

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Request of       )  
Elite Express, LLC, for an       )     Case No. 10-79-TR-CVF  
Administrative Hearing.       )               (OH3265005928C)

In the Matter of the Request of       )  
Elite Express, LLC, for an       )     Case No. 10-244-TR-CVF  
Administrative Hearing.       )               (OH3265005951C)

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

Mike DeWine, Attorney General of the state of Ohio, by Stephen A. Reilly, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Bonnie Ostrander, 9140 Angola Road, Holland, Ohio 43528, on behalf of Elite Express, LLC.

OPINION

I.     Background

A.     Case No. 10-79-TR-CVF

On September 18, 2009, Robert Divjak, a motor carrier inspector employed by the Ohio State Highway Patrol, inspected a commercial motor vehicle (CMV) owned by Elite Express, LLC, (Respondent) and operated by Brian McIlroy in Williams County, Ohio (Tr. at 9-10; Staff Ex. 1). Mr. Divjak stopped this CMV for inspection because he observed that the air bags in the suspension system were flat (Tr. at 9-10).

During the inspection, Mr. Divjak noted, among other violations, apparent violations of Title 49, Code of Federal Regulations (C.F.R.), Section 393.207(f) (air suspension pressure loss), Section 393.45(d) (brake connections leak), and Section 393.65 (fuel lines leaking) (Staff Ex. 1). Subsequently, on December 21, 2009, the Commission's Transportation Department staff (Staff) issued a notice of preliminary

determination to Respondent, proposing a civil forfeiture of \$250.00 for the apparent violations of 49 C.F.R. Sections 393.207(f), 393.45(d), and 393.65 (Staff Ex. 3). On January 25, 2010, Respondent filed a request for an administrative hearing in Case No. 10-79-TR-CVF, regarding the notice of preliminary determination issued by Staff.

B. Case No. 10-244-TR-CVF

Further, on September 30, 2009, Mr. Divjak, inspected another CMV owned by Respondent and operated by Patrick Williams in Williams County, Ohio (Tr. at 15-16; Staff Ex. 2). Mr. Divjak stopped this vehicle for inspection because he observed chains lying loose on the bed of the flatbed trailer (Tr. at 16).

Among other violations, Mr. Divjak noted an apparent violation of 49 C.F.R. Section 392.9(a)(2) (failing to secure vehicle equipment) (Staff Ex. 2). Subsequently, on January 25, 2010, Staff issued a notice of preliminary determination to Respondent, proposing a civil forfeiture of \$100.00 for the apparent violation of 49 C.F.R. Section 392.9(a)(2) (Staff Ex. 4). On February 26, 2010, Respondent filed a request for an administrative hearing in Case No. 10-244-TR-CVF, regarding the notice of preliminary determination issued by Staff.

A prehearing conference was held for both cases on June 7, 2010. By entry dated July 9, 2010, the attorney examiner set this matter for hearing for August 19, 2010. However, the Respondent was unable to attend the hearing. Subsequently, the hearing was rescheduled for March 21, 2011. At the hearing, Mr. Divjak and John Canty testified on behalf of Staff and Bonnie Ostrander 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 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

At the hearing, Mr. Divjak testified that, at the time of the first inspection, he observed that the air bags for the suspension system were flat. He also noted that the

gladhand, a component of the braking system, was leaking air and that the fuel lines were leaking (Tr. at 10). Because of these defects, Mr. Divjak placed the vehicle out-of-service (Tr. at 10, 13-14; Staff Ex. 1). Following the inspection, Mr. Divjak escorted the vehicle to J&L Sales, where the CMV could be repaired (Tr. at 10-11). Subsequently, Mr. Divjak returned to J&L Sales to confirm that the out-of-service defects were repaired (Tr. at 14-15; Staff Ex. 6, 6A, 6b).

With respect to the second inspection, Mr. Divjak testified, prior to the inspection, he observed the unsecured chains as the CMV passed by him. The inspection revealed that 17 chains were unsecured on the bed of the flat-bed trailer (Tr. at 16). Mr. Divjak placed the CMV out-of-service following the inspection but permitted the CMV to proceed after the driver had properly secured the chains (Tr. at 16-17).

Ms. Ostrander testified that, with respect to the first inspection, the CMV had passed its annual inspection six months prior to the inspection by Mr. Divjak and the CMV had not been used full time by Respondent until the month of the inspection (Tr. at 31). Ms. Ostrander testified that the driver had conducted his pre-trip inspection on the day of the inspection by Mr. Divjak and that the air bag for the suspension system was inflated at that time. Ms. Ostrander claimed that, after the driver loaded his vehicle, between the point of the load and the destination, the air bag blew or deflated itself (Tr. at 31-32, 33-34). Ms. Ostrander also testified that the fuel line was only leaking when there was pressure on the fuel line and the motor was running and that it was necessary for the driver to start the engine in order to ultimately find the source of the fuel leak, which was a clamp on a fuel leak which had loosened (Tr. at 32). Ms. Ostrander also opined that the brake violation was the result of a broken seal which is capable of failing at any moment (Tr. at 32).

Ms. Ostrander further testified that none of the violations were the result of negligence by the driver and that the defects either happened immediately before the inspection or were not detectable by the driver (Tr. at 34). Ms. Ostrander stated that the driver had been terminated as a result of the inspection but that, after gathering all the facts, she now feels like he should have been given another opportunity (Tr. at 35-36). Regarding the second inspection, Ms. Ostrander testified that the driver had traveled from Indiana to the inspection location and the chains had not moved and there was only one chain which was loose and needed tightened down (Tr. at 36-37).

On rebuttal, Mr. Divjak testified that, with respect to the second inspection, the cargo chains were laying towards the front of the trailer in the center in a big ball and there was no securement on the chains at all (Tr. at 40).

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 Staff has

demonstrated by a preponderance of evidence that, at the time of the first inspection on September 18, 2009, Respondent was in violation of 49 C.F.R. Sections 393.207(f), 393.45(d), and 393.65; and at the time of the second inspection, Respondent was in violation of 49 C.F.R. Section 392.9(a)(2), as alleged by Staff. Each violation was supported by the testimony of Mr. Divjak, who personally observed each violation. Further, Mr. Divjak's testimony was corroborated by inspection reports prepared contemporaneously with the inspection (Staff Ex. 1 and 2; Tr. at 11-12 and 16-17). The record also demonstrates that the defects underlying the violations were so severe that the CMV was required to be placed out of service (Tr. at 13-14 and 16-17) and that Mr. Divjak was able to observe at least two of the violations as the CMV passed him prior to the inspection (Tr. at 9-10 and 16). With respect to Ms. Ostrander's testimony, the Commission notes that the witness was not present at either inspection (Tr. at 38) and that the witness did not offer any documents or other evidence to corroborate her testimony; instead, the witness was relying solely on information provided by the drivers, one of whom was terminated by the Respondent following the inspection (Tr. at 35, 38).

With respect to the proposed civil 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 John Canty, the Assistant Chief of the Compliance Division of the Commission's Transportation Department regarding the proposed civil forfeiture. Mr. Canty testified that the combined forfeiture of \$350.00 for the two cases proposed by Staff was established by a schedule prepared by the Staff (Tr. at 24-29; Staff Ex. 5). Mr. Canty also testified that the proposed forfeiture was consistent with the guidelines developed by the Commercial Vehicle Safety Alliance (Tr. at 29).

Therefore, based upon the record in this proceeding, and 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 Commission finds that a civil forfeiture of \$350.00 is fair and reasonable and should be assessed against the Respondent.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) On January 25, 2010, Respondent filed a request for an administrative hearing in Case No. 10-79-TR-CVF, regarding apparent violations of 49 C.F.R. Sections 393.207(f), 393.45(d), and 393.65, and a civil forfeiture of \$250.00 proposed by Staff.

- (2) On February 26, 2010, Respondent filed a request for an administrative hearing in Case No. 10-244-TR-CVF, regarding an apparent violation of 49 C.F.R. Section 392.9(a)(2), and a civil forfeiture of \$100.00 proposed by Staff.
- (3) A prehearing conference was held for both cases on June 7, 2010.
- (4) A hearing was held in this matter on March 21, 2011.
- (5) 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.
- (6) Based upon the record in this proceeding, Staff has proven that the Respondent violated 49 C.F.R. Sections 393.207(f), 393.45(d), 393.65, and 392.9(a)(2).
- (7) 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 \$350.00 is fair and reasonable.

#### ORDER

It is, therefore,

ORDERED, That Respondent be assessed a civil forfeiture of \$350.00 for violation of 49 C.F.R. Sections 393.207(f), 393.45(d), 393.65, and 392.9(a)(2), as adopted by the Commission. It is, further,

ORDERED, That Respondent pay \$350.00 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, 4<sup>th</sup> Floor, Columbus, Ohio 43215-3793. In order to assure proper credit, Respondent is directed to write the case number on the face of the check. It is, further,

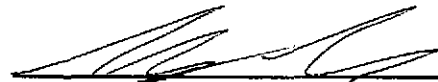
ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,

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


THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Paul A. Centolella

  
Steven D. Lesser

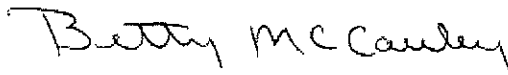
  
Andre T. Porter

  
Cheryl L. Roberto

GAP/sc

Entered in the Journal

**AUG 17 2011**



Betty McCauley  
Secretary