

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Request of All)
States Freight Systems, Inc., for an) Case No. 05-879-TR-CVF
Administrative Hearing.)

OPINION AND ORDER

The Commission, considering 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 Steven L. Beeler, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

OPINION:

I. Background

On March 18, 2005, Keith Kerns, a safety investigator employed by the Commission, conducted a compliance review of All States Freight Systems, Inc., (Respondent) at the Respondent's facility in Twinsburg, Ohio (Tr. at 8, 18-19; Staff Ex. 2). During the compliance review, Mr. Kerns noted, among other violations, the following apparent violations of Title 49, Code of Federal Regulation (C.F.R.):

Section 172.800(b) Transporting hazardous materials without a security plan.

Section 382.301(b)(2) Using a driver before the motor carrier has received a negative preemployment controlled substance test result.

Section 382.305(b)(2) Failing to conduct random controlled substance testing at an annual rate of not less than the applicable annual rate of the average number of driver positions.

Section 391.45(b)(1) Using a driver not medically reexamined each 24 months.

Section 396.3(b) Failing to keep minimum records of inspection and maintenance.

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Section 396.11(a) Failing to require driver to prepare vehicle inspection report.

Subsequently, on June 21, 2005, Staff issued a Notice of Preliminary Determination to Respondent proposing a civil forfeiture of \$5,375.00 for the apparent violations discovered during the compliance review (Staff Ex. 13). On July 8, 2005, Respondent requested an administrative hearing regarding the apparent violations and proposed forfeiture. A prehearing conference was held on August 5, 2005, and a hearing was held on September 29, 2005. At the hearing, Mr. Kerns and Jonathan Frye testified on behalf of the Staff, and Patrick A. Ward testified on behalf of Respondent.

II. The Law

Pursuant to the provisions of Section 4919.79, Revised Code, and Rule 4901:2-5-02, Ohio Administrative Code (O.A.C.), the Commission has adopted the provisions of the Hazardous Materials Regulation, 49 C.F.R. Sections 171-180, and the Federal Motor Carrier Safety Rules, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property in interstate commerce where such transportation takes place into or through this state. Further, Section 4919.99, Revised Code, authorizes the Commission to assess a civil forfeiture of up to \$10,000 per day per violation against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce, into or through this state.

III. Discussion And Conclusion

A. Apparent Violation of 49 C.F.R. Section 172.800(b).

Section 172.800(b) requires that each person who transports hazardous materials in quantities requiring placards under 49 C.F.R. Section 172, Subpart F to develop and adhere to a security plan for hazardous materials. At the hearing, Mr. Kerns testified that, during the compliance review, he requested that the company provide him with a copy of its security plan for hazardous materials and that the company failed to provide him with a specific security plan (Tr. at 35-36). In his report, which he prepared at the time he conducted the compliance review, Mr. Kerns noted that he "spoke with Patrick Ward regarding haz mat [sic] issues. He advised me that the carrier has no written security plan" (Tr. at 36; Staff Ex. 2 at 11). Further, Mr. Kerns noted that the Respondent transported hazardous materials in bulk quantities requiring placards on at least five occasions (Staff Ex. 2 at 2).

At the hearing, Mr. Ward testified that Respondent participates in a number of initiatives to maintain quality, safe, and secure operations and that, as part of those initiatives, Respondent had adopted a security plan which, while not identified as a

"Hazardous Materials Security Plan" does contain the components required by Section 172.800 and was made available to Mr. Kerns along with all other policies governing hazardous materials safety (Tr. at 103-104). Mr. Ward produced a document at hearing (Respondent Ex. 2) which Mr. Ward testified met the requirements of the rule, and Mr. Kerns acknowledged that, if he had been presented with this document when he performed the compliance review, he would have agreed that the document addressed the intent of the regulation if not all of the specific details (Tr. at 79-81). Mr. Ward testified that this document was given to Mr. Kerns during the compliance review (Tr. at 113). Mr. Kerns maintains, however, that the document was not made available to him during the compliance review (Tr. at 75-76, 81-82).

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 the Staff has proven that the Respondent, acting knowingly, violated the provision of Section 172.800. At the hearing, Mr. Kerns testified that he was not given any documents which met the substance of the security plan (Tr. at 75-76, 81-82). Mr. Kern's testimony is corroborated by his notes made contemporaneously with the compliance review (Staff Ex. 2 at 11). Further, the Commission notes the extensive documentation collected throughout the compliance review by Mr. Kerns (Staff Ex. 3 through Staff Ex. 10). It is highly unlikely that, in the course of collecting this evidence that Mr. Kerns failed to recognize the security plan.

B. Apparent Violation of 49 C.F.R. Section 382.301(a).

Section 382.301(a) requires that, prior to the first time a driver begins to work for a motor carrier, the driver shall undergo testing for controlled substances as a condition prior to being used, unless the employer uses an exception pursuant to Section 382.301(b). Mr. Kerns testified at the hearing he had discovered two counts of violation of Section 382.301(a) (Tr. at 39-40; Staff Ex. 2 at 2). Mr. Kerns stated that two drivers had been tested but that the testing took place more than 30 days prior to their actual hire date. Mr. Kerns stated that it is allowable for the preemployment testing to occur more than 30 days prior to the actual hire date, but the drivers must be placed in the carrier's random testing pool (Tr. at 40-41). Mr. Kerns testified that he confirmed that these drivers had not been placed in the Respondent's random pool before their actual hire date (Tr. at 43-45).

Mr. Ward testified that one of the drivers, Donald Arnold, completed his preemployment testing on October 22, 2004, and began work on January 1, 2005 (Tr. at 106). Mr. Ward further testified that, during the period between his preemployment test and his actual hire date, Mr. Arnold was driving for another motor carrier, Central Transport, which had implemented a random testing program consistent with the safety rules (Tr. at 106-107). Mr. Ward did not address the second driver in his testimony.

The Commission finds that Staff has proven both counts of this violation by a preponderance of the evidence. Section 382.301(b) provides an exception to the preemployment testing requirement if a driver has participated in a random testing pool within the last 30 days and if the driver was tested in the preceding six months or participated in the pool for the 12 months previous to his employment application. 49 C.F.R. Section 382.301(b)(1),(2). Although Mr. Ward testified that one of the drivers was in a random testing pool for another motor carrier during the period between his preemployment test and the date he actually began work, Mr. Ward did not provide evidence that the driver had been tested in the preceding six months or that the driver had been participating in the random testing pool for the 12 months preceding his employment application with Respondent (Tr. at 118). Absent such evidence, the Commission cannot find that Respondent was subject to the exception provided by Section 382.301(b).

C. Apparent Violation of 49 C.F.R. Section 382.305(b)(2).

Section 382.305(b)(2) requires that motor carriers conduct random controlled substance testing at an annual rate of not less than the average number of driver positions. Mr. Kerns testified that he determined the Respondent should have conducted 13 random drug tests during the calendar year; however, Mr. Kerns testified that only nine random tests had been performed (Tr. at 45-49; Staff Ex. 5). Accordingly, Mr. Kerns noted that there were four counts of violation of Section 382.305(b)(2) (Tr. at 50).

At the hearing, the Respondent did not present any testimony disputing the occurrence of this violation although the Respondent did present testimony regarding mitigating circumstances with respect to this alleged violation. The Commission will address the mitigating circumstances in our discussion of the appropriate civil forfeiture to be assessed in this case. Nonetheless, the Commission finds that Staff has proven, by a preponderance of the evidence, the occurrence of four violations of Section 382.305(b)(2).

D. Apparent Violation of 49 C.F.R. Section 391.45(b)(1).

The provisions of 49 C.F.R. Section 391.45(b)(1) prohibit the use of any driver who has not been medically examined and certified as qualified to operate a commercial motor vehicle during the preceding 24 months. At the hearing, Mr. Kerns testified that two drivers were used to operate a commercial motor vehicle although they had not had a medical examination in the preceding 24 months (Tr. at 52-54; Staff Ex. 6).

At the hearing, the Respondent did not present any testimony disputing the occurrence of this violation although the Respondent did present testimony regarding mitigating circumstances with respect to this alleged violation. The Commission will address the mitigating circumstances in our discussion of the appropriate civil forfeiture to be assessed in this case. Nonetheless, the Commission finds that Staff has proven, by a preponderance of the evidence, the occurrence of two violations of Section 391.45(b)(1).

E. Apparent Violation of 49 C.F.R. Section 396.3(b).

Section 396.3(b) requires motor carriers to maintain, for at least one year, records regarding inspections, repairs and maintenance. At the hearing, Mr. Kerns testified that, prior to the compliance review, he reviewed the records of roadside inspections performed on Respondent's vehicles (Tr. at 64-65; Staff Ex. 9). During the compliance review, Mr. Kerns examined the maintenance files for the vehicles which had safety defects discovered during these roadside inspections to determine whether the Respondent maintained records of the repairs to the safety defects (Tr. at 65). Mr. Kerns discovered four instances where the Respondent had no record of repairing defects discovered during roadside inspection (Tr. at 65-69; Staff Ex. 2 at 10).

The Respondent did not present any testimony disputing the occurrence of this violation although the Respondent did present testimony regarding mitigating circumstances with respect to this alleged violation. The Commission will address the mitigating circumstances in our discussion of the appropriate civil forfeiture to be assessed in this case. Nonetheless, the Commission finds that Staff has proven, by a preponderance of the evidence, the occurrence of four violations of Section 396.3(b).

F. Apparent Violation of 49 C.F.R. Section 396.11(a).

Section 396.11(a) provides that motor carriers shall require drivers to complete a drive vehicle inspection report (DVIR), in writing, at the completion of each day's work on each vehicle operated. Mr. Kerns testified that, during the compliance review, he discovered 33 days where a vehicle had been operated but the driver failed to complete a DVIR (Tr. at 70-73; Staff Ex. 2 at 9; Staff Ex. 10).

Mr. Ward testified at the hearing that these alleged violations were due to the fact that a single driver had run out of the proper forms to complete his DVIR for a period of approximately one month but that the driver had maintained his copy of the DVIR (Tr. at 109-110). Mr. Ward further testified that Respondent had confirmed with the driver that he had completed the daily vehicle inspection (Tr. at 110-111). Finally, Mr. Ward testified that Respondent had offered to make these records available to Mr. Kerns during the compliance review (Tr. at 110). However, Mr. Ward also admitted that this driver had submitted at least one DVIR, on the correct forms, during the period when Mr. Ward claimed that the driver had run out of the correct forms (Tr. at 122-123; Staff Ex. 2 at 9). Mr. Ward also acknowledged that another driver had failed to submit DVIRs during the same period (Tr. at 123-124).

The Commission finds that the Staff has proven, by a preponderance of the evidence, the 33 violations of Section 396.11(a) alleged by the Staff. As with the other violations alleged by Staff, the record contains extensive documentary evidence

supporting this violation (Staff Ex. 2 at 9; Staff Ex. 10), and while Respondent's explanation for the origin of the violation may serve as a mitigating circumstance, it does not excuse the violations or demonstrate that the violations did not occur.

G. Proposed Forfeiture.

Rule 4901:2-7-06(A), Ohio Administrative Code, 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 Jonathan Frye, the Chief of the Compliance Division of the Commission's 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 violations (Tr. at 85-86, 92; Staff Ex. 12), the extent of the alleged violations (Tr. at 87-88, 92; Staff Ex. 12), the Respondent's culpability for the alleged violations (Tr. at 88, 92; Staff Ex. 12), the Respondent's history of violations (Tr. at 88-89, 92; Staff Ex. 12) and the Respondent's ability to pay (Tr. at 89, 92-93; Staff Ex. 12).

The Respondent also presented testimony at the hearing regarding mitigating circumstances with respect to the violations. Mr. Ward testified that, although the compliance review had resulted in a recommendation for a "Conditional" rating from the United States Department of Transportation, Respondent had applied for, and received, an upgrade in the rating to "Satisfactory" (Tr. at 101-102). Mr. Ward also testified that Respondent submitted to an independent audit and that, of the 55 roadside inspections reviewed by the auditor, only three had violations with no trends among the violations (Tr. at 103, 119). Mr. Ward testified that the Respondent had implemented remedial measures to prevent future violations, including revising their controlled substances testing procedures (Tr. at 107, 117), implementing a systems to ensure that drivers receive their periodic physical examinations (Tr. at 108) and implementing a system for maintenance records for owner-operators leased by the Respondent (Tr. at 18-109).

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 of \$5,375.00 is fair and reasonable. However, based upon the mitigating circumstances offered by the Respondent at hearing, the Commission will order the Respondent to pay \$3,225.00 immediately; and the Commission will hold the remainder of the forfeiture, \$2,150.00, in abeyance for a period of one year, to be paid if the roadside inspection or compliance reviews reveal a pattern of violations of the Hazardous Materials Regulation, 49 C.F.R. Sections 171-180, or the Federal Motor Carrier Safety Rules, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, or if the Respondent fails to comply with the Commission's order in this

proceeding. The Commission directs its Staff to conduct a compliance review during the 12 months to ensure that the Respondent is conducting its operations in compliance with the applicable safety rules, and the Commission directs the Respondent to cooperate in the completion of such compliance review and to provide all appropriate records to the Staff upon request.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On June 21, 2005, All States Freight Systems, Inc., filed a request for an administrative hearing regarding an apparent violations of 49 C.F.R. Sections 172.800(b), 382.301(a), 382.305(b)(2), 391.45(b)(1), 396.3(b), and 396.11(a), and a civil forfeiture of \$5,375.00 proposed by the Staff.
- (2) A prehearing conference was held on August 5, 2005.
- (3) A hearing was held on September 29, 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. Sections 172.800(b), 382.301(a), 382.305(b)(2), 391.45(b)(1), 396.3(b), and 396.11(a).
- (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 history of violations, the Respondent's ability to pay, and all other matters as justice requires, the proposed civil forfeiture of \$5,375.00 is fair and reasonable.

ORDER:

It is, therefore,

ORDERED, That All States Freight Systems, Inc., be assessed a civil forfeiture of \$5,375.00 for violation of 49 C.F.R. Sections 172.800(b), 382.301(a), 382.305(b)(2), 391.45(b)(1), 396.3(b), and 396.11(a), as adopted by the Commission. It is, further,

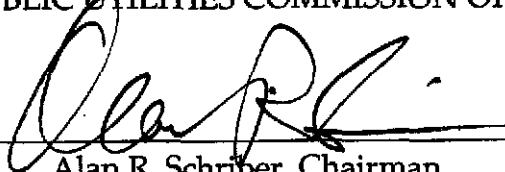
ORDERED, That Respondent pay \$3,225.00 to the State of Ohio within 30 days. Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793. It is, further,

ORDERED, That the remainder of the assessed civil forfeiture, \$2,150.00, be held in abeyance for a period of one year, to be paid if the roadside inspection or compliance reviews reveal a pattern of violations of the Hazardous Materials Regulation, 49 C.F.R. Sections 171-180, or the Federal Motor Carrier Safety Rules, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, or if the Respondent fails to comply with this opinion and order. 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.

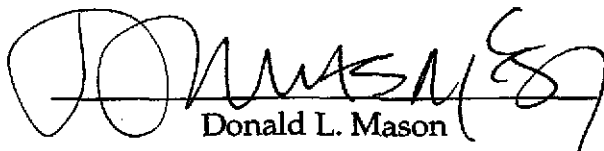
THE PUBLIC UTILITIES COMMISSION OF OHIO


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Renee J. Jenkins
Secretary