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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of James R. Hurley Jr. dba)
M&H Hotshot Express, Notice of Apparent) Case No. 08-513-TR-CVF
Violation and Intent to Assess Forfeiture.) (OH3249002339D)

OPINION AND ORDER

The Commission, considering the testimony and exhibits presented in this matter, the applicable law, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

James R. Hurley Jr., 7580 Old Acton Road, Moody, Alabama 35004, on his own behalf as complainant.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Thomas G. Lindgren, Assistant Attorney General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Commission.

OPINION:

I. Nature of the Proceeding and Background

On July 26, 2007, at the scales near Cambridge, Ohio, Dale A. Webster of the Ohio State Highway Patrol (Officer Webster) inspected a pickup truck and trailer being driven by James R. Hurley Jr. dba M&H Hotshot Express (Mr. Hurley). During the inspection, Officer Webster wrote the following violation of the Code of Federal Regulations (C.F.R.) into the Driver/Vehicle Examination Report (Examination Report):

49 C.F.R. 395.8(e) False report of drivers record of duty status.
Driver logging off-duty, while sleeping in a truck that is not equipped with a sleeper.

Officer Webster confirmed that the only violation found during the inspection was that Mr. Hurley's record of duty status (logbook) indicated that he was off-duty, despite Mr. Hurley's admission that he had been sleeping in his truck, which had no sleeper berth as defined by the Federal Motor Carrier Safety Rules (FMCSR) (Tr. at 10-11). Officer Webster placed Mr. Hurley out of service for ten hours because of the logbook violation (Tr. at 11).

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On March 10, 2008, Mr. Hurley was timely served a Notice of Preliminary Determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In the Notice of Preliminary Determination, Mr. Hurley was notified that Commission staff (Staff) intended to assess a civil monetary forfeiture of \$100.00 for violating 49 C.F.R. 395.8(e). Mr. Hurley responded on April 9, 2008, by requesting an administrative hearing. A prehearing conference was conducted on June 12, 2008, but no settlement was agreed upon. A hearing was scheduled for August 7, 2008, but was postponed at Mr. Hurley's request until December 4, 2008, at which time it was conducted. No briefs were filed by either party.

II. The Law

Under Rule 4901:2-5-02(A), O.A.C., the Commission adopted the FMCSR, found in 49 C.F.R. 40, 42, 383, 387, and 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. In addition, Rule 4901:2-5-02(B), O.A.C., requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all rules of the U.S. Department of Transportation (USDOT). 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. Issues in the Case

There are three issues presented by the facts of this case: (1) whether Mr. Hurley had, on the days immediately before July 26, 2007, been sleeping in a commercial motor vehicle (CMV), as defined by the C.F.R., (2) if sleeping in a commercial motor vehicle that has no sleeper berth may be recorded in a record of duty status (logbook) as off-duty time, and (3) whether an Examination Report that erroneously indicates a Level 1 inspection is valid evidence that the alleged violation had occurred.

In order to address these issues, we must first examine the threshold issue: whether, at the time of the inspection, the weight of Mr. Hurley's vehicle rendered it a CMV. According to 49 C.F.R. 390.5, a CMV means any self-propelled or towed motor vehicle used in interstate commerce having a gross vehicle weight rating (GVWR) or gross combination weight rating (GCWR) of 10,001 lbs. or more. The same regulation defines GVWR as the value specified by the manufacturer as the loaded weight of a single motor vehicle. GCWR is defined by 49 C.F.R. 390.5 as the value specified by the manufacturer as the loaded weight of a combination motor vehicle, i.e., the power unit and the towed unit.

Staff's Position

Officer Webster explained that on July 26, 2007, he prepared an Examination Report of the vehicle, trailer, and documents carried by Mr. Hurley. According to Officer Webster, he randomly selects vehicles for inspection, for example, every second or third vehicle, and does not look for any particular type of vehicle (Tr. at 8). Officer Webster stated that Mr. Hurley was driving a hotshot, i.e., a pickup truck that pulled a trailer by using a hitch (Tr. at 23, 91). Officer Webster said that he inspects pickup trucks if such vehicles have a gross vehicle weight rating (GVWR) exceeding 10,000 lbs. and are used in interstate commerce to transport passengers or property (Tr. at 22-23).

To determine GVWR, Officer Webster checks the manufacturer's data plates on the truck and trailer; if such plates are not present, he learns the GVWR by inputting the truck's vehicle identification number (VIN) into the software program "VIN Assist" (Tr. at 53-54). According to Officer Webster, the data plate is typically found on the driver's door (Tr. at 55-56); Officer Webster relied on this plate when recording that the GVWR of Mr. Hurley's one-ton dual-wheel truck was 11,200 lbs. (Tr. at 9, 61). In addition, stated Officer Webster, the truck displayed commercial markings indicating name of carrier and a USDOT number (Tr. at 92-93). Officer Webster added that, at the time of inspection, a 20,000 lb. GVWR trailer was attached to the truck, resulting in a combined gross weight of 31,200 lbs., which exceeded the minimum 10,000 lb. gross combination weight rating (GCWR) for a commercial motor vehicle (Tr. at 54, 58). Officer Webster conceded that it is possible to make weight modifications to the GVWR of a truck (Tr. at 23). However, Officer Webster contends that Mr. Hurley never stated during the inspection that the truck had a sticker indicating that its GVWR had been changed (Tr. at 61-63, 86-87, 92). In sum, stated Officer Webster, he based the violation on (1) the GVWR as indicated by the manufacturer's data plate, (2) the fact that the truck displayed commercial markings, and (3) the GCWR of the truck and trailer (Tr. at 61, 75).

Mr. Hurley's Position

Mr. Hurley contends that although the manufacturer's data plate on his truck indicates a GVWR of 11,200 lbs., he had modified the truck so that it did not exceed the 10,001 lb. GVWR threshold for a CMV (Tr. at 98, 111-112). Mr. Hurley states that he notified Officer Webster of the modification during the inspection (Tr. at 62, 63, 98, 114-115, 133) and told him that there was a decal on the front door of the truck indicating that a modification had occurred, but according to Mr. Hurley, Officer Webster was "in a hurry," "belligerent," and "wouldn't listen" (Tr. at 57-58, 100-101, 109, 114). In addition, Mr. Hurley contends that he had explained to Officer Webster that his truck had not been attached to his trailer until two hours before his inspection, because he had stopped in Winchester, Virginia, for two days (Tr. at 96). He admits that his truck does not comply with federal sleeper berth

requirements, but contends that his truck is exempt because its GVWR is just 10,000 lbs. (Tr. at 111). As evidence of the modification, Mr. Hurley introduced Hurley Exhibit 7 and Hurley Exhibit 8, which were photos of the manufacturer's data plate and of the decal indicating the modification. Hurley Exhibit 8 indicates a GVWR of exactly 10,000 lbs.

Commission Conclusion

At hearing, Staff is required by Rule 4901:2-7-20(A), O.A.C., to prove the occurrence of the violation by a preponderance of the evidence.

Initially, we note that neither the C.F.R. nor its interpretations clearly prohibit vehicle modifications, of the type done by Mr. Hurley, to reduce vehicle weight. Therefore, there is no issue with the method by which Mr. Hurley lowered his truck's gross weight so as to not be considered a CMV. In addition, the evidence presented by Mr. Hurley substantiates his claim that his vehicle had been modified to reduce the weight below 10,001 lbs. GVWR. Specifically, Hurley Exhibit 8, the photo of the modified vehicle decal on Mr. Hurley's truck, indicates a GVWR of 10,000 lbs., which is below the 10,001 lb. GVWR threshold specified for a CMV in 49 C.F.R. 390.5. Hurley Exhibit 8 also documents that the modification was made in January 2007, prior to the July 26, 2007, inspection of Mr. Hurley. Finally, Mr. Hurley argues that, while off-duty, he had uncoupled his modified truck from the trailer so that he was no longer in a truck and trailer with a combined gross weight exceeding 10,000 lbs. (Tr. at 58-59, 126, 128-129).

For its part, staff did not raise questions about the authenticity of the decal showing the weight of Mr. Hurley's vehicle or the weight modifications made to the vehicle by Mr. Hurley, nor did staff request documentation of such vehicle modifications. Furthermore, at hearing, Officer Webster conceded that he could not know for certain whether Mr. Hurley's truck had been attached to the trailer on the day prior to inspection (Tr. at 59), and Staff did not prove otherwise. Indeed, Officer Webster admitted that if Mr. Hurley's truck did not exceed 10,000 lbs. and had also been uncoupled from the trailer, Mr. Hurley would not have been in a CMV (Tr. at 58-59, 61).

Based on the record before us, staff did not present sufficient evidence to support a finding that Mr. Hurley's vehicle is a CMV. The Commission concludes that the evidence supports the finding that Mr. Hurley had modified his truck so that the GVWR did not exceed 10,001 lbs. and, therefore, he was exempt from the logbook requirements. As a result, any other issues in this case need not be addressed. In addition, because the cited violation does not apply to Mr. Hurley, he should not be assessed the civil forfeiture of \$100.00, and the alleged violation of 49 C.F.R. 395.8(e) should be removed from Mr. Hurley's Safety-Net record and history of violations.

However, we wish to emphasize that our decision is limited to the facts of this case, and does not in any way limit the obligation of drivers to comply with logbook and sleeper berth requirements in vehicles and under circumstances where federal requirements clearly apply.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On July 26, 2007, Officer Webster conducted a driver and vehicle inspection of an M & H Hotshot Express truck and trailer driven by Mr. Hurley. At that time, Officer Webster determined that Mr. Hurley had violated 49 C.F.R. 395.8(e).
- (2) Mr. Hurley was timely served a Notice of Preliminary Determination that set forth a civil forfeiture of \$100.00 for violating 49 C.F.R. 395.8(e).
- (3) A hearing was in this matter was convened on December 4, 2008.
- (4) Staff did not demonstrate, by a preponderance of the evidence, that Mr. Hurley had violated 49 C.F.R. 395.8(e). Therefore, Mr. Hurley should not be assessed the \$100.00 civil forfeiture, and the alleged violation should be deleted from Mr. Hurley's Safety-Net record and history of violations.

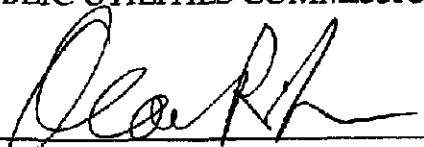
ORDER:

It is, therefore,

ORDERED, That Mr. Hurley should not be assessed the civil forfeiture of \$100.00, and the alleged violation of 49 C.F.R. 395.8(e) should be removed from Mr. Hurley's Safety-Net record and history of violations. 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

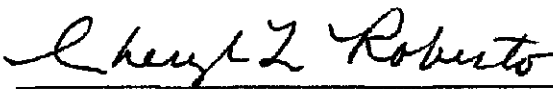


Paul A. Centolella

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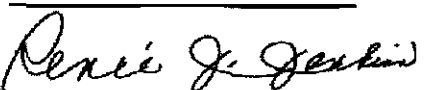
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Entered in the Journal
MAR 18 2009



Renee J. Jenkins
Secretary