

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of William Railing and) Case No. 11-4472-TR-CVF
Konrad Construction, Notice of Apparent) OH3257001020D
Violation and Intent to Assess Forfeiture.) OH3257001020C

OPINION AND ORDER

The Commission, considering the evidence of record, the applicable law, and being otherwise fully advised, issues its opinion and order in this matter.

APPEARANCES:

William Railing, 200 Short McGraws Road, Valley Grove, West Virginia 26060, on his own behalf.

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

OPINION:

I. Nature of the Proceedings and Background.

On March 16, 2011, Inspector Dennis Bays with the Ohio State Highway Patrol (Highway Patrol) stopped and inspected a vehicle operated by Konrad Construction and driven by William Railing,¹ in the state of Ohio. The Highway Patrol found various violations of Title 49 of the Code of Federal Regulations (C.F.R.):

<u>C.F.R. Section</u>	<u>Violation</u>
395.8(A)	No drivers record of duty status
391.41(a)	No medical certificate in driver's possession
393.43	No or improper breakaway or emergency braking
392.2UCR	Failure to pay UCR free
390.21(B)	Carrier name and/or USDOT not displayed

¹ At the hearing, Mr. Railing explained that Konrad Construction is a one-member limited liability corporation, of which he is the sole owner (Tr. at 6).

Mr. Railing was timely served with Notices of Preliminary Determination (NPD) in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In the NPDs, Mr. Railing was notified that Staff intended to assess civil monetary forfeitures totaling \$850.00 for violations of the above-noted sections of the C.F.R. A prehearing teleconference was conducted in this case; however, the parties failed to reach a settlement agreement during the conference. Thereafter, a hearing was held on October 18, 2011, at which Mr. Railing appeared on his own behalf and on behalf of Konrad Construction. Staff and Mr. Railing declined to submit post-hearing briefs on the matter.

II. Law

Under Rule 4901:2-5-02(A), O.A.C., the Commission adopted certain provisions of the motor carrier safety regulations of the U.S. Department of Transportation (USDOT) 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 regulations of the USDOT, which have been adopted by the Commission. 49 C.F.R. 390.5 defines a commercial motor vehicle (CMV), in pertinent part as follows:

any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle— (1) Has a gross vehicle weight rating or gross combination weight rating or gross vehicle weight or gross combination weight of 4,536 kilograms (10,001 pounds) or more whichever is greater...

However, 49 C.F.R. 390.3 provides rules governing the general applicability of the motor carrier safety regulations, including exemptions to the rules. Specifically, 49 C.F.R. 390.3(f) provides:

Exemptions. Unless otherwise specifically provided, the rules in this subchapter do not apply to - (3) The occasional transportation of personal property by individuals not for compensation nor in the furtherance of a commercial enterprise.

III. Summary of the Testimony

Inspector Bays testified that on March 16, 2011, he was sitting at mile marker 73 on Interstate 70, in the median, where he was conducting inspections of every tenth

vehicle that passed. As a result, he stopped the vehicle driven by Mr. Railing, which he described as a straight truck pulling a trailer. (Tr. 8-9.)

Inspector Bays explained that when he stops a vehicle, he conducts a driver interview to determine if he has jurisdiction over the vehicle. In response to the interview, Inspector Bays states that Mr. Railing told him that he was going to Indianapolis, Indiana, and that he was hauling furniture in the vehicle. Upon inspecting the cargo in the trailer, Inspector Bays says he observed construction equipment and testified that he felt that the vehicle was in commerce because the side of the vehicle was labeled as Konrad Construction and the vehicle contained construction equipment. Therefore, Inspector Bays went ahead and conducted an inspection of the vehicle. (Tr. at 11-12.)

Inspector Bays testified that he observed the label "Konrad Construction" on the side of the trailer being pulled by the box truck and observed construction equipment inside the trailer, leading him to believe the vehicle was in commerce. However, Inspector Bays admitted that Mr. Railing was not operating as a "for hire" carrier (Tr. at 24). In conducting the inspection, Inspector Bays stated that he found a lack of a breakaway system that is required on a commercial motor vehicle, that Mr. Railing lacked a medical card and had no record of duty status, that the vehicle was being operated without a periodic inspection, that the unified carrier registration fee had not been paid, and that carrier name or USDOT numbers are not displayed on the truck. Inspector Bays explained that Mr. Railing objected to the inspection, stating that he was not a commercial motor vehicle, but that he was going to a friend's house in Indianapolis, Indiana. (Tr. at 15-17.)

During Inspector Bays' testimony, Staff introduced numerous photos of the vehicle driven by Mr. Railing. However, those photos were not in color, and were so blurry that an average person was unable to ascertain what was being shown. Only through the testimony of Inspector Bays did it become clear what some of the photos showed, including that some construction material was contained in the trailer marked "Konrad Construction."

Mr. Railing testified that on March 16, 2011, he was traveling in his 22-foot box truck which he converted to a recreational vehicle with windows, doors, plumbing, electrical, and sleeping bunks, and to which he had attached his construction trailer from his business, Konrad Construction, that he operates solely in West Virginia. He testified that he was on his way to Indianapolis, Indiana, from his home in West Virginia, to drop a log splitter at a friend's home, and would then continue on to perform construction work on his own home in Victor, Idaho. The log splitter that Mr. Railing dropped off in Indiana was a personal possession that has subsequently been moved out to his home in Idaho. Mr. Railing further testified that in addition to

construction materials in the trailer that would be used to work on his home, there was furniture under blankets in the front of the trailer and in the converted recreational vehicle that was intended for his home in Idaho, that was not viewed by Inspector Bays during his inspection of the vehicle. Mr. Railing offered his credit card statement into evidence to show his purchases made during his trip of food and fuel and substantiate his statement of his destination (Resp. Ex. 2). Moreover, Mr. Railing also offered into evidence a utility bill from his residence in Victor, Idaho to show ownership of the residence. Mr. Railing did not offer evidence to dispute the violations listed in the inspection report. (Tr. at 47-52.)

IV. Conclusion

Rule 4901:2-7-20(A), O.A.C., requires that, at the hearing, Staff prove the occurrence of the violation by a preponderance of the evidence. The Commission finds that, based upon the record in this proceeding, Staff has not proven by a preponderance of the evidence that Mr. Railing was engaged in commerce. Instead we find that Mr. Railing was engaged in the occasional transportation of personal property by individuals not for compensation nor in the furtherance of a commercial enterprise and exempted from regulation under 49 C.F.R. 390.3(f).

Although Staff's witness, Inspector Bays testified that he observed the label "Konrad Construction" on the side of the trailer being pulled by the box truck and observed construction equipment in the trailer, Staff offered no evidence that Mr. Railing or Konrad Construction were engaged in commerce at the time of the stop, other than Inspector Bays' assumption. Moreover, Inspector Bays admitted that Mr. Railing was not operating as a "for hire" carrier (Tr. at 24). Further, although Staff presented some pictures of Mr. Railings vehicle and its contents, the pictures presented by Staff are neither clear nor in color and do not accurately depict the contents of the recreational vehicle or the trailer, and only certain objects can be discerned from the quality of the pictures and the entire cargo areas are certainly not visible. (Staff Exs. 1A-1K.)

Instead, the only evidence presented at the hearing to clearly indicate what Mr. Railing was hauling and where he was hauling it was his own testimony that he was moving furniture to his home in Idaho and taking his own construction equipment to Idaho to work on the home. In support of his assertions, Mr. Railing presented his credit card statement into evidence, showing that he was traveling from his home in West Virginia to his home in Idaho as he claimed. Moreover, the utility bill submitted by Mr. Railing evidences that he did have a home in Idaho.

Because the sole reasons for believing that Mr. Railing's vehicle was a CMV engaged in commerce are the markings on the trailer and the presence of some

construction equipment, we conclude that Mr. Railing was exempt from regulation under 49 C.F.R. 390.3(f) because he was transporting his own personal property for his own purpose, and not in commerce. Therefore, we find it unnecessary to reach the issue of the alleged violations of the 49 C.F.R Sections 395.8(A), 391.41(a), 393.43, 392.2, and 390.21(B). However, we emphasize that our decision in this case is based on the specific facts at issue here.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On March 16, 2011, the Highway Patrol stopped and inspected a motor vehicle, driven by William Railing and owned by Konrad Construction in the state of Ohio. The Highway Patrol found the following violations of Title 49 C.F.R.:

<u>C.F.R. Section</u>	<u>Violation</u>
395.8(A)	No drivers record of duty status
391.41(a)	No medical certificate in driver's possession
393.43	No or improper breakaway or emergency braking
392.2UCR	Failure to pay UCR free
390.21(B)	Carrier name and/or USDOT not displayed

- (2) Mr. Railing was timely served Notices of Preliminary Determination that set forth civil forfeiture assessments totaling \$850.00 for the above-noted violations of the C.F.R.
- (3) A prehearing conference was held on August 16, 2011.
- (4) A hearing was held on October 18, 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 not proven that Respondent violated 49 C.F.R. 395.8(A), 391.41(a), 393.43, 392.2, and 390.21(B).

- (7) Based upon the record in this proceeding, Mr. Railing was exempt from regulation under 49 C.F.R. 390.3(f) because he was transporting his own personal property for his own purpose, not for compensation or in furtherance of a commercial enterprise.

It is, therefore,

ORDERED, That this case be dismissed and closed of record. It is, further,

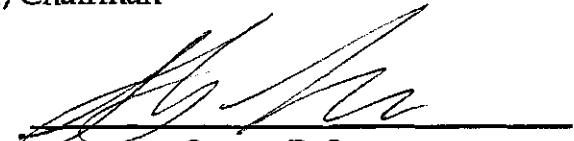
ORDERED, That the violations be deleted from Mr. Railing's and Konrad Construction's Safety Net records and histories of violation. It is, further,

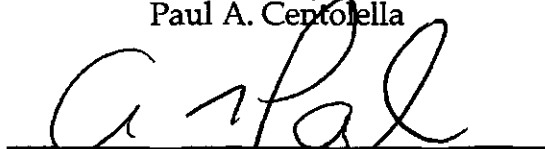
ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centofella


Steven D. Lesser

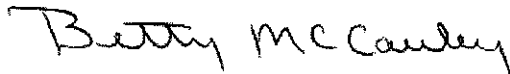

Andre T. Porter


Cheryl L. Roberto

KLS/dah

Entered in the Journal

JAN 11 2012


Betty McCauley
Secretary