

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Barron Young, Notice of)
Apparent Violation and Intent To Assess) Case No. 16-0422-TR-CVF
Forfeiture.)

**BRIEF ON BEHALF OF
THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

I. INTRODUCTION

Barron Young (“Respondent”) violated provisions of the Federal Motor Carrier Safety Regulations by operating a vehicle while using additional equipment or accessories that decreased the safety of operation of the commercial motor vehicle. He was preliminarily assessed a forfeiture of \$250.00.

The record shows that the Staff of the Public Utilities Commission of Ohio (“Staff”) offered the testimony of a highly qualified and credible Motor Carrier Enforcement inspector, as well as the testimony of a compliance officer of the Transportation Compliance Division of the Public Utilities Commission of Ohio (“Commission”), to support both the violation and the resulting civil forfeiture. The record supports the finding of the violations of the Motor Carrier Safety Regulations at issue in this proceeding. Based on the evidence of record, established precedent of the

Commission, and on sound public policy, the total monetary civil forfeiture of \$250.00 should be imposed against Respondent.

II. STATEMENT OF FACTS

A. Procedural History of the Case

According to Staff witness Jonathan Frye, Respondent was timely and properly provided with all required notices and process in this case. Tr. at 16. Respondent was sent a Notice of Preliminary Determination on January 29, 2016, as required and described in Ohio Admin. Code §4901:2-7-12. Staff Exhibit 2. The Notice of Preliminary Determination cited the following violation:

- 49 C.F.R. § 390.17 – Operating a CMV while texting

Respondent then filed a request for a hearing in this matter. The hearing was conducted on May 9, 2016.

B. Factual Background of the Violations at Issue in This Proceeding

On October 20, 2015, Ohio State Highway Patrol Motor Carrier Enforcement Officer Melanie Kurtz conducted a roadside inspection of a vehicle being operated by Respondent, Barron Young. Tr. at 6. The inspection was performed as part of Officer Kurtz's regular assigned duties and responsibilities. *Id.* The witnesses differed in their descriptions of how the inspection occurred.

Officer Kurtz, an 8-year veteran of the State Highway Patrol Motor Carrier Enforcement division, testified that she was travelling immediately behind Mr. Young.

As another semi was attempting to pass, Mr. Young's truck veered left, crossing into the lane of the other semi and nearly running into it. Tr. at 7.

As she overtook Mr. Young's truck, Officer Kurtz looked into his cab and noticed that Mr. Young was holding a cell phone in his right hand, and appeared to be "texting with his thumb." Tr. at 7. Because such action would be a violation of the motor carrier safety regulations, Officer Kurtz pulled over Mr. Young and conducted an inspection. Tr. at 8.

Mr. Young denied that his truck crossed the center line or in any way endangered any other vehicle. Tr. at 18. He also denied that he was texting. *Id.* He even produced records to demonstrate that he was neither texting nor placing a call. Young Ex. 1.

While the witnesses disagree on what led up to the inspection, they agree on one essential fact; indeed, the penultimate fact in this case. Officer Kurtz observed that Mr. Young was driving while holding a cell phone in one hand. Tr. at 7. Because she was driving a larger vehicle, a Chevrolet Tahoe, she could easily see into the cab. According to Officer Kurtz, it was "extremely clear" that Mr. Young was driving with one hand, holding a cell phone with the other. Tr. at 11. Even Mr. Young acknowledged that he had his cell phone in his hand when Officer Kurtz passed his vehicle. Tr. at 22.

Following the inspection, Officer Kurtz prepared a report describing the results of her inspection, citing Mr. Young for the violation noted above. Staff Ex. 1.

III. LAW AND ARGUMENT

A. Drivers Must Comply with the Motor Carrier Safety Regulations.

The Commission, as the lead agency for the Motor Carrier Safety Assistance Program (“MCSAP”) in Ohio, regulates operation of commercial motor vehicles. Ohio Rev. Code § 4905.80. In furtherance of this obligation, the Commission has adopted rules governing the conduct drivers, shippers, and motor carriers that are engaged in commerce. The Commission has adopted standards for motor carrier safety pursuant to authority delegated by the Ohio General Assembly. Ohio Rev. Code § 4905.81. These rules, which are found under Ohio Admin. Code § 4901:2-5, largely adopt the U.S. Department of Transportation motor carrier safety regulations. The state has continually sought to implement programs to ensure the safety of the motoring public and to reduce accidents involving commercial motor carriers. It is the Commission’s duty to keep Ohio’s roadway safe from accidents involving commercial motor vehicles. Compliance with the regulations is imperative.

B. Respondent Failed to Comply with the Regulations by Operate a Commercial Motor Vehicle While Distracted by Accessory Equipment in Violation of 49 C.F.R. § 390.17.

Respondent was cited for a single violation of 49 C.F.R. § 390.17. That section provides that:

Nothing in this subchapter shall be construed to prohibit the use of additional equipment and accessories, not inconsistent with or prohibited by this subchapter, provided such equipment and accessories do not decrease the safety of operation of the commercial motor vehicles on which they are used.

While it is true that the Inspection Report, and the Notice of Preliminary Determination, Staff Exs. 1 and 2 respectively, both state that the violation was for “operating a CMV while texting,” it is not relevant that Mr. Young may not have been texting, as Officer Kurtz believed, at the time that he was observed. Significantly, the regulation does not require that the driver actually be using the accessory in any particular way. It is sufficient if the accessory creates a distraction.

Initially, a cell phone is exactly the kind of device contemplated by this regulation. Question 1 of the official interpretations to 49 C.F.R. § 390.17 specifies that “[h]andheld or other wireless electronic devices that are brought into a CMV are considered ‘additional equipment and accessories’ within the context of § 390.17.”

Officer Kurtz testified that, in her opinion, based on her experience as a motor carrier enforcement inspector, having a cell phone in your hand while driving a semi is a distraction. Tr. at 9. According to Mr. Jonathan Frye, Chief of the Compliance Division of the Commission Transportation Section, the purpose of the regulation is to ensure that drivers are focused on their duties and are aware of their surroundings. He, too, testified that just having a cell phone could be a distraction. Tr. at 17.

Mr. Young’s description of how he came to have the phone in his hand demonstrates that he was distracted.

Mr. Young: I had my phone sitting behind the cup, it was in the cup holder. The phone slid on the floor underneath my accelerator foot, so I picked the phone up, was putting it up on top of the dash, this little holder on top of the dash, and that's when she saw the phone in my hand and she pulled me over . . .

Tr. at 18-19. Mr. Young was clearly distracted: by his phone falling to the floor; by the phone sliding beneath his accelerator foot; by reaching down beneath his foot to retrieve the phone; and by attempting to reposition the phone on his dashboard. Whether these distractions contributed to his erratic driving is not certain. He had to reach down to pick up an object off of the floor of his cab. Tr. at 22. It is reasonable to believe that he was distracted by his phone.

Moreover, his actions were unnecessary, and could easily have been avoided. Officer Kurtz testified that Mr. Young's driving should not have been disrupted even had his cell phone gone under his accelerator pedal. Tr. at 27. And he had ample opportunity to pull off of the side of the road, retrieve his phone, and reposition it securely without endangering himself or the driving public. Tr. at 28.

C. The Commission Has Authority to Assess Civil Forfeitures.

The Commission has the statutory power to assess monetary forfeitures against motor transportation Companies for non-compliance with Federal Motor Carrier Safety Regulations. Ohio Rev. Code § 4923.99. The Legislature granted the Commission the authority to assess forfeitures for violations of the motor carrier safety provisions. *Id.*

The Commission has authority to adopt safety rules applicable to motor carrier regulation and has, in fact, adopted the Federal Motor Carrier Safety Regulations of the U.S. Department of Transportation in Title 49 of the Code of Federal Regulations, Parts 40, 367, 380, 382, 383, 385, 386, 387 and 390 through 397. Ohio Admin. Code § 4901:2-5-03(A). The Commission has also adopted civil forfeiture and procedural rules. Ohio

Admin. Code §§ 4901:2-7-01 - 4901:2-7-22. The Commission enforces the Motor Carrier Safety Regulations for the State of Ohio.

Staff witness Jonathan Frye testified that the procedure for determining forfeiture assessments for violations of the Motor Carrier Safety Regulations is consistent with that recommended by the Commercial Vehicle Safety Alliance (CVSA). Likewise, the fine structure and forfeiture amounts are similarly consistent with those recommended by the CVSA. These procedures, and the resulting forfeiture amounts, are consistently followed and equally applied to all drivers, shippers, and carriers. Tr. at 14. In this case, the violation carries a \$250.00 forfeiture. In Mr. Frye's opinion, based on his thirteen years of experience as Chief of the Compliance Division of the Commission Transportation Department, that amount was properly and fairly assessed against Mr. Young. Tr. at 16.

IV. CONCLUSION

Based on the record produced at the hearing and for the reasons stated herein, the Staff respectfully requests that the Commission find that the Respondent violated Section 390.17 of the Federal Motor Carrier Safety Regulations, and that the Commission hold Respondent liable for the civil forfeiture of two hundred fifty dollars (\$250.00) as recommended by the Staff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Brief on Behalf of the Staff of the Public Utilities Commission of Ohio** was served by regular U.S. mail, postage prepaid, and fax, upon the following parties of record, this 3rd day of June, 2016.

Werner. L. Margard III
Werner L. Margard III
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Summary: Brief filed on Behalf of the Public Utilities Commission of Ohio. electronically filed by Ms. Tonnetta Scott on behalf of PUC