

1 BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

2 - - -

3 In the Matter of: :
4 Elite Express, LLC and : Case No. 11-5517-TR-CVF
5 John Mercer. :

6 - - -

7 PROCEEDINGS

8 before Scott Farkas, Hearing Examiner, at the Public
9 Utilities Commission of Ohio, 180 East Broad Street,
10 Room 11-C, Columbus, Ohio, called at 10:00 a.m. on
11 Tuesday, February 28, 2012.

12 - - -

13
14
15
16
17
18
19
20 ARMSTRONG & OKEY, INC.
21 222 East Town Street, 2nd Floor
22 Columbus, Ohio 43215
23 (614) 224-9481 - (800) 223-9481
24 Fax - (614) 224-5724
25

 - - -

1 APPEARANCES:

2 Mike DeWine
3 Ohio Attorney General
4 Thomas G. Lindgren
5 Assistant Attorney General
6 Public Utilities Section
7 180 East Broad Street
8 Columbus, Ohio 43215

9 On behalf of the Staff.

10 - - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

- - -

WITNESSES	PAGE
Meanie Kurtz	
Direct examination by Mr. Lindgren	5
Thomas Forbes	
Direct examination by Mr. Lindgren	15
Recross-examination by	

- - -

STAFF EXHIBITS	ID'D	REC'D
1 - Driver/Vehicle Examination Report	8	22
2 - Notice of Preliminary Determination - Vehicle	17	22
3 - Notice of Preliminary Determination - Driver	19	22

- - -

1 Tuesday Morning Session,
2 February 28, 2012.

3 - - -

4 ATTORNEY EXAMINER: The Commission has
5 called for hearing at this time and place in the
6 matter of Elite Express and John Mercer notice of
7 apparent violation and intent to assess forfeiture,
8 Case No. 11-5517-TR-CVF.

9 My name is Scott Farkas, I'm the Attorney
10 Examiner assigned to this case.

11 At this time I'll take appearances first
12 on behalf of staff?

13 MR. LINDGREN: On behalf of the staff of
14 the Commission, Ohio Attorney General Mike DeWine, by
15 Thomas G. Lindgren, Assistant Attorney General, 180
16 East Broad Street, 6th Floor, Columbus, Ohio,
17 43215.

18 ATTORNEY EXAMINER: Thank you.

19 I'll note for the record that no one is
20 here on behalf of Elite Express or John Mercer. No
21 one else is here in the hearing room other than the
22 inspector and the attorney for the staff and the
23 court reporter.

24 At this time you want to put on a
25 witness?

1 MR. LINDGREN: Yes, thank you, your
2 Honor. I call to the stand Inspector Melanie Kurtz.

3 (Witness sworn.)

4 ATTORNEY EXAMINER: Proceed.

5 - - -

6 MELANIE KURTZ

7 being by me first duly sworn, as hereinafter
8 certified, deposes and says as follows:

9 DIRECT EXAMINATION

10 By Mr. Lindgren:

11 Q. Good morning.

12 Will you please state and spell your full
13 name for the record?

14 A. Melanie, M-e-l-a-n-i-e, K-u-r-t-z,
15 K-u-r-t-z.

16 Q. Thank you.

17 And what is your business address? Your
18 employer's address.

19 A. I'm not sure of the number, but it's Main
20 Street, Findlay, Ohio.

21 Q. And where are you employed?

22 A. Ohio State Highway Patrol.

23 Q. And what is your position there?

24 A. Motor Carrier Enforcement Inspector.

25 Q. How long have you been a Motor Carrier

1 Enforcement Inspector?

2 A. Two years.

3 Q. And approximately how many inspections
4 have you done in that time?

5 A. 2,000.

6 Q. What sort of training have you received
7 for your position?

8 A. North American Standards A and B, it's a
9 course here in Columbus. And then all the required
10 hazmat courses.

11 Q. Do you hold any certifications?

12 A. Yes.

13 Q. And what are those?

14 A. Just the North American Standards
15 inspection.

16 Q. Are those required for all motor vehicle
17 inspectors?

18 A. Yes.

19 Q. Thank you.

20 Ms. Kurtz, do you recall inspecting a
21 vehicle driven by John Mercer and owned by Elite
22 Express, LLC on January 12 of 2011?

23 A. Yes.

24 Q. Thank you.

25 Was this inspection done as part of your

1 inspections for the Ohio State Highway Patrol?

2 A. We were called to the inspection by the
3 Wood County Sheriff's Department.

4 Q. Why did they call you to the inspection?

5 A. I was at the scales working and the Wood
6 County Sheriff had stopped -- there was two trucks
7 together from the same carrier -- stopped them on a
8 state route that runs parallel to I-75. They were
9 bypassing the scales.

10 Q. So they were stopped by the Wood County
11 Sheriff's Office because they had bypassed the
12 scales?

13 A. When they -- it was very cold that day,
14 it was like 6 degrees out, and when they exited the
15 ramp to get off at the Signet Road exit, one of the
16 trucks, the fuel was gelling up. So at the time one
17 of them was actually towing the other when they were
18 stopped. That's why the sheriff stopped them,
19 because one was towing the other.

20 Q. Thank you.

21 Did you do an inspection on the Elite
22 Express vehicle when you arrived at the scene?

23 A. Yes. We took them to the scales to weigh
24 them out and then I did the inspection there at the
25 scales.

1 Q. Thank you.

2 Did you prepare a report that reflects
3 the results of your inspection?

4 A. Yes.

5 MR. LINDGREN: May I approach the
6 witness?

7 EXAMINER PRICE: Yes.

8 MR. LINDGREN: Let the record reflect I'm
9 handing the witness what I've marked for
10 identification as Staff Exhibit 1.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. Ms. Kurtz, do you recognize this
13 document?

14 A. Yes.

15 Q. Can you explain what it is?

16 A. This is the inspection that we type up in
17 the program called Aspen when we inspect vehicles.
18 It has all the carrier information at the top, driver
19 information is over on the right, our location, what
20 they're hauling, where they came from, where they're
21 going. And then all the driver and vehicle
22 violations.

23 Q. Thank you.

24 Did you prepare this at the time of your
25 inspection?

1 A. Yes.

2 Q. Thank you.

3 And does it accurately reflect the
4 results of your inspection of the vehicle driven by
5 John Mercer?

6 A. Yes.

7 Q. Thank you.

8 It appears that you found a number of
9 violations that you noted on the report; is that
10 correct?

11 A. Yes.

12 Q. Thank you.

13 Today I'm just going to focus on four of
14 the violations that you had noted and I'll just ask
15 you to explain briefly what they were for.

16 There was one for a violation of
17 393.207(a) for axle positioning, parts defective or
18 missing. Can you explain how you found that
19 violation and explain what it means?

20 A. I was only doing a level 2, I was not
21 intending to open the hood, mainly because of the
22 temperatures. I would love to have done a level 1 at
23 this time but it was horribly cold and our scales has
24 no wind block. It was just too cold.

25 But when I looked at the side of the

1 truck, the tire was not right. It was crooked only
2 on the driver's side of the vehicle. On the left
3 side of the vehicle it was straight. It could have
4 been alignment, it could have been really anything of
5 that respect.

6 So you kind of really don't grab ahold of
7 it. But then when you look at his past inspections,
8 two inspections ago axle positions parts were bad.

9 So I had him, with the hood shut, just
10 rock the wheel back and forth, and I mean, the whole
11 axle assembly went back and forth like four or five
12 inches.

13 ATTORNEY EXAMINER: Can I stop you for a
14 second?

15 THE WITNESS: Yes.

16 ATTORNEY EXAMINER: You had said you had
17 made a distinction between the driver's side and the
18 left side?

19 THE WITNESS: I'm sorry, the right side.
20 I meant the right side.

21 ATTORNEY EXAMINER: Thank you.

22 THE WITNESS: Sorry.

23 MR. LINDGREN: Thank you.

24 Q. (By Mr. Lindgren) Also you had noted a
25 violation of 393.75(a)(2) for tire sidewall

1 separation on axle 5L. Can you explain what that
2 means?

3 A. There was a large -- sometimes there are
4 where there's like seams where they'll put them
5 together. Sometimes there is a line underneath in
6 the sidewall and it usually runs clear from the inner
7 of the tire to the tread.

8 This was -- I think that's what it was
9 initially, but one end of it was much larger, like it
10 was coming apart. And I definitely already had an
11 opinion it was a violation but I wanted to show the
12 driver what it was that I was referring to. And he
13 said "I know," and he wouldn't even get out of the
14 truck.

15 Q. Okay.

16 A. Because usually I want their, not really
17 their opinion, I want to distinctly show them the
18 violation. So when they do call down here, they know
19 exactly what I was talking about.

20 Q. Right. Is that separation an indication
21 that the tire was likely to rupture soon?

22 A. That the cords in the sidewall are coming
23 apart.

24 Q. You had also noted a violation of
25 393.21(b), carrier name and/or USDOT number not

1 displayed. Can you explain that violation?

2 A. I'm pretty sure it was the passenger side
3 of the vehicle. It had been painted on where there
4 were like mailbox letters. I think the name was
5 painted and then it had mailbox letters were the DOT
6 number. Some letters were missing. And the name was
7 faded off.

8 Q. So it was not legible?

9 A. Correct.

10 Q. Thank you.

11 And finally, you noted violation
12 396.9(d)(2) failure to correct defects noted on
13 previous inspections. How did you become aware of
14 these previous inspections?

15 A. We can get into the FMCSA site and get a
16 clear result and we can see past inspections of that
17 vehicle.

18 Q. Thank you.

19 And which inspections had not -- had been
20 found before but not corrected?

21 A. There was one from Michigan and
22 Maryland -- which violations or which inspections?

23 Q. Well, which violations?

24 A. The 390.21, which was the carrier name
25 that had been wrote on previous inspections.

1 Q. Yes.

2 A. And then the 393.81, which was the
3 neither horn worked. It had an air horn and a
4 steering wheel horn, a city horn, and neither of them
5 worked.

6 Q. Thank you.

7 ATTORNEY EXAMINER: Can we go of on the
8 record for just a second?

9 (Off the record.)

10 ATTORNEY EXAMINER: Back on the record.

11 Q. And, Ms. Kurtz, did you find any
12 violations that were attributed to the driver?

13 A. Yes. We wrote the driver for bypassing
14 the scales.

15 Q. Okay. And did you also cite him for a
16 violation of OAC 2-5-07D for operating a vehicle out
17 of service?

18 A. Yes, we did.

19 Q. And can you explain why you did that?

20 A. When I noticed the axle shifting, I
21 hadn't went to my vehicle yet and look up the past
22 inspections. I knew the axle was shifting, I knew
23 that was definitely not a service.

24 But then I went to my vehicle and saw the
25 past inspection, I want to say it was from

1 December 29, just like two weeks before this, that
2 truck was put out of service at that same location
3 for that problem, and the driver again said "Yeah, I
4 know." The driver just, he knew.

5 I'd asked him Why are you driving this
6 vehicle with all these out of service violations that
7 are very dangerous? And he says If I don't, someone
8 else will. That's all he really had to say.

9 Q. Thank you.

10 Was there a sticker or anything on the
11 vehicle that indicated that it had been put out of
12 service?

13 A. No.

14 Q. But he did acknowledge he was aware of
15 that.

16 A. Yes.

17 Q. Thank you.

18 ATTORNEY EXAMINER: Did you put him out
19 of service after that?

20 THE WITNESS: Yes.

21 Q. Ms. Kurtz, is there anything else you
22 recall about this inspection that you think would be
23 important to note today?

24 A. There could have been a lot more
25 violations if the weather would have cooperated and

1 the daylight and we could have done a level 1. I
2 would like to have done a level 1 on this vehicle.
3 But it really, this is just touching with the level
4 2, that's my opinion.

5 Q. Is this an unusual number of violations
6 to find in a level 2 inspection?

7 A. Yes.

8 MR. LINDGREN: Thank you. I have no
9 further questions for this witness.

10 ATTORNEY EXAMINER: I have no questions
11 either. You're excused, thank you.

12 THE WITNESS: Thank you.

13 MR. LINDGREN: The staff next calls Tom
14 Forbes to the stand.

15 (Witness sworn.)

16 ATTORNEY EXAMINER: Have a seat.

17 - - -

18 THOMAS FORBES

19 being first duly sworn, as prescribed by law, was
20 examined and testified as follows.

21 DIRECT EXAMINATION

22 By Mr. Lindgren:

23 Q. Good morning, Mr. Forbes.

24 A. Good morning.

25 Q. Could you please state your full name for

1 the record?

2 A. Tom Forbes, F-o-r-b-e-s.

3 Q. Thank you.

4 What is your business address?

5 A. Public Utilities Commission of Ohio, 180
6 East Broad Street, 4th Floor, Columbus, Ohio, 43215.

7 Q. Are you employed by the Public Utilities
8 Commission of Ohio?

9 A. Yes, sir.

10 Q. What is your position there?

11 A. I'm a compliance officer in the
12 Compliance Division of Transportation.

13 Q. How long have you been a compliance
14 officer?

15 A. Seven years.

16 Q. What are your duties in that position?

17 A. I review field inspections and compliance
18 reviews and prepare forfeiture assessments, enter
19 fine amounts into the computer and mail fine letters.
20 Conduct settlement conferences with the respondents,
21 answer technical questions from the motor carrier and
22 hazardous material regulations.

23 Conduct inspections to keep my
24 certifications current. Attend in-service training,
25 and do educational outreach seminars.

1 Q. Thank you.

2 You mentioned you held some
3 certifications. What are those certifications?

4 A. The North American Standard level 1
5 driver and vehicle inspection course, hazardous
6 material inspections, cargo tank inspections, bulk
7 package inspections, compliance reviews, level 6
8 radioactive inspections.

9 Q. Thank you.

10 A. Uh-huh.

11 Q. Mr. Forbes, are you familiar with the
12 forfeitures assessed in this case?

13 A. Yes, sir.

14 Q. Thank you.

15 MR. LINDGREN: May I approach the
16 witness?

17 ATTORNEY EXAMINER: Yes.

18 MR. LINDGREN: Let the record reflect
19 that I'm handing the witness what I've marked for
20 identification as Staff Exhibit 2.

21 (EXHIBIT MARKED FOR IDENTIFICATION.)

22 Q. Mr. Forbes, do you recognize this
23 exhibit?

24 A. Yes, sir.

25 Q. Can you explain what it is?

1 A. It is a notice of preliminary
2 determination letter that was sent to Elite Express,
3 reference Inspection No. 0H3258002704.

4 Q. Thank you.

5 And what is the purpose of this notice?

6 A. This notice is sent to a carrier after a
7 settlement conference is held where resolution was
8 not completed at the settlement conference level.
9 And it advises the respondent through an attachment
10 that they can either pay the forfeiture amount within
11 30 days, or request an administrative hearing.

12 Q. Can you explain how the forfeiture noted
13 here would have been calculated?

14 A. For non-hazmat violations the forfeitures
15 are broken up into three -- excuse me, four groups.
16 Groups 1, 2, and 3 involve out-of-service violations,
17 and group 4 involves violations that are not required
18 to be out of service.

19 On the case at hand there were two group
20 4 violations: One for the company markings and
21 390.21(b), that resulted in a \$100 forfeiture; one
22 for failing to correct defects from a previous
23 inspection under 396.9(d)(2), that resulted in a \$100
24 forfeiture.

25 There was one group 2 violation for

1 393.207(a), an axle positions part that was defective
 2 and out of service, resulted in a \$50 violation. And
 3 there was one group 3 violation for 393.75(a)(2),
 4 tire sidewall separation, that was out of service,
 5 that resulted in a \$40 forfeiture.

6 The total fines for all the violations
 7 what \$290

8 Q. And was that \$290 total correctly
 9 calculated in your opinion?

10 A. Yes, sir.

11 Q. And is that the amount you would
 12 recommend the Commission assess if they find that
 13 Elite Express was responsible for the violations
 14 noted on Staff Exhibit 1?

15 A. Yes, sir.

16 Q. Thank you.

17 MR. LINDGREN: May I approach the witness
 18 again?

19 ATTORNEY EXAMINER: Yes.

20 MR. LINDGREN: Let the record reflect I'm
 21 now handing the witness what I've marked for
 22 identification as Staff Exhibit 3.

23 (EXHIBIT MARKED FOR IDENTIFICATION.)

24 Q. Mr. Forbes, do you recognize this
 25 exhibit?

1 A. Yes, sir.

2 Q. And can you explain what this is?

3 A. This deals with the same inspection but
4 the driver violations for that inspection dealing
5 with the driver that was operating the out-of-service
6 vehicle. Again, it is a notice of preliminary
7 determination.

8 Q. Thank you.

9 And can you explain how the forfeiture on
10 this notice would have been calculated?

11 A. Operating an out-of-service vehicle under
12 section 2-5-07D is a group 4 violation with a
13 \$1,000 fine. So there was one violation at
14 \$1,000 making the total fine \$1,000 on the driver's
15 side of this case.

16 Q. Thank you.

17 And in your opinion was that forfeiture
18 correctly calculated?

19 A. Yes, sir.

20 Q. And is that the amount you would
21 recommend to the Commission for assessment against
22 the driver in this case?

23 A. Yes, sir.

24 Q. Thank you.

25 Concerning both the forfeitures against

1 the carrier and the driver, were they calculated in
2 accordance with PUCO's standard practices?

3 A. Yes, sir.

4 Q. And are they consistent with any national
5 standards that you follow?

6 A. They're consistent with the Commercial
7 Vehicle Safety Standards.

8 Q. And who adopted those standards?

9 A. Commercial Vehicle Safety Administration,
10 CVSA.

11 Q. Thank you.

12 MR. LINDGREN: I have no further
13 questions for this witness.

14 EXAMINER PRICE: Let's go off the record
15 for a second.

16 (Off the record.)

17 ATTORNEY EXAMINER: Let's go back on the
18 record.

19 On the particular violation against the
20 driver, it indicates "Operating out of service
21 vehicle - carrier was mad," m-a-d.

22 Is there some letter or further words
23 that would apply there?

24 THE WITNESS: Yes. The description's cut
25 off after so many characters. The full text would be

1 "Operating out of service vehicle - carrier was made
2 aware of 393.207(a) violation on 12/23/10 on
3 Inspection No. OH3229007789."

4 ATTORNEY EXAMINER: Thank you.

5 THE WITNESS: You're welcome.

6 ATTORNEY EXAMINER: Anything further?

7 MR. LINDGREN: Nothing further for this
8 witness, your Honor.

9 At this time would I like to move the
10 admission of Staff Exhibits 1, 2, and 3.

11 ATTORNEY EXAMINER: Those will be
12 admitted.

13 (EXHIBITS ADMITTED INTO EVIDENCE.)

14 MR. LINDGREN: Also, your Honor, I would
15 like to note that the staff has reached a settlement
16 agreement with the driver, Mr. Mercer, and I am
17 expecting to receive a signed settlement agreement
18 back from him soon, which I will then file with the
19 Docketing Division.

20 In the event that the settlement
21 agreement is received, I would recommend the
22 Commission rule on that, however, if no signed
23 settlement agreement is filed within 30 days, I would
24 recommend the Commission at that time find the driver
25 in default and assess the violation noted on Staff

1 Exhibit 3.

2 ATTORNEY EXAMINER: So noted. Thank you.

3 Anything further?

4 MR. LINDGREN: Nothing further, your
5 Honor.

6 ATTORNEY EXAMINER: Then we'll be
7 adjourned. Thank you.

8 MR. LINDGREN: Thank you.

9 (Hearing adjourned at 10:26 a.m.)

10 - - -

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Tuesday, February 28, 2012, and carefully compared with my original stenographic notes.

Julieanna Hennebert, Registered Professional Reporter and RMR and Notary Public in and for the State of Ohio.

My commission expires February 19, 2013.

(JUL-1838)

- - -

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/20/2012 10:00:07 AM

in

Case No(s). 11-5517-TR-CVF

Summary: Transcript Transcript of Elite Express, LLC and John Mercer hearing held on 02/28/12 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Hennebert, Julieanna Mrs.