

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Victor Boata, Notice of )  
Apparent Violation and Intent to Assess ) Case No. 12-3153-TR-CVF  
Forfeiture. ) (OH3296012993D)

OPINION AND ORDER

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

APPEARANCES:

Mike DeWine, Ohio Attorney General, by Werner Margard, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Public Utilities Commission of Ohio.

Victor Boata, 11740 Hogan Highway, Clinton, MI, 49236, on his own behalf.

OPINION:

I. Nature of the Proceeding and Background

On August 27, 2012, Inspector Mark Lambert of the Ohio State Highway Patrol (Highway Patrol) conducted an inspection of a commercial motor vehicle (CMV) on State Route 2 in Lorain County operated by ENZO, Inc., and driven by Victor Boata. Inspector Lambert noticed multiple violations on the CMV and stopped it to conduct an inspection. Inspector Lambert noticed that Mr. Boata's medical certificate required him to wear corrective lenses while operating a CMV and that Mr. Boata was not wearing corrective lenses during the inspection. Inspector Lambert found that Mr. Boata committed an apparent violation of Title 49, Code of Federal Regulations (C.F.R.), Section 391.11(b)(4), for not properly wearing corrective lenses while operating a CMV.

On November 19, 2012, Commission Staff (Staff) timely served a Notice of Preliminary Determination (NPD) on Mr. Boata in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In the NPD, Mr. Boata was notified that Staff intended to assess a civil monetary forfeiture totaling \$250.00 for violating 49 C.F.R. 391.11(b)(4). The parties could not reach a settlement at a January 22, 2013, prehearing conference. The hearing was conducted on April 9, 2013.

## II. Applicable Law

The Commission adopted the Federal Motor Carrier Safety Rules pursuant to Rule 4901:2-5-02(A), O.A.C, for the purpose of governing transportation by motor vehicle in the state of Ohio. The Federal Motor Carrier Safety Rules are found in 49 C.F.R. 40, 107 subparts (f) and (g), 367, 380, 382, 383, 385, 386, 387, and 390-397. 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 United States Department of Transportation (USDOT). Further, Section 4923.99, Revised Code, authorizes the Commission to assess a civil forfeiture of up to \$25,000 per day against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce.

Rules 4901:2-7-01 through 4901:2-7-22, O.A.C., govern all proceedings of the Commission to assess forfeitures and make compliance orders. These rules require that a respondent be afforded reasonable notice and the opportunity for a hearing where the Commission staff finds a violation of the Federal Motor Carrier Safety Rules. Rule 4901:2-7-20(A), also provides that, during the evidentiary hearing, Staff must prove the occurrence of the violation by a preponderance of the evidence.

## III. Issue

The issue in this case is whether Mr. Boata was wearing corrective lenses while operating a CMV. The Commission notes that Mr. Boata does not contest how the civil forfeiture was calculated or that he was required to wear corrective lenses.

## IV. Discussion and Conclusion

At the hearing, Staff presented testimony by Inspector Lambert, who is a CMV inspector that works for the Motor Carrier Enforcement Unit of the Ohio State Highway Patrol (Tr. at 5, 6). He has been a CMV inspector for over 30 years (Tr. at 6). Inspector Lambert testified that he did not really have an independent recollection of the inspection of Mr. Boata, but that his recollection was refreshed upon reviewing the inspection report (Tr. at 6, 7). Inspector Lambert testified that when Mr. Boata drove by he noticed a few violations and pulled him into a rest area (Tr. at 8). Inspector Lambert then asked Mr. Boata for his logbook, registration, bills, medical certificate, and driver's license before conducting an inspection of the CMV (Tr. at 8). Mr. Boata's medical card indicated that he was restricted to wearing glasses while operating a CMV (Tr. at 9). When Inspector Lambert asked Mr. Boata for his glasses, they were in the visor above the steering wheel (Tr. at 8). Inspector Lambert then testified that Mr. Boata was not wearing

glasses when he drove by him (Tr. at 9). Further, Inspector Lambert testified that when he stopped Mr. Boata, approached the cab, and performed the inspection, Mr. Boata was not wearing glasses (Tr. at 9, 10).

Staff then presented testimony by Jonathan Frye, Chief of the Compliance Division at the Public Utilities Commission of Ohio (Tr. at 15). Mr. Frye testified that the proposed forfeiture of \$250.00 is appropriate and is consistent with the recommended fine schedule produced by the Commercial Motor Vehicle Safety Alliance (Tr. at 16-18). Further, Mr. Frye testified that Mr. Boata received all of the notices that he was required to be served with in a timely fashion as required by Commission rules (Tr. at 19).

Mr. Boata did not dispute that he was required to wear corrective lenses while operating a vehicle or that the proposed forfeiture was incorrectly calculated. However, Mr. Boata did contest the facts of the case, specifically that he was driving without his glasses. Mr. Boata testified that he was wearing his glasses when he was driving and removed them when he parked the truck (Tr. at 28). Mr. Boata testified that when he stopped the truck and parked it, he removed his glasses from his eyes to wipe his face (Tr. at 28). Mr. Boata testified that he has his glasses on when he's driving and that, on the day of the inspection, he was not driving without his glasses (Tr. at 28; Staff Ex. 4). Mr. Boata also testified that the weather on the day of the inspection consisted of very heavy rain (Tr. at 28).

In *In the Matter of Steven Holliday, Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 09-859-TR-CVF (09-859), the Commission found that insufficient evidence had been presented against the Respondent for violating 49 C.F.R. 391.11(b)(4). In 09-859, the Respondent could not provide the inspector with his glasses upon request. The Respondent testified that he was wearing his glasses while driving but removed them before the inspection and then could not find them when requested by the inspector. However, the Respondent subsequently found his glasses in the passenger seat and produced them to the inspector after the inspection had been completed. No evidence was presented that the inspector observed the Respondent driving without glasses, only that the driver could not produce his glasses upon request. The Commission held that insufficient evidence had been presented to demonstrate that the Respondent was not wearing his glasses while operating a CMV.

This case is similar to 09-859 in that Mr. Boata testified that he was wearing his glasses while driving but removed them before the inspection (Tr. at 28; Staff Ex. 4). However, unlike the driver in 09-859, Mr. Boata produced his glasses for the inspector upon request (Tr. at 8). Also unlike 09-859, testimony was presented in this case by the Inspector that he observed Mr. Boata driving without his glasses (Tr. at 9).

In *In the Matter of the Patrick Hudnell, Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 09-389-TR-CVF (09-389), the Commission found that the testimony by the State Trooper regarding the circumstances of the inspection was persuasive and that the weight of the evidence more fully supported the conclusion that the Respondent was driving without corrective lenses in violation of 49 C.F.R. 391.11(b)(4). The Respondent testified that he was driving with his glasses on and then took them off when he was pulled over. The Respondent then questioned the ability of the Trooper to observe whether he was wearing his glasses while driving because the Respondent sits far back in the cab and the vehicle was moving when the Trooper observed him. The Trooper testified unequivocally that he had a clear view of the Respondent's cab and that the Respondent was not wearing glasses while driving the CMV. Furthermore, the Trooper's testimony was corroborated by the inspection report, which was prepared by the Trooper contemporaneously with the inspection. The Commission found the Trooper's testimony to be credible and that the weight of the evidence more fully supported the conclusion that the Respondent violated 49 C.F.R. 391.11(b)(4).

This case is distinguishable from 09-389 in that Inspector Lambert did not testify unequivocally that he had a clear view of Mr. Boata's cab or that he clearly saw Mr. Boata driving without his glasses. Inspector Lambert testified that he did not really have an independent recollection of the inspection of Mr. Boata, but that his recollection was refreshed upon reviewing the inspection report (Tr. at 6, 7). However, the inspection report does not contain a note or indication that Inspector Lambert observed Mr. Boata driving without his glasses (Staff Ex. 1). Furthermore, no testimony was presented by Inspector Lambert regarding where his vehicle was when he first observed Mr. Boata, the rate of speed that he was traveling when he observed Mr. Boata, or what the weather was like when he observed Mr. Boata. Mr. Boata testified that he first noticed Inspector Lambert when he saw the flashing lights behind the CMV and that there was very heavy rain on the day of the inspection (Tr. at 28). While Mr. Lambert testified that he observed Mr. Boata when he drove past, the record is not clear as to where Inspector Lambert's vehicle was when Mr. Boata drove past. Without evidence indicating where Inspector Lambert was when Mr. Boata drove past, what point of view Inspector Lambert had when he observed Mr. Boata, and whether the weather conditions were something other than very heavy rain, we cannot find that sufficient evidence has been presented demonstrating that Inspector Lambert clearly observed Mr. Boata driving without his glasses.

After a review of the testimony and evidence submitted in this case, we find that Staff has not demonstrated by a preponderance of the evidence that Mr. Boata was driving a CMV without corrective lenses in violation of 49 C.F.R. 391.11(b)(4). It is

undisputed that Mr. Boata is required to wear corrective lenses while operating a CMV. Inspector Lambert testified that he observed Mr. Boata driving without glasses but his recollection of the inspection is based upon the inspection report, which contains no indication of whether Inspector Lambert actually observed Mr. Boata driving without glasses (Tr. at 6, 7; Staff Ex. 1). Furthermore, we believe that if Inspector Lambert did not observe Mr. Boata from a clear point of view, and if the weather conditions consisted of heavy rain, then it would have been very difficult for Inspector Lambert to observe Mr. Boata driving without glasses. Finally, we believe that Mr. Boata's testimony that he removed his glasses upon being pulled over is consistent with the evidence that his glasses were on the visor above the steering column, which is within reach of Mr. Boata from his position in the driver's seat. Accordingly, the Commission finds that Staff has not proven the occurrence of a violation of 49 C.F.R. 391.11(b)(4) by a preponderance of the evidence. Therefore, the \$250.00 forfeiture assessed against Mr. Boata should be eliminated, and the violation should be deleted from Mr. Boata's Safety-Net record and history of violations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On December 6, 2012, Victor Boata filed a request for an administrative hearing regarding the apparent violation of 49 C.F.R. Section 391.11(b)(4) and a civil forfeiture of \$250.00 proposed by the Staff.
- (2) A prehearing conference was held on January 22, 2013.
- (3) A hearing was held on April 9, 2013.
- (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) Insufficient evidence has been presented to conclude that Mr. Boata was not wearing corrective lenses while driving. Staff, therefore, has not proven by a preponderance of the evidence, pursuant to Rule 4901:2-7-20, O.A.C., that a violation of 49 C.F.R. Section 391.11(b)(4) occurred.
- (6) Victor Boata should not be assessed the \$250.00 forfeiture, and the alleged violation should be deleted from his Safety-Net record and history of violations.

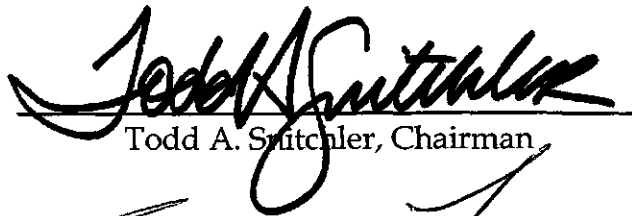
ORDER:

It is, therefore,

ORDERED, That Victor Boata should not be assessed the civil forfeiture of \$250.00 for the alleged violation of 49 C.F.R. Section 391.11(b)(4), which should be removed from his Safety-Net record and history of violations. It is, further,

ORDERED, That a copy of this opinion and order be served upon each party of record.

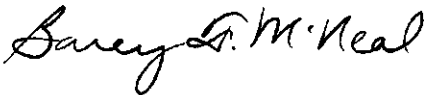
## THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Switchler, Chairman  
Steven D. Lesser  
Lynn Slaby  
M. Beth Trombold

BAM/sc

Entered in the Journal

MAY 29 2013

  
Barcy F. McNeal

Barcy F. McNeal  
Secretary