

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF DAVID ZIEGLER,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE NO. 16-2170-TR-CVF
(OH3238010949D)

OPINION AND ORDER

Entered in the Journal on January 31, 2018

I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated, by a preponderance of the evidence, that David Ziegler violated Commission transportation rules by using a hand-held mobile telephone while driving a commercial motor vehicle, and should be assessed the \$250 civil forfeiture recommended by Staff. In addition, by a preponderance of the evidence, Staff did not demonstrate that Mr. Ziegler violated Commission transportation rules requiring the driver of a placarded commercial motor vehicle to stop before driving over a railroad grade crossing. Therefore, the \$500 civil forfeiture should not be assessed, and the violation should be deleted from Mr. Ziegler's Safety-Net record and history of violations.

II. PROCEDURAL HISTORY

{¶ 2} On August 19, 2016, Motor Carrier Enforcement Inspector Michael Byrne of the Ohio State Highway Patrol (OSHP) stopped and inspected a commercial motor vehicle (CMV) operated by Central Ohio Farmers Co-Op Inc. and driven by David Ziegler (Respondent). At the time of the inspection, Inspector Byrne prepared a report that identified two Federal Motor Carrier Safety Regulations (FMCSR) violations, specifically, 49 C.F.R. 392.82(a)(1), which prohibits a driver from using a hand-held mobile telephone while driving a CMV, and 49 C.F.R. 392.10(a)(3), which requires that a driver of a placarded CMV must stop before driving over a railroad grade crossing. Mr. Ziegler was timely served with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-12. In the NPD, Respondent was notified that Staff intended to

assess a civil forfeiture of \$250 for violating 49 C.F.R. 392.82(a)(1) and \$500 for violating 49 C.F.R. 392.10(a)(3). On November 2, 2016, Mr. Ziegler filed a request for hearing. A prehearing conference was conducted on January 10, 2017, and a hearing was scheduled for March 16, 2017; however, because of continuances requested by Mr. Ziegler and by Staff, respectively, the hearing was conducted on September 28, 2017. At the hearing, Staff witnesses Inspector Byrne and Rod Moser, Chief of the Transportation Department's Compliance Division, testified in support of the violations and forfeiture amounts. Mr. Ziegler testified on his own behalf.

III. DISCUSSION

{¶ 3} Under Ohio Adm.Code 4901:2-5-02(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations (FMCSR), 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-02(C) requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Further, R.C. 4923.99 authorizes the Commission to assess a civil forfeiture of up to \$25,000 per day, per violation, against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce, in or through this state. Ohio Adm.Code 4901:2-7-20 requires that, at the hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 4} 49 C.F.R. 392.82(a)(1) states that "no driver shall use a hand-held mobile telephone while driving a commercial motor vehicle." 49 C.F.R. 392.10(a)(3) requires that the driver of a placarded CMV "shall not cross a railroad track *** at grade unless he/she first: Stops the * * * [CMV] within 50 feet of, and not closer than 15 feet to, the tracks; thereafter listens and looks in each direction along the tracks for an approaching train; and ascertains that no train is approaching. When it is safe to do so, the driver may drive * * * across the tracks * * *."

{¶ 5} The issue in this case is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent was using his hand-held mobile telephone while driving a CMV, and that Respondent failed to stop a placarded CMV before driving over a grade crossing, and thus was in violation of 49 C.F.R. 392.82(a)(1) and 49 C.F.R. 392.10(a)(3).

{¶ 6} Inspector Byrne stated that he has been with OSHP since 2000 and has been trained for CMV and hazardous material inspections (Tr. at 6-7). He explained that on August 19, 2016, he was driving on U.S. Route 224, just west of U.S. Route 23, and followed a placarded CMV as it approached a grade crossing. Inspector Byrne added that there was one car between his vehicle and the CMV. (Tr. at 11-13, 44; Staff Ex. 1.)

{¶ 7} Inspector Byrne asserts that he “watched the rotation of the wheel nut covers” on the left wheel of the CMV’s steering axle (Tr. at 12). Inspector Byrne estimated, but was not certain, that the wheel nut covers extended two inches from the wheel on the steering axle (Tr. at 24-25). According to Inspector Byrne, Respondent was “slowing down * * * but never came to a complete stop” as he proceeded over the railroad tracks at 25 to 35 miles per hour. (Tr. at 44, 48-49; Staff Ex. 1.) While following the CMV, Inspector Byrne observed Mr. Ziegler in the driver’s side rear view mirror holding a mobile telephone close to his head during a conversation. Inspector Byrne contends that, during the inspection, Mr. Ziegler admitted he was talking on a hand-held mobile telephone and had failed to stop the CMV before driving over the grade crossing. (Tr. at 12, 14, 15-16, 22; Staff Ex. 1.)

{¶ 8} Inspector Byrne explained that U.S. Route 224 is a straight two-lane road with an incline as the highway approaches the railroad tracks (Tr. at 19). He did not recall if he had driven left of center to better observe rotation of the wheel nut covers on the steering axle, nor was he certain if incline of the highway helped him observe whether Respondent had stopped the CMV before driving over the railroad tracks. Inspector Byrne asserts, however, that regardless of the incline or whether he had driven left of

center, he could easily see the wheel nut covers rotate on the CMV's steering axle. (Tr. at 19, 20, 25, 43-46.) Further, Inspector Byrne contends that his Chevrolet Tahoe enables him to sit up high, so that he could clearly see over the car that was located between his vehicle and the CMV (Tr. at 20-21). Inspector Byrne testified that the weather was sunny and clear, and that there were no obstructions that hindered his observations. He emphasized that he would not have written that Respondent failed to stop at the grade crossing if the 49 C.F.R. 392.10(a)(3) violation had not occurred. (Tr. at 18, 26, 46-47, 49.)

{¶ 9} Mr. Ziegler denies failing to stop at the grade crossing and contends that several factors interfered with Inspector Byrne's ability to observe rotation of the wheel nut covers. First, Mr. Ziegler asserted that Inspector Byrne was driving 15 to 20 feet behind the CMV. Second, Respondent emphasized that only one-half inch of the wheel nut covers are visible from behind the CMV, because the width of the CMV's cargo tank hinders visibility from the rear (Tr. at 26-27.) In Mr. Ziegler's opinion, "from that distance [15 to 20 feet, and] at that angle [directly behind the CMV] * * * you can't even see the lug nuts * * *." (Tr. at 26-27, 39-40.) Mr. Ziegler admits that he was talking on his hand-held mobile telephone while driving, but emphasized that he did stop the CMV before driving over the railroad tracks (Tr. at 38, 40-41).

{¶ 10} Staff witness Moser testified that the monetary amount assessed for the violation was determined by using a civil forfeiture assessment worksheet and a civil forfeiture violations chart. Mr. Moser added that the amount is consistent with the guidelines issued by the Commercial Vehicle Safety Alliance and concluded that the forfeiture was calculated correctly. (Tr. at 31-34; Staff Ex. 2.)

IV. COMMISSION CONCLUSION

{¶ 11} 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 notes that Mr. Ziegler testified that he was talking on a hand-held mobile telephone while

driving a CMV and thus violated 49 C.F.R. 392.82(a)(1). The Commission, however, finds the evidence inconclusive regarding Respondent's failure to stop a placarded CMV prior to driving over a grade crossing. Therefore, Staff did not prove, by a preponderance of the evidence, that Mr. Ziegler failed to comply with 49 C.F.R. 392.10(a)(3).

{¶ 12} The record contains Inspector Byrne's testimony and inspection report notes, which indicate that he watched the rotation of the wheel nut covers on the CMV's steering axle and determined that Respondent did not stop the CMV before driving over the grade crossing (Tr. at 12, 48-49). Inspector Byrne also contends that the weather was sunny and clear, there were no obstructions to hinder his observations, and the height of his Chevrolet Tahoe enhanced his visibility (Tr. at 18, 20-21, 26). Inspector Byrne emphasized that he would not have written the 49 C.F.R. 392.10(a)(3) violation if it had not occurred (Tr. at 49). Absent other factors, we would give great weight to Inspector Byrne's testimony and inspection report. However, it is significant that Inspector Byrne made his observations while driving behind the CMV on a two-lane straight highway, with a car between his vehicle and the CMV (Tr. at 13, 19). Furthermore, Inspector Byrne could not recall if he drove left of center to observe the rotation of the wheel nut covers from a different angle, or if the incline of the highway as it approached the railroad tracks assisted his observation (Tr. at 19-20). Finally, Inspector Byrne did not respond to Respondent's contention that only one-half inch of the wheel nut covers are visible from behind the CMV, because the width of the CMV's cargo tank hinders visibility from the rear (Tr. at 26-27.) All of the preceding factors render questionable Inspector Byrne's ability to accurately determine whether the CMV had failed to stop at the grade crossing.

{¶ 13} In sum, the Commission concludes that Respondent violated 49 C.F.R. 392.82(a)(1) by talking on a hand-held mobile telephone while driving a CMV. In addition, the Commission concludes that there is insufficient evidence to find that Mr. Ziegler violated 49 C.F.R. 392.10(a)(3) by failing to stop a placarded CMV before

driving over a grade crossing. This does not mean that the Commission has determined that Respondent stopped the CMV before proceeding over the railroad tracks. The Commission's opinion is limited to the finding that insufficient evidence has been presented to determine that Mr. Ziegler committed the alleged violation.

{¶ 14} Accordingly, the Commission finds that Mr. Ziegler should not be assessed the \$500 forfeiture for violating 49 C.F.R. 392.10(a)(3), and that the alleged violation should be deleted from Mr. Ziegler's Safety-Net record and history of violations. The Commission further finds that Respondent should be assessed the \$250 forfeiture for violating 49 C.F.R. 392.82(a)(1). Mr. Ziegler is directed to make payment of the \$250 civil forfeiture within 60 days of this Opinion and Order by certified check or money order payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. The inspection number (OH3238010949D) should be written on the face of the certified check or money order to ensure proper credit.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 15} On May 26, 2016, Inspector Michael Byrne stopped and inspected a motor vehicle driven by David Ziegler. Mr. Ziegler was alleged to be in violation of 49 C.F.R. 392.82(a)(1), for using a hand-held mobile telephone while driving a CMV, and 49 C.F.R. 392.10(a)(3), which requires that a driver of a placarded CMV must stop before driving over a railroad grade crossing.

{¶ 16} Respondent was timely served with an NPD, alleging violations of 49 C.F.R. 392.82(a)(1) and 49 C.F.R. 392.10(a)(3). In the NPD, Respondent was notified that Staff intended to assess civil monetary forfeitures of \$250 for the 49 C.F.R. 392.82(a)(1) violation and \$500 for the 49 C.F.R. 392.10(a)(3) violation.

{¶ 17} A prehearing conference was convened in this case on January 10, 2017, and a hearing was conducted on September 28, 2017.

{¶ 18} Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 19} Based upon the record in this proceeding, the Commission finds that Staff has not proven, by a preponderance of the evidence, that Mr. Ziegler violated 49 C.F.R. 392.10(a)(3) by failing to stop a placarded CMV before driving over a grade crossing. Accordingly, Respondent should not be assessed the \$500 forfeiture, and the alleged violation should be deleted from his Safety-Net record and history of violations.

{¶ 20} Based on the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Mr. Ziegler violated 49 C.F.R. 392.82(a)(1) by using a hand-held mobile telephone while driving a CMV. Accordingly, Mr. Ziegler should be assessed the \$250 forfeiture, and should pay the forfeiture within 60 days from the date of this Opinion and Order.

VI. ORDER

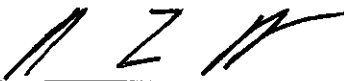
{¶ 21} It is, therefore,

{¶ 22} ORDERED, That David Ziegler must pay a civil forfeiture of \$250 for violating 49 C.F.R. 392.82(a)(1) within 60 days of this Opinion and Order. Payment shall be made by check or money order payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 16-2170-TR-CVF and inspection number OH3238010949D should be written on the face of the check or money order. It is, further,

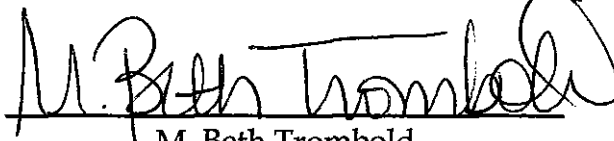
{¶ 23} ORDERED, That David Ziegler should not be assessed a civil forfeiture of \$500 for the alleged violation of 49 C.F.R. 392.10(a)(3), which should be removed from his Safety-Net record and history of violations. It is, further,

{¶ 24} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

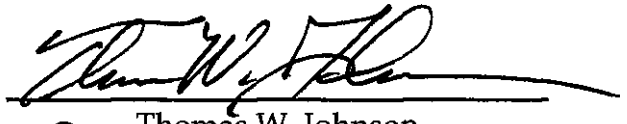
THE PUBLIC UTILITIES COMMISSION OF OHIO



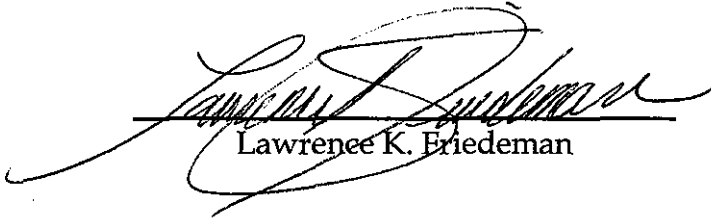
Asim Z. Haque, Chairman



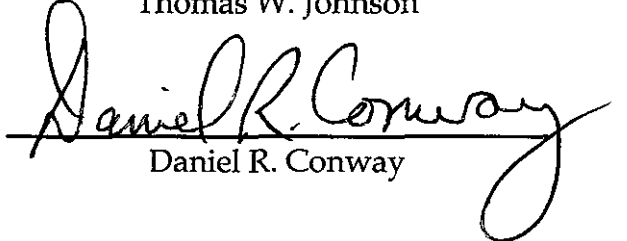
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman



Daniel R. Conway

JML/sc

Entered in the Journal

JAN 31 2018



Barcy F. McNeal
Secretary