

III. Discussion And Conclusion

The provisions of 49 C.F.R. Section 392.10 require every driver of a commercial motor vehicle carrying Class 3 (Flammable Liquid) hazardous materials in quantities requiring placards to stop the commercial motor vehicle within 50 feet, and no closer than 15 feet, of a railroad grade crossing. In this case, Mr. Hodgson does not dispute that his vehicle was transporting Class 3 hazardous materials in quantities requiring placards. In addition, Mr. Hodgson does not dispute the amount of the civil forfeiture proposed by the Staff. The sole dispute in this case is whether Mr. Hodgson stopped his commercial motor vehicle within 50 feet, and no closer than 15 feet, of the grade crossing.

At the hearing, the Staff presented testimony by Philip Haskins, a Hazardous Materials Specialist employed by the Commission's Transportation Department. Mr. Haskins has been employed with the Staff since 1988 (Tr. at 7). He has received his hazardous materials inspection certification from the Federal Motor Carrier Safety Administration (Tr. at 8).

Mr. Haskins testified that, prior to the inspection, his vehicle was parked approximately 50 yards from the grade crossing and that he had an unobstructed view of the grade crossing (Tr. at 19). Mr. Haskins testified that he observed the vehicle approach the crossing and that the vehicle failed to stop or slow; in fact, his testimony indicates that the vehicle appeared to accelerate through the crossing (Tr. at 21). The inspection report prepared by Mr. Haskins during the inspection also notes that the vehicle appeared to

accelerate through the grade crossing (Staff Ex. 1). Further, Mr. Haskins testified that, because the grade crossing is on a narrow two-lane rural road, he inspected the vehicle approximately two miles from the crossing, at the first safe location where the vehicle could be inspected and that at no time did he lose sight of the vehicle after it crossed the grade crossing (Tr. at 21-22). Mr. Haskins testified that he followed Mr. Hodgson's vehicle from the crossing to the inspection location and passed him just before reaching the inspection site in order to indicate where the vehicle should pull over for the inspection (Tr. at 32-33). Finally, Mr. Haskins testified that, during the inspection, Mr. Hodgson stated that he forgot the rule requiring him to stop at the grade crossing (Tr. at 21-22; Staff Ex. 1).

Mr. Hodgson testified that he has been driving commercial motor vehicles transporting hazardous materials for 30 years (Tr. at 72). In addition, Mr. Hodgson testified that he has never been charged with failing to stop at a grade crossing prior to this case (Tr. at 73). Mr. Hodgson testified that he did stop at the grade crossing (Tr. at 73, 77-78, 88). Further, Mr. Hodgson testified that, at the time of the inspection, he quoted the rule to Mr. Haskins, rather than admitting that he forgot the rule (Tr. at 75-76). Mr. Hodgson also testified that he did not see Mr. Haskins following after he crossed the grade crossing and that the first time he saw Mr. Haskins was in the parking lot where he intended to get something to eat at a restaurant (Tr. at 73, 76-77). Finally, Mr. Hodgson testified that it would have been impossible for Mr. Haskins to have observed him cross the grade crossing and reach the parking lot ahead of Mr. Hodgson (Tr. at 80-81).

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. The Commission finds that, based upon the record in this proceeding, Staff has proven that the Respondent, acting knowingly, violated 49 C.F.R. Section 392.10 as alleged. Staff's witness, Mr. Haskins, testified unequivocally that the commercial motor vehicle driven by Mr. Hodgson failed to stop at the grade crossing. The record is clear that Mr. Haskins had an unobstructed view of the crossing at the time of the violation. The record further demonstrates that Mr. Haskins followed the commercial motor vehicle to a safe location in which to perform the inspection and that at no time did Mr. Haskins lose sight of the vehicle. Further, Mr. Haskins testimony is supported by the inspection report (Staff Ex. 1), which was prepared by Mr. Haskins contemporaneously with the inspection. We find that the testimony by Mr. Haskins regarding the circumstances of the violation to be persuasive and that the weight of the evidence more fully supports the conclusion that the violation occurred as alleged by Staff.

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. The Staff presented testimony from Jonathan Frye, the Chief of the Compliance Division of the Transportation Department regarding the proposed civil forfeiture. Mr. Frye testified that, in determining the amount of the proposed forfeiture, the Staff considered the nature and gravity of the alleged violation, the extent of the alleged violation, the Respondent's culpability for the violation and the Respondent's history of violations, as well as the amount and relative hazard of the hazardous materials on the vehicle. (Tr. 55-57; 61; Staff Ex. III). Further, Mr. Frye testified that the proposed forfeiture of \$127.50 was consistent with the forfeiture proposed for drivers in similar circumstances (Tr. at 55-57). This testimony was not disputed by Mr. Hodgson at the hearing.

Based upon the testimony of Mr. Frye at the hearing, the Commission finds that, considering these factors, the amount of the proposed forfeiture in this case is fair, reasonable and consistent with the forfeitures proposed for drivers in similar circumstances. Accordingly, the Commission will assess a civil forfeiture of \$127.50 against the Respondent.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On May 24, 2005, Paul E. Hodgson (Respondent) filed a request for an administrative hearing regarding an apparent violation of 49 C.F.R. Section 392.10 and a civil forfeiture of \$127.50 proposed by the Staff.
- (2) A prehearing conference was held on June 23, 2005.
- (3) A hearing was held on September 28, 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, acting knowingly, violated 49 C.F.R. Section 392.10.
- (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, the proposed forfeiture of \$127.50 is fair,

¹ The record reflects that Mr. Hodgson inadvertently paid the civil forfeiture after receiving the notice issued by the Staff. However, we note that the fact that Mr. Hodgson has paid the proposed forfeiture was not deemed by the Commission to be an admission that the violation occurred as alleged or was not otherwise relevant to our decision in this case.

reasonable and consistent with the forfeitures proposed for drivers in similar circumstances.

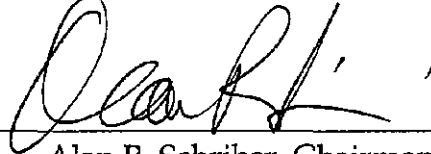
ORDER:

It is, therefore,

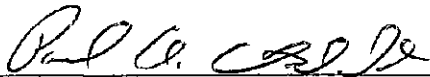
ORDERED, That Paul E. Hodgson be assessed a civil forfeiture of \$127.50 for violation of 49 C.F.R. Section 392.10, as adopted by the Commission. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

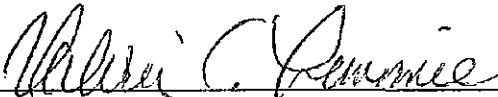
THE PUBLIC UTILITIES COMMISSION OF OHIO



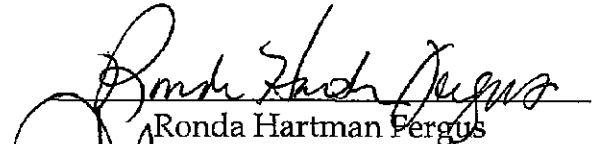
Alan R. Schriber, Chairman



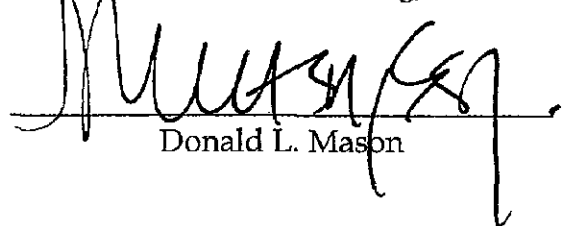
Paul A. Centolella



Valerie A. Lemmie



Ronda Hartman Fergus



Donald L. Mason

GAP:ct

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SEP 05 2007



Renee J. Jenkins
Secretary