

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Juan A. Lopez, Notice of)
Apparent Violation and Intent to Assess) Case No. 13-2441-TR-CVF
Forfeiture.) (OH3274014204D)

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 in this matter.

APPEARANCES:

Michael J. Yemc, Jr., 600 South High Street, Suite 200, Columbus, Ohio 43215, on behalf of Juan A. Lopez.

Mike DeWine, Ohio Attorney General, by Thomas G. Lindgren, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

NATURE OF THE PROCEEDING:

On September 3, 2013, the Ohio Highway Patrol (Highway Patrol) stopped and inspected a commercial motor vehicle (CMV), operated by Mile High Logistics, Inc. (Mile High Logistics) and driven by Juan A. Lopez (Mr. Lopez or Respondent), in the state of Ohio. The Highway Patrol inspector found hours-of-service (missing log book entries) and brake adjustment violations, and the driver and CMV were placed out of service (Driver/Vehicle Inspection Report No. OH3274014201) for 10 hours at a near-by highway rest area. Approximately two hours later, the inspector observed Mr. Lopez drive the CMV out of the rest area. The inspector again stopped the CMV and issued a second inspection report (Driver/Vehicle Inspection Report No. OH3274014204D) with the following violation of the Code of Federal Regulations (C.F.R.) that is relevant to this case:

<u>Code</u>	<u>Violation</u>
49 C.F.R. Section 395.13(d)	Driving after being declared out of service for hours-of-service violation on inspection number OH3274014201.

Mr. Lopez was timely served a Notice of Preliminary Determination in accordance with Ohio Adm.Code 4901:2-7-12. In this notice, Mr. Lopez was notified that Staff

intended to assess a civil monetary forfeiture totaling \$1,000.00 for the 49 C.F.R. Section 395.13(d) (Section 395.13(d)) violation. A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement during the conference. Subsequently, a hearing was convened on March 12, 2014. Staff and counsel for Mr. Lopez stipulated at the commencement of the hearing that he had been placed out of service at the initial inspection and that, should the Commission find him liable for the Section 395.13(d) violation, \$1,000.00 would be the appropriate forfeiture amount (Tr. at 6).

Background:

The roadside inspection in this case took place along Interstate I-271 near the northbound highway rest area in Summit County, Ohio. The truck driven by Mr. Lopez had been inspected approximately two hours previously by Inspector Douglas A. Bell, a motor carrier enforcement inspector with the Highway Patrol. At the time of this inspection, Mr. Lopez was still subject to a 10-hour, out-of-service driving restriction that resulted from the first inspection.

Issue in the Case:

Inspector Bell observed Mr. Lopez driving the Mile High Logistics' truck from the rest area before his out-of-service period from the previous inspection had expired. Mr. Lopez admitted that he drove before the expiration of his out-of-service period. Mr. Lopez, however, maintained that he should not be held liable because he is a diabetic, and he could not stay at the rest area without the proper food for his diabetic diet. Mr. Lopez explained that he was proceeding to a restaurant to get the food he required when he was stopped again by Inspector Bell.

DISCUSSION:

In this case, Inspector Bell testified that he was checking vehicles in the north bound I-271 rest area and saw the mechanic leave after fixing the Mile High Logistics' truck. Mr. Lopez then pulled into the rest area from the entrance ramp and went inside a rest area building. When Mr. Lopez emerged, he got into the truck and pulled out of the rest area. At that time, Inspector Bell stopped the truck alongside I-271 and asked Mr. Lopez where he was going. Mr. Lopez replied that he was hungry and could not be expected to stay at the rest area without any food. After the inspection, Inspector Bell listed the out-of-service driving violation on a Driver/Vehicle Examination report (Staff Exhibit 1), again placed the truck driven by Mr. Lopez out of service, and then escorted Mr. Lopez in the Mile High Logistics' truck to a McDonald's restaurant. (Tr. at 9-14.)

Mr. Lopez testified that he was going to a McDonald's restaurant, about a mile and a quarter from the rest area where he had been placed out of service, to get something to

eat, when he was stopped by Inspector Bell and inspected a second time. Mr. Lopez testified that he is a diabetic (Respondent's Exhibits 1 and 2 - April 2013 laboratory results and physical examination report for Mr. Lopez) and that he cannot eat the types of pre-packaged food items and sodas available at the rest area. Mr. Lopez stated that he needs to eat foods like salads and vegetables in order to control his blood sugar level; otherwise, his sugar level goes down and his body starts shaking. Further, Mr. Lopez noted that he is not insulin dependent, but that he does take medication for his diabetes. (Tr. at 20-22, 27.)

Mr. Lopez testified that he knew he had been placed out of service at the time of the first inspection and that he had to wait for ten hours before driving again. He stated that, because he is a newly diagnosed diabetic, it did not occur to him to explain to the inspector that he has diabetes and that he needed to get some food. Also Mr. Lopez stated his belief that the inspector was just doing his job and would not really care about him being a diabetic. With regard to keeping food with him on his truck, Mr. Lopez maintained that he cannot keep the food items he needs to eat, like vegetables, for any length of time in a cooler or other container. He stated that he has to stop for food every time he needs to eat. However, Mr. Lopez acknowledged that he might be held up on the highway because of an accident or road construction for an hour or more when he needs to eat. (Tr. at 24-26.)

The Commission initially observes that the transportation safety regulation in this matter, Section 395.13(d), mandates that no driver who has been declared out of service shall operate a CMV until that driver may lawfully do so. In Mr. Lopez's case, in order for him to lawfully drive the Mile High Logistics' truck, corrective measures for the violations from the first inspection needed to be taken. Those corrective measures were: making brake adjustments on the truck, which was done by a mechanic who had been summoned to the I-271 rest area, and a ten hour off-duty period for Mr. Lopez because of missing entries in his log book. As noted previously, Mr. Lopez admitted that he drove the truck before the out-of-service period expired. Indeed, Mr. Lopez knew that he was prohibited from driving the truck before the expiration of his out-of-service period. (Tr. at 22, 24, 26.) He simply maintained that he drove the truck out of necessity, in order to get to a restaurant that served the food he needed to support his diabetic diet.

The Commission, however, further observes that when Inspector Bell became aware of Mr. Lopez's stated need for restaurant food, he escorted Mr. Lopez in the Mile High Logistics' truck to a McDonald's restaurant after the second inspection. This response to what Inspector Bell was told about Mr. Lopez's diabetes leads us to believe that a telephone call to the nearest Highway Patrol post by Mr. Lopez, with an explanation of his situation, might have accomplished the same thing, i.e., gotten his out-of-service venue changed from the highway rest area to the restaurant parking lot, without incurring the violation of driving after being placed out of service. Further, because Mr. Lopez called his company from the rest area where he was placed out of service and a mechanic was

sent to the rest area by the company in order to adjust the brakes, he could have also told his company dispatcher that he was out of service at the rest area and asked them to send some food. Be that as it may, the Commission believes, as Staff suggested in its examination of Mr. Lopez at hearing (Tr. at 25), and despite Mr. Lopez's assertions to the contrary, that it is possible to carry the type of perishable food items desired by Mr. Lopez, preserved in a properly cooled container, on a truck. Moreover, in line with Staff's further examination of Mr. Lopez at hearing (Tr. at 25-26), the Commission believes that this is a step that a professional truck driver on a specific diet might well take knowing that traffic tie-ups due to construction or an accident might at any time temporarily prohibit the driver from reaching a highway exit to eat at a restaurant or other place where foodstuffs necessary to alleviate his diabetic condition could be obtained. In addition, the exhibits that were submitted included the results of the medical tests that show Mr. Lopez is a recently diagnosed diabetic.

After a review of the testimony and evidence submitted in this case, the Commission believes that the record is clear regarding the Section 395.13(d) violation. Mr. Lopez admitted to the violation. In addition, the Commission is of the opinion that Inspector Bell witnessed Mr. Lopez driving the Mile High Logistics' truck, after he was placed out of service and before his out-of-service period had expired, and properly cited him for the violation. Mr. Lopez's arguments at hearing were not sufficient to demonstrate that he should not be held liable for the Section 395.13(d) violation. Based on the facts of this case, the Commission finds that we have to balance the seriousness of professional drivers having a diabetic condition operating CMVs in a safe manner to themselves and the traveling public, with the evidence that this is a medical condition only recently diagnosed to Mr. Lopez, coupled with his learning the associated responsibilities such as ensuring sufficient foodstuffs on board his CMV; and that this balancing warrants some adjustment to the assessed civil forfeiture recommended by Staff. Therefore, we find that Mr. Lopez should be assessed one half of the civil forfeiture (\$500.00) that must be paid within 30 days of the date of this opinion and order. The other half of the recommended civil forfeiture (\$500.00) should be held in abeyance for a period of one year from the date of this opinion and order. If during that period of time, Mr. Lopez is found to have violated the same Federal Motor Carrier Safety Regulation as found herein, the remaining \$500.00 portion of the civil forfeiture shall become due and payable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On September 3, 2013, the Highway Patrol stopped and inspected a CMV operated by Mile High Logistics and driven by Mr. Lopez in the state of Ohio. The Highway Patrol inspector found the following violation of the C.F.R.:

- | <u>Code</u> | <u>Violation</u> |
|-------------------|---|
| Section 395.13(d) | Driving after being declared out of service for hours-of-service violation on inspection number OH3274014201. |
- (2) Mr. Lopez was timely served a Notice of Preliminary Determination that set forth a civil forfeiture of \$1,000.00 for the Section 395.13(d) violation.
 - (3) A hearing in this matter was convened on March 12, 2014.
 - (4) Mr. Lopez admitted to the Section 395.13(d) violation. In addition, Staff demonstrated at hearing, by a preponderance of the evidence, that Mr. Lopez committed the Section 395.13(d) violation.
 - (5) Mr. Lopez's arguments at hearing were not sufficient to demonstrate that he should not be held liable for the civil forfeiture assessed for the Section 395.13(d) violation.
 - (6) Pursuant to R.C. 4905.83, Mr. Lopez must pay the State of Ohio the civil forfeiture assessed for the Section 395.13(d) violation. Mr. Lopez shall have 30 days from the date of this order to pay the forfeiture of \$500.00. The other half of the recommended civil forfeiture \$500.00 should be held in abeyance for a period of one year from the date of this opinion and order. If during that period of time, Mr. Lopez is found to have violated the same Federal Motor Carrier Safety Regulation as found herein, the remaining \$500.00 portion of the civil forfeiture shall become due and payable.

It is, therefore,

ORDERED, That Mr. Lopez pay the assessed amount of \$500.00 for the Section 395.13(d) violation, as set forth in Finding (6). Payment should be made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. In order to assure proper credit, Mr. Lopez is directed to write the case number (OH3274014204D) on the face of the check or money order. It is, further,


ORDERED, That the other half of the recommended civil forfeiture \$500.00 should be held in abeyance for a period of one year from the date of this opinion and order. If

during that period of time, Mr. Lopez is found to have violated the same Federal Motor Carrier Safety Regulation as found herein, the remaining \$500.00 portion of the civil forfeiture shall become due and payable. 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,

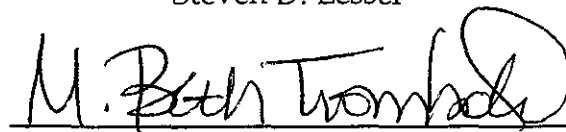
ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser

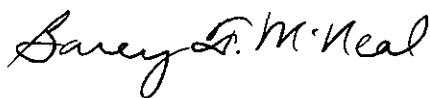

Lynn Slaby


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KKS/vrm

Entered in the Journal
AUG 20 2014



Barcy F. McNeal
Secretary