

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of George Ncube, Notice) Case No. 05-202-TR-CVF
of Apparent Violation and Intent To) (OH0341002502D)
Assess Forfeiture.) (OH0341002503D)

OPINION AND ORDER

The Commission, considering the public hearing held on October 11, 2006 and October 26, 2006, issues its opinion and order in this matter.

APPEARANCES:

John Alden, One East Livingston Avenue, Columbus, Ohio 43215, on behalf of George Ncube.

Marc Dann, Attorney General of Ohio, by William L. Wright and John H. Jones, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

Nature of the Proceeding:

On September 8, 2004, the Ohio State Highway Patrol (Highway Patrol) inspected a motor vehicle in the state of Ohio operated by CLM Freight Lines, Inc. and driven by George Ncube. As a result of the inspection, the Highway Patrol found the following violation of the Code of Federal Regulations (C.F.R.) relevant to this case: 49 C.F.R. Section 395.8(a) - no log book entries for 9/5/2004 to 9/8/2004, out of service (\$100.00).¹ Subsequently, because Mr. Ncube drove the company truck after being placed out of service, the Highway Patrol cited him for the following violation of the C.F.R.: 49 C.F.R. Section 392.2 - operating vehicle while driver was placed out of service (\$1,000.00).²

- 1 49 C.F.R. Section 395.8(a) provides, in pertinent part, that (a)(1) "Every driver who operates a commercial motor vehicle shall record his/her duty status, in duplicate, for each 24-hour period."
- 2 49 C.F.R. Section 392.2 provides, in pertinent part, that "Every commercial motor vehicle must be operated in accordance with the laws ordinances, and regulations of the jurisdiction in which it is being operated."

In this particular case, the Ohio regulation indicated by the language of 49 C.F.R. Section 392.2 is Rule 4901:2-5-07(D), Ohio Administrative Code. That code section provides, in pertinent part, that "Drivers declared out of service shall remain out of service until such time as they are qualified to drive a commercial motor vehicle and meet all conditions established in the law, rule, or out of service order upon which their out of service status was based."

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Mr. Ncube was timely served with a Notice of Preliminary Determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In this notice, Mr. Ncube was notified that staff intended to assess a civil monetary forfeiture of \$1,100.00 for violation of 49 C.F.R. Section 395.8(a) (Section 395.8(a)) and Rule 4901:2-5-07(D), O.A.C. (2-5-07(D)). A prehearing teleconference was conducted in the case, but the parties failed to reach a settlement agreement during the conference. Subsequently, a hearing was scheduled and continued twice, at Mr. Ncube's request, because of scheduling conflicts. A hearing was convened on October 11, 2006. However, because of a misunderstanding on the part of Mr. Ncube's counsel about his client's need to be present at hearing, Mr. Ncube did not attend the October 11, 2006 proceeding. The Highway Patrol trooper's testimony was presented at hearing on October 11, 2006. Thereafter, on October 26, 2006, the hearing again was convened, and Mr. Ncube appeared and testified.

Background

At the time of the inspection in this matter, Mr. Ncube was transporting refrigerated foods from a shipper's facility in Indianapolis, Indiana, to New Stanton, Pennsylvania. Initially, the company truck was stopped for speeding and a speeding citation was issued to Mr. Ncube. A roadside inspection then was performed adjacent to Rt. 70 in Licking County, Ohio. Upon discovering no entries in the driver's log book from September 5, 2004 to September 8, 2004, Trooper Gary Neitzelt placed the truck driven by Mr. Ncube out of service for ten hours at the nearby Duke truck stop, and Mr. Ncube was cited for violation of Section 395.8(a). A short time later, Trooper Neitzelt recognized Mr. Ncube approximately five miles east of the truck stop where he had been placed out of service. At that time, Trooper Neitzelt cited Mr. Ncube for operating during his out of service time in violation of Section 392.2/2-5-07(D), and he was placed out of service again at the same truck stop.

Issues in the Case

Staff's contentions in this matter are straight forward. Mr. Ncube did not have his log book up to date (Tr. Vol. I, at 11), and he operated his company's truck after being placed out of service (Tr. Vol. I, at 22, 26). Trooper Neitzelt testified that there was no question about Mr. Ncube's ability to understand and speak English (Mr. Ncube later testified that he spoke English as a second language.³), that Mr. Ncube possessed a valid commercial driver's license (CDL), and that, in order to obtain a CDL, one must demonstrate a proficiency in English (Tr. Vol. I, at 31-32). Trooper Neitzelt testified that Mr. Ncube readily understood and complied with the instructions pertaining to the inspection. He noted that Mr. Ncube also understood, and initially complied with, the directive placing him out of service (Tr. Vol. I, at 25, 50-51). Trooper Neitzelt testified that Mr. Ncube's only explanation for operating his company's truck during his out of service

³ Mr. Ncube testified that he is South African by nationality and that his mother is a Zulu (Tr. Vol. II, at 20).

period was that he had no money and that the truck stop would not take his comp checks.⁴ Trooper Neitzelt also noted Mr. Ncube's statement that he needed to get to a hotel and obtain something to eat (Tr. Vol. I, at 22, 54-55). Trooper Neitzelt, however, verified that the truck stop did accept Mr. Ncube's TCH/CFS brand of commercial checks (Tr. Vol. I, at 23, 44). Trooper Neitzelt further noted that Mr. Ncube was driving a truck equipped with a sleeper cab and that he thus did not understand Mr. Ncube's stated need for a hotel (Tr. Vol. I, at 24-25). Mr. Ncube said nothing more to Trooper Neitzelt about where he was going when he was stopped by the trooper for the second time (Tr. Vol. I, at 55).

In addition, Trooper Neitzelt testified that he stopped Mr. Ncube for the second time at the junction of Route 40 and Route 13, a north-south access route connecting Route 40 and I-70, east of the Duke truck stop. Trooper Neitzelt noted that I-70 is the direct route for the delivery of Mr. Ncube's load at the location listed on his manifest, New Stanton, Pennsylvania, and that his interpretation of Mr. Ncube's actions was that Mr. Ncube was taking a side road to avoid troopers and arrive at his destination. Moreover, Trooper Neitzelt testified that Mr. Ncube was going the wrong way to get to an alternate destination for food, drink, or shelter. He noted that there are two other truck stops closer along I-70; the closest being three miles headed west. However, the closest truck stop along I-70, headed in the direction that Mr. Ncube was going, east, is 35 miles away (Tr. Vol. I, at 48).

Mr. Ncube, for his part, testified at the October 26, 2006 hearing that he had held a CDL for two or three years at the time he was cited in this matter. Mr. Ncube testified that his defense to the out-of-service violation was a lack of understanding of what the trooper meant by placing him out of service (Tr. Vol. II, at 8-9, 35-36, 51-52). Mr. Ncube stated that he was not denying the occurrence of the violations charged against him (Tr. Vol. II, at 55-56), but that he had no intention of trying to deliver his load (Tr. Vol. II, at 61). He stated that when he first was placed out of service, he contacted the dispatcher at his company and his load was rescheduled for 2:00 p.m. on the following day (Tr. Vol. II, at 10, 18). Mr. Ncube noted that loads are delivered by appointment at his destination in New Stanton, Pennsylvania, and that there is no overnight parking at the delivery point (Tr. Vol. II, at 19).

Mr. Ncube testified that there probably were two misunderstandings connected with his violation for driving while out of service. Noting that the first misunderstanding occurred between him and an employee at the Duke truck stop, he testified that the Duke

⁴ A comp check is a type of commercial check commonly issued to truck drivers. A comp check is similar to a traveler's check. However, it cannot merely be signed and cashed. In order to use a comp check, a driver must call his company and request that the company deposit money into an account maintained by that check service. The company then gives the driver an approval code, and the driver enters the approval code on the check. The truck stop, in turn, can call the check company by using an 800 number on the check, and verify the dollar amount of the check with the approval code. The truck driver then may cash the check at the truck stop (Tr. 22-23).

employee probably thought he meant personal checks, not comp checks, when she informed him that the truck stop would not take his check. The employee also informed him that he could not leave his trailer at the Duke truck stop (Tr. Vol. II, at 11-12, 14, 51).⁵ Further, Mr. Ncube testified that the second misunderstanding occurred with his interpretation of Trooper Neitzelt's advice to him after he was stopped for the first time, that he should find some food and stay at the truck stop for 10 hours. Mr. Ncube testified that his truck had no heat, and since he could not cash a check and obtain something to eat at the Duke truck stop, he thought that perhaps Trooper Neitzelt meant he could find some other place to eat, as long as he was not working (Tr. Vol. II, at 15, 35). Mr. Ncube testified that the Duke employee he spoke with suggested a nearby Wal-Mart store as a place where he might cash his personal check. Mr. Ncube testified that, if he remained in the same area and did not drive on the interstate, he thought that he would be in compliance with his out-of-service restriction. Mr. Ncube noted that he drove from the Duke truck stop to the Wal-Mart store in order to get his check cashed and find a restaurant, but that he could not make a turn from the road he was driving on. Also, the Wal-Mart store had posted a sign stating that no truck parking was allowed on the premises. Mr. Ncube testified that he was searching for a place to park when he was stopped again by the same trooper (Tr. Vol. II, at 12-15).

Discussion

The Commission initially notes that Mr. Ncube did not deny failing to maintain his log book or moving his vehicle while he was placed out of service (Tr. Vol. II, at 55-56). He stated that he misunderstood the meaning of being placed out of service and that he was not familiar with the area and was trying to find a place to park, cash his check, and eat at a restaurant. After a review of the evidence, the Commission agrees with staff on the log book violation. No evidence in the case excuses or mitigates Mr. Ncube's failure to maintain his log book. However, with regard to operating while out of service, the Commission would note two points that are crucial in analyzing this violation. First, Mr. Ncube contacted his dispatcher after he was placed out of service the first time and rescheduled the delivery of his load for 2:00 p.m. on the next day (Tr. Vol. II, at 10, 18). The destination for the load in Pennsylvania, at New Stanton, did not have facilities to accommodate his early arrival (Tr. 19), so Mr. Ncube would have gained nothing by leaving the Duke truck stop near Buckeye Lake, going to New Stanton, and arriving more than 24 hours before his rescheduled delivery time. Further, the Commission takes notice that, on a current United States Department of Transportation highway map, the distance from Buckeye Lake, Ohio, to New Stanton, Pennsylvania is approximately 150 miles, less than three hours driving time away. Second, as mentioned previously, Mr. Ncube

⁵ Mr. Ncube testified that the Duke truck stop had the Comdata brand of comp checks on its desk, so it probably did not accept his CFS brand of comp checks. However, he testified that he did not specifically ask the Duke employee if Duke took CFS comp checks. In addition, Mr. Ncube testified that another employee at the desk of the Duke truck stop, when shown his brand of comp checks, would not accept them after he was placed out of service the second time (Tr. Vol. II, at 57, 59-60).

attempted to cash a check and leave his trailer at the Duke truck stop, but was unable to do either. At that point, it appears to the Commission that Mr. Ncube was left with two choices: a) go hungry and be cold at the Duke truck stop for not less than 10 hours, the length of his original out-of-service time, or b) try to find a location where he could find what he needed and, in his estimation, comply with the out-of-service order. He chose to move to a location where he thought that he might be able to cash a check, leave his trailer, get something to eat, and serve his out-of-service time. The Commission thus believes that, in light of Mr. Ncube's rescheduled delivery time at 2:00 p.m. on the next day and the choices that he faced in obtaining basic needs, he was not attempting to circumvent the law, but merely was attempting to find a place to eat and stay for the next 24 hours.

Consequently, while Mr. Ncube admitted moving his vehicle while he was placed out of service, and thus was in violation of Section 392.2/2-5-07(D), the Commission feels that it is appropriate, based on the circumstances of this case, to waive the forfeiture. We, therefore, conclude that Mr. Ncube should be assessed \$100.00 for violation of Section 395.8(a), no log book entries for September 5, 2004 to September 8, 2004, and that the \$1000.00 forfeiture for violation of Section 392.2/2-5-07(D), for operating while out of service, should not be assessed. The citation for violating Section 392.2/2-5-07(D), however, should remain in Mr. Ncube's History of Violations in the Commission's records.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On September 8, 2004, the Highway Patrol stopped and inspected a commercial motor vehicle operated by CLM Freight Lines, Inc. and driven by George Ncube. As a result of the inspection, the Highway Patrol found the following violation of the Code of Federal Regulations (C.F.R.) relevant to this case: 49 C.F.R. Section 395.8(a) - no log book entries for 9/5/2004 to 9/8/2004, out of service (\$100.00). Subsequently, because Mr. Ncube drove the company truck after being placed out of service, the Highway Patrol cited him for the following violation: 49 C.F.R. Section 392.2 - operating vehicle while driver was placed out of service (\$1,000.00).
- (2) Mr. Ncube was timely served a Notice of Preliminary Determination that set forth a forfeiture of \$1,100.00 for violation of 49 C.F.R. Section 395.8(a) and Rule 4901:2-5-07(D), O.A.C.
- (3) A hearing in this matter was convened on October 11, 2006 and October 26, 2006.

- (4) Staff presented evidence that Mr. Ncube had failed to maintain his log book and had moved his truck while being placed out of service.
- (5) The evidence at hearing demonstrated that Mr. Ncube violated Section 395.8(a) and Section 392.2/2-5-07(D). However, the Commission feels that it is appropriate, based on the circumstances of this case, to waive the forfeiture for violation of Section 392.2/2-5-07(D).
- (6) Mr. Ncube should be assessed the \$100.00 forfeiture for violation of Section 395.8(a), no log book entries for 9/5/2004 to 9/8/2004, but the forfeiture for violation of Section 392.2/2-5-07(D) (\$1000.00), for operating while out of service, should not be assessed. The citation for violating Section 392.2/2-5-07(D), however, should remain listed in Mr. Ncube's History of Violations in the Commission's records.
- (7) The parties stipulated that the civil forfeiture amounts in this matter were calculated appropriately (Tr. Vol. II, at 56-57).
- (8) The Commission determined, based on all the required statutes and administrative rules, that violations of Section 395.8(a) and Section 392.2/2-5-07(D) were proven by a preponderance of the evidence.
- (9) Pursuant to Section 4905.83, Revised Code, Mr. Ncube must pay the State of Ohio the civil forfeiture assessed for violation of Section 395.8(a). Mr. Ncube shall have 30 days from the date of this entry to pay the assessed forfeiture of \$100.00.
- (10) 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, therefore,

ORDERED, That Mr. Ncube pay the assessed amount of \$100.00 for the violation of 49 C.F.R. Section 395.8(a) within 30 days to the State of Ohio, as set forth in Findings of Fact and Conclusions of Law (9) and (10). It is, further,

ORDERED, That the forfeiture for violation of 49 C.F.R. Section 392.2/2-5-07(D)(\$1000.00) should not be assessed, but the citation for 49 C.F.R. Section 392.2/2-5-07(D) should remain listed in Mr. Ncube's History of Violations in the Commission's records. 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 order be served on each party of record.

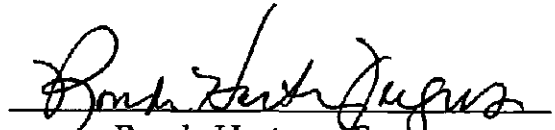
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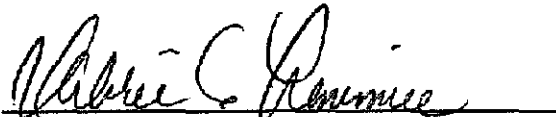
Alan R. Schriber, Chairman



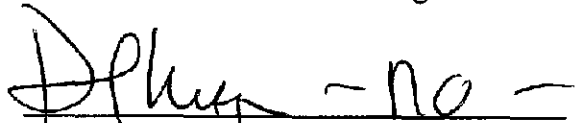
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Renee J. Jenkins
Secretary