

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Quality Fixtures )  
Installations, Notice of Apparent Violation ) Case No. 15-1103-TR-CVF  
and Intent to Assess Forfeiture. ) (OH3284011175C)

In the Matter of Garrell Burgess, Notice of )  
Apparent Violation and Intent to Assess ) Case No. 15-1209-TR-CVF  
Forfeiture. ) (OH3284011175D)

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. The Commission finds that Staff failed to prove by a preponderance of the evidence that Quality Fixtures Installations (QFI) or Garrell Burgess violated the Federal Motor Carrier Safety Rules (FMCSR).

I. Procedural History

Following a March 20, 2015, inspection of a commercial motor vehicle (CMV) driven by Mr. Burgess, Staff timely served QFI and Mr. Burgess each with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-02. QFI was cited in the NPD for violation of: 49 C.F.R. 393.95(a) (CMV must be equipped with fire extinguisher), 49 C.F.R. 393.95(f) (CMV must be equipped with warning devices), 49 C.F.R. 393.43 (trailer must be equipped with a properly operating breakaway), 49 C.F.R. 396.3(a)(1) (tie rod ends must have limited excessive play), 49 C.F.R. 390.21(b) (carrier name and/or USDOT number not displayed as required), and 49 C.F.R. 392.9b(a) (operating CMV in interstate commerce without USDOT registration). Mr. Burgess was cited in the NPD for violation of 49 C.F.R. 391.41(a) (CMV driver must possess a medical examiner's certificate). The NPDs also notified QFI and Mr. Burgess that Staff intended to assess \$690.00 and \$100.00 civil monetary forfeitures, respectively, for violating the Commission's transportation rules. Dustin Bass, owner of QFI, filed a request for hearing in 15-1103-TR-CVF (15-1103) and Mr. Burgess filed a request for hearing in Case No. 15-1209-TR-CVF (15-1209). The cases were consolidated; a prehearing conference was conducted on August 4, 2015, and a hearing was held on November 10, 2015. At the hearing, Motor Carrier Inspector Drew Fowler and Jonathan Frye, Chief of the Commission's Compliance Division, testified on behalf of Staff. Mr. Burgess testified on behalf of himself and Mr. Bass testified on behalf of QFI.

## II. Law

Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the FMCSR, specifically, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property within Ohio. Ohio Adm.Code 4901:2-5-03(B) and (C) require all motor carriers engaged in intrastate and interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Ohio Adm.Code 4901:2-7-20(A) requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

## III. Issue

Staff claims that the pickup truck and trailer, owned by QFI and driven by Mr. Bass, in combination, constituted a CMV that was used in interstate commerce. Mr. Bass contends that QFI was not in violation of the FMCSR because the trailer was not used in interstate commerce. Mr. Burgess contends that he had been moving personal goods, including furniture, as a favor for an acquaintance and without any financial compensation.

## IV. Summary of the Evidence Presented at the Hearing

Inspector Fowler testified that he stopped Mr. Burgess, who was traveling in a pickup truck and fully enclosed trailer, because there were faded markings on the trailer that read "Installation Fixtures," but there were no markings on the pickup truck. In addition, the breakaway switch on the trailer was missing. Inspector Fowler stated that the trailer was owned by QFI, while the towing unit, a pickup truck, was owned by Mr. Burgess. (Tr. at 9-11, 28). According to Inspector Fowler, Mr. Burgess indicated that he was in the construction contracting business and was traveling from Fairfield, Ohio, where he was working for QFI, to Elizabethtown, Kentucky (Tr. at 11-12, 27, 31, 79). Inspector Fowler contends that construction contractors' vehicles often consist of a pickup truck pulling a trailer, and he assumed, when Mr. Burgess stated that QFI is his employer, that the word "installation" in the QFI name also meant "construction." As a result, Inspector Fowler concluded that the trailer contained construction equipment. (Tr. at 28, 79-80; Staff Ex. 1). Inspector Fowler acknowledged that he never looked inside the trailer, and that, while he had taken photographs of various sides of the vehicle, he did not take photographs of the inside the trailer, because his camera "fogged up on me." Inspector Fowler also could not recall whether he asked Mr. Burgess what was inside the trailer or if Mr. Burgess had indicated what was in the trailer. (Tr. at 27-28, 31, 78-79). According to Inspector Fowler, the manufacturer's information attached to the truck and trailer indicated that the gross combination

weight rating (GCWR) of the CMV exceeded 10,001 lbs. In light of all the preceding factors, Inspector Fowler concluded that Mr. Burgess was operating a CMV in interstate commerce, making Mr. Burgess and QFI subject to the FMCSR. (Tr. at 14-16, 31, 75-77, 79, Staff Ex. 1).

Inspector Fowler asserts that, only when the inspection was finished and he placed the CMV out of service, did Mr. Burgess state that he had used the trailer to move personal goods (Tr. at 29-30, 81). The inspector added that Mr. Burgess made a telephone call after being placed out of service, but he did not know to whom Mr. Burgess spoke during the call (Tr. at 30).

Mr. Frye testified that the proposed forfeitures for QFI and Mr. Burgess are appropriate and consistent with the fine schedule that Staff maintains (Tr. at 15, 24-25). Mr. Frye added that QFI and Mr. Burgess received, in timely manner, all of the notices that were required to be served, pursuant to Commission rules (Tr. at 22-24).

Mr. Burgess testified that, at the time of the inspection, the trailer was empty and that he was returning from delivering the furniture to his niece's fiancée, as a favor and not for compensation (Tr. at 46, 48-49, 50-52, 56-57, 59, 73-74). He also noted that, although he had been working for QFI in the area where the stop occurred, his work did not include hauling any material, and he asserted that he was not conducting any business on the day of the inspection (Tr. at 46, 52-54, 58-59). He added that QFI does not transport property and that the trailer was stored on his property because QFI had no room to store the trailer in Florida (Tr. at 53, 60-61). According to Mr. Burgess, because QFI owned the trailer, he asked Mr. Bass for permission to use the trailer for moving furniture (Tr. at 50-51, 65-66). He contends that the GWCR of the CMV is not 10,001 lbs., but rather 9,260 lbs., and that he told Inspector Fowler that he had been assisting in a personal move at that time. He also confirmed that Inspector Fowler never looked inside the trailer (Tr. at 46, 50-51, 56, 58-59, 73).

According to Mr. Burgess, he uses the pickup truck on his farm and to assist friends, and the tools and scaffolding in the back of his truck were necessary for maintenance on his barn (Tr. at 46-49). He added that road grime had accumulated on adhesive that remained on the trailer after the markings were removed, giving the impression that the trailer was marked as a CMV (Tr. at 53-55).

Mr. Bass explained that QFI assists retail stores with setting up shelves and similar items of hardware necessary for displays (Tr. at 66, 68). He emphasized that Mr. Burgess was not working for QFI on March 20, 2015, and had not done so for about three weeks. Mr. Bass added that, although Mr. Burgess had called him after being stopped by Inspector Fowler, it was only to indicate that he was undergoing an

inspection. (Tr. at 67, 71). Mr. Bass also explained that, except for the trailer that Mr. Burgess borrowed, QFI owns no trucks or trailers (Tr. at 66-68). Mr. Bass explained that QFI employees "fly to jobs sometimes and are picked up, and sometimes we drive our personal vehicles" (Tr. at 68-69). He stated that, upon purchasing the trailer, he removed its markings and transported it to Mr. Burgess' property in Kentucky, to provide storage space for the anticipated growth of QFI projects in that region (Tr. at 63-64). However, he said, the trailer sat unused for three months, and never ended up being used to store anything (Tr. at 64, 70-71). Like Mr. Burgess, Mr. Bass believed that road grime had stuck to adhesive remaining on the trailer after removal of markings, giving the impression that the trailer was still marked as a CMV (Tr. at 63-67, 68-71). Mr. Bass observed that, while Inspector Fowler used his camera for photos of alleged marking violations, he never took any photographs of the outside or inside of the trailer (Tr. at 72).

#### V. Commission Conclusion and Order

Ohio Adm.Code 4901:2-7-20 requires, at hearing, that Staff prove the occurrence of a violation by a preponderance of the evidence. The Commission finds, based on a preponderance of the evidence, that Staff has not proven that QFI or Mr. Burgess violated the FMCSR.

The evidence presented by Staff relies on Inspector Fowler's assumption that Mr. Burgess was operating a CMV in interstate commerce. Inspector Fowler came to the conclusion that Mr. Burgess was working for a construction company, because he was driving a truck and trailer combination that Inspector Fowler believes is similar to that used by construction contractors, and because the faded markings on the trailer, as well as the name of Mr. Burgess' employer, appeared to indicate the truck was used for construction business. However, there was insufficient evidence presented by Staff that Mr. Burgess was operating a CMV, or that the vehicle was a CMV operated in interstate commerce. In addition, while Staff provided testimony and photographs of the cited violations, there was no evidence that the pickup truck or the trailer contained any construction materials, notwithstanding the fact that the name on the side of the truck contains words used by companies engaged in the construction business.

In sum, the Commission concludes that there is insufficient evidence to find that QFI violated 49 C.F.R. 393.95(a), 49 C.F.R. 393.95(f), 49 C.F.R. 393.43, 49 C.F.R. 396.3(a)(1), 49 C.F.R. 390.21(b), and 49 C.F.R. 392.9b(a). There is also insufficient evidence that Mr. Burgess violated 49 C.F.R. 391.41(a). Such findings do not mean that the Commission concludes that Mr. Burgess was transporting personal goods on the day of the inspection, and thus was subject to 49 C.F.R. 390.3(f)(3), which states that "the occasional transportation of personal property by individuals, not for

compensation nor in the furtherance of a commercial enterprise" is exempt from the FMCSR. The Commission's opinion is limited to the finding that insufficient evidence was presented to determine that Mr. Burgess was driving a CMV in interstate commerce on the day of the inspection.

Accordingly, the Commission finds that QFI should not be assessed a total \$690.00 forfeiture for violating 49 C.F.R. 393.95(a), 49 C.F.R. 393.95(f), 49 C.F.R. 393.43, 49 C.F.R. 396.3(a)(1), 49 C.F.R. 390.21(b), and 49 C.F.R. 392.9b(a). Similarly, we find that Mr. Burgess should not be assessed \$100.00 for violating 49 C.F.R. 391.41(a). All alleged violations against QFI and Mr. Burgess should be deleted from their Safety-Net records and history of violations.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On March 20, 2015, Motor Carrier Inspector Drew Fowler stopped and inspected a CMV driven by Garrell Burgess. Inspector Fowler found the trailer, owned by Quality Fixtures Installations, to be in violation of 49 C.F.R. 393.95(a) (CMV must be equipped with a fire extinguisher), 49 C.F.R. 393.95(f) (CMV must be equipped with warning devices), 49 C.F.R. 393.43 (trailer must be equipped with a properly operating breakaway), 49 C.F.R. 396.3(a)(1) (tie rod ends must have limited excessive play), 49 C.F.R. 390.21(b) (carrier name and/or USDOT number not displayed as required), and 49 C.F.R. 392.9b(a) (operating CMV in interstate commerce without USDOT registration). Inspector Fowler found Mr. Burgess to be in violation of 49 C.F.R. 391.41(a) (CMV driver must possess a medical examiner's certificate).
- (2) QFI was timely served with an NPD, alleging violations of 49 C.F.R. 393.95(a) (CMV must be equipped with a fire extinguisher), 49 C.F.R. 393.95(f) (CMV must be equipped with warning devices), 49 C.F.R. 393.43 (trailer must be equipped with a properly operating breakaway), 49 C.F.R. 396.3(a)(1) (tie rod ends must have limited excessive play), 49 C.F.R. 390.21(b) (carrier name and/or USDOT number not displayed as required), and 49 C.F.R. 392.9b(a) (operating CMV in interstate commerce without USDOT registration). The NPD indicated that Staff intended to assess a civil monetary forfeiture of \$690.00 against QFI. In addition,

Mr. Burgess was timely served with an NPD, alleging a violation of 49 C.F.R. 391.41(a) (CMV driver must possess a medical examiner's certificate). The NPD indicated that Staff intended to assess a civil forfeiture of \$100.00 against Mr. Burgess.

- (3) A prehearing conference was conducted on August 4, 2015, and a hearing was held on November 10, 2015.
- (4) Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.
- (5) Based upon the record in this proceeding, insufficient evidence has been presented to conclude that QFI violated 49 C.F.R. 393.95(a), 49 C.F.R. 393.95(f), 49 C.F.R. 393.43, 49 C.F.R. 396.3(a)(1), 49 C.F.R. 390.21(b), and 49 C.F.R. 392.9b(a), and that Mr. Burgess violated 49 C.F.R. 391.41(a). Staff, therefore, has not proven, by a preponderance of the evidence pursuant to Ohio Adm.Code 4901:2-7-20, that QFI and Mr. Burgess violated any of aforementioned rules.
- (6) Accordingly, QFI should not be assessed the \$690.00 forfeiture, and Mr. Burgess should not be assessed the \$100.00 forfeiture. In addition, the alleged violations should be deleted from the Safety-Net record and history of violations for QFI and Mr. Burgess.

ORDER:

It is, therefore,

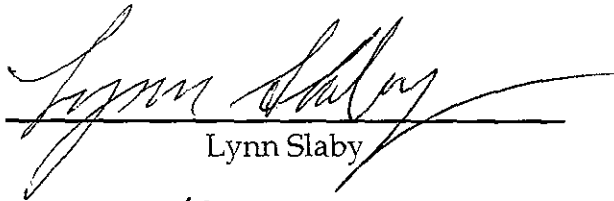
ORDERED, That QFI should not be assessed a total civil forfeiture of \$690.00 for the alleged violations of 49 C.F.R. 393.95(a), 49 C.F.R. 393.95(f), 49 C.F.R. 393.43, 49 C.F.R. 396.3(a)(1), 49 C.F.R. 390.21(b), and 49 C.F.R. 392.9b(a), which should be removed from QFI's Safety-Net record and history of violations. It is, further,

ORDERED, That Mr. Burgess should not be assessed a total civil forfeiture of \$100.00 for the alleged violation of 49 C.F.R. 391.41(a), 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 all parties of record.

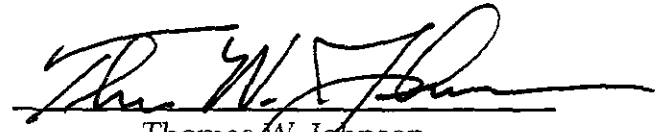
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Andre T. Porter, Chairman

  
Lynn Slaby

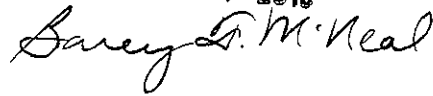
  
M. Beth Trombold

  
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Entered in the Journal

~~APR 27 2016~~  


Barcy F. McNeal  
Secretary