

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF MIDWEST LOGISTICS
SYSTEMS, LTD., NOTICE OF APPARENT
VIOLATION AND INTENT TO ASSESS
FORFEITURE.**

**CASE NO. 17-2556-TR-CVF
(CR201810190017)**

OPINION AND ORDER

Entered in the Journal on January 23, 2019

I. SUMMARY

{¶ 1} The Commission finds that Staff did not demonstrate, by a preponderance of the evidence, that Midwest Logistics Systems, Ltd., violated the Commission's transportation rules by using a physically unqualified driver.

II. PROCEDURAL HISTORY

{¶ 2} On October 19, 2017, a Staff investigator conducted a compliance review at the office of Midwest Logistics Systems, Ltd. (Midwest Logistics or Respondent). During the compliance review, Staff noted the following apparent violations of Title 49, Code of Federal Regulations (C.F.R.):

- (1) 391.45(b)(1); using a driver not medically examined and certified during the preceding 24 months, (2 citations);
- (2) 391.11(b)(4); using a physically unqualified driver, (2 citations);
- (3) 395.8(f); failing to require driver to prepare record of duty status in form and manner prescribed; and
- (4) 392.2; operating a commercial motor vehicle not in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated.

{¶ 3} Subsequently, on December 13, 2017, Staff issued a Notice of Preliminary Determination (NPD) to Respondent in accordance with Ohio Adm.Code 4901:2-7-12, notifying Respondent that Staff intended to assess a \$1,000 civil monetary forfeiture for violations of the Commission's transportation regulations.

{¶ 4} On December 27, 2017, Midwest Logistics filed a request for an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13. A prehearing conference was held on March 6, 2018; however, the parties were unable to reach a resolution. A hearing was held on August 15, 2018. At the hearing, Mr. Rod Moser and Investigator Michael Blackburn appeared as witnesses for Staff and Mr. Peter Voelker appeared on behalf of Midwest Logistics.

III. LAW

{¶ 5} 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.

{¶ 6} As relevant to this case, 49 C.F.R. 391.11(b)(4) specifies that a person is qualified to drive a motor vehicle if that person is physically qualified in accordance with Subpart E; Physical Qualifications and Examinations. In order to be physically qualified he must have a current medical examiner's certificate as required by 49 C.F.R.

391.41(a)(1)(i). 49 C.F.R. 391.41(b), as relevant here, specifies that a person is physically qualified if he has no established medical history or clinical diagnosis of diabetes mellitus currently treated with insulin for control.

IV. ISSUE

{¶ 7} At issue is whether Staff satisfied its burden to show, by a preponderance of the evidence, that Midwest Logistics used a physically unqualified driver in violation of 49 C.F.R. 391.11(b)(4).

V. SUMMARY OF THE EVIDENCE

{¶ 8} Mr. Blackburn stated that he is a hazardous materials specialist 2 with the Staff of the Public Utilities Commission of Ohio and is trained for hazardous material inspections, compliance reviews, new entrant certifications, motor code certifications, and cargo tank certifications. He explained that he conducted a compliance review at Midwest Logistics principal place of business and found that Midwest Logistics was not in compliance with the Commission's transportation rules (Tr. at 9-11; Staff Ex. 2).

{¶ 9} Mr. Blackburn asserted that the violation of 391.11(b)(4) was part of a sample for driver qualification review. Mr. Blackburn stated that during the review he noticed that the driver had a K2 restriction on his license, meaning he is restricted to drive in Ohio only. He explained that he wanted to follow up to see why the K2 restriction was present and whether the driver had violated that restriction. After reviewing paperwork, Mr. Blackburn stated he found that the driver was insulin dependent and should not be operating commercial motor vehicles without a federal waiver for insulin-dependent diabetes. Mr. Blackburn explained that he reviewed paperwork included in the driver's qualification file from Midwest Logistics. This paperwork included, but was not limited to, medical examination reports for commercial driver fitness determination for years 2012, 2013, 2014, and 2017 as well as medical examiner's certificates for years 2010 to 2017. (Tr. at 11-13; Staff Ex. 2 and 3.)

{¶ 10} Mr. Blackburn asserted that on December 28, 2010, the driver was found to be not qualified by his physician because of his insulin dependency. The physician then voided the exam without a valid federal waiver. According to Mr. Blackburn, the next day, December 29, 2010, the driver went to a different physician and stated he did not have insulin dependency and used metformin to treat his diabetes and was granted a medical restriction card. (Tr. at 20-29; Staff Ex. 2 and 3.) Mr. Blackburn testified that the driver needed a federal diabetes waiver from the Federal Motor Carrier Safety Administration (FMCSA) because under C.F.R. 391.41(b)(3) a person is not physically qualified to drive a commercial motor vehicle if they require insulin to control diabetes (Tr. at 26-30). Lastly, Mr. Blackburn asserted that in 2017 the physician incorrectly certified the driver, without a federal waiver, even though the driver listed insulin under his current medications. He testified that after speaking with the physician, the physician misunderstood the regulations and thought she could qualify an insulin-dependent driver for intrastate operations only. Mr. Blackburn testified that he believes that the driver uses insulin to treat his diabetes and the evidence points to the driver concealing his use of insulin since December 29, 2010. (Tr. at 68-76.)

{¶ 11} Mr. Rod Moser, Chief of Compliance within the Transportation section at the Public Utilities Commission, testified that he reviews civil forfeiture assessments for the Commission to ensure that the fines are the correct amount and that he reviewed the assessment against the Respondent. According to Mr. Moser, the NPD in this matter sent to Midwest Logistics identified the violations and the amount of the assessment for the violations (Staff Ex. 1). Mr. Moser testified that the in this case \$1,000 is an appropriate forfeiture amount assessed for a violation of 391.11(b)(4). Accordingly, Mr. Moser recommended the forfeiture amount to the Commission. (Tr. at 6-8; Staff Ex. 1.)

{¶ 12} Mr. Voelker testified that he is general counsel for Midwest Logistics Systems and has been there for three years. Mr. Voelker testified that he had not seen the 2017 medical examination form before the hearing and all he was provided was the driver's

2017 medical card. According to Mr. Voelker, the medical card is the only medical-related document that the carrier is required to obtain and that the driver had a valid medical card since 2010. Mr. Voelker stated that in preparing for the hearing he reviewed the FMCSA regulations and that taking metformin to control diabetes did not disqualify the driver from operating a commercial motor vehicle nor did the driver require a waiver to operate a commercial motor vehicle. Further, Mr. Voelker testified that, once Midwest Logistics became aware that the driver was dependent on insulin and did not have the necessary waiver, Midwest Logistics took the driver off the highway and moved him into a role where he would not be driving. Lastly, Mr. Voelker testified that Midwest employs around 1,000 drivers and he does not have time to review all of the many years of driver qualification files. (Tr. at 79-83, 95, 98-99, Respondent Ex. 1-7.)

VI. COMMISSION CONCLUSION

{¶ 13} Ohio Adm.Code 4901:2-7-20(A) requires that, at the hearing, Staff prove the occurrence of a violation by a preponderance of the evidence. Based upon the record in this proceeding, the Commission finds that Staff has not proven, by a preponderance of the evidence, that Respondent violated 49 C.F.R. 391.11(b)(4) by using a physically unqualified driver.

{¶ 14} The Commission finds that based on the evidence at hearing, Midwest Logistics did not knowingly use a physically unqualified driver. Midwest Logistics had on file a valid medical examiner certificate for the driver for the years 2010 through 2017 as required by FMSCA, as well as long form medical examination records for 2012, 2013, and 2014 (Tr. at 81; Respondent Exs. 1-6; Staff Exs. 2-3). As confirmed by Staff witness Blackburn, motor carriers are not required to keep long-form medical exams in the driver qualification file (Tr. at 51). The Commission finds that there is not sufficient evidence in the record to support Staff's argument that the driver lied on his medical examination forms since 2010. To the contrary, there are seven years of valid medical examiner certificates as well as three long form medical examination records to support

Respondent's argument that the driver switched his course of treatment in 2010, and maintained that treatment until 2017. (Tr. at 57-58; Respondent Exs. 1-6; Staff Exs. 2-3).

{¶ 15} In 2017, Respondent's driver saw a physician who mistakenly certified the driver despite his disclosure of using insulin to control his diabetes (Tr. 54; Respondent Ex. 6). With respect to the 2017 long form medical examination report disclosing insulin use, the evidence is not clear where the form originated. Mr. Blackburn testified that he received the form from Midwest Logistics, but also asserted he did contact the physician for documents and received documents from her. Mr. Voelker testified that he had never seen the document before and that it was not provided by Midwest Logistics (Tr. at 63, 69, 80). While we recognize the importance of using physically qualified drivers, we do not believe the assessment of a violation is justified by the evidence in this case, as Midwest Logistics had a valid medical certificate for the driver as required by FMCSA. The Commission finds persuasive Respondent's argument that it had no knowledge if the driver was using insulin based on the valid medical certificates and long form medical examination records stating he used metformin and diet to control his diabetes (Respondent Exs. 1-6; Tr. at 87.) Further, we note that Midwest Logistics removed the driver from operating a motor carrier once it became aware he was dependent on insulin (Tr. at 95.) Accordingly, we do not find sufficient evidence was presented to demonstrate that a violation occurred. The Commission notes that if Midwest Logistics employs the driver in a driving role, while he is using insulin to control his diabetes, a federal waiver must be obtained as required by 49 C.F.R. 391.41 (b).

{¶ 16} Accordingly, the Commission finds that Respondent should not be assessed a civil forfeiture of \$1,000 for the violations of 49 C.F.R. 391.11(b)(4). The alleged violation of 49 C.F.R. 391.11 (b)(4) should also be deleted from Respondent's Safety-Net record and history of violations.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 17} On October 19, 2017, Mr. Blackburn completed a compliance review at the facility of Midwest Logistics and found alleged violations of the Commission's transportation regulations including: 391.45(b)(1); using a driver not medically examined and certified during the preceding 24 months, 391.11(b)(4); using a physically unqualified driver, (2 citations) 395.8(f); failing to require driver to prepare record of duty status in form and manner prescribed, and 392.2; operating a commercial motor vehicle not in accordance with the laws, ordinances, and regulation of the jurisdiction in which it is being operated- unsafe driving. Midwest Logistics is only contesting the violation of 391.11(b)(4), using a physically unqualified driver.

{¶ 18} Midwest Logistics was timely served with an NPD listing a civil forfeiture of \$1,000 for violation of 49 C.F.R. 391.11(b)(4).

{¶ 19} A prehearing conference was conducted on March 6, 2018, and a hearing was held on August 15, 2018.

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

{¶ 21} Based upon the record in this proceeding, the Commission finds that Staff has not demonstrated, by a preponderance of the evidence, that Midwest Logistics violated the Commission's transportation rules by using a physically unqualified driver.

VIII. ORDER

{¶ 22} It is, therefore,

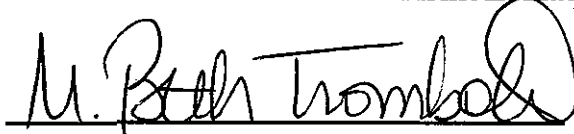
{¶ 23} ORDERED, That the alleged violation of 49 C.F.R. 391.11(b)(4) be dismissed and removed from Respondent's Safety-Net record and history of violations. It is, further,

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

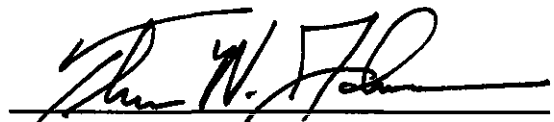
THE PUBLIC UTILITIES COMMISSION OF OHIO



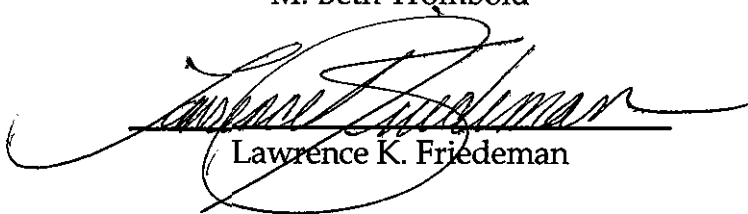
Asim Z. Haque, Chairman



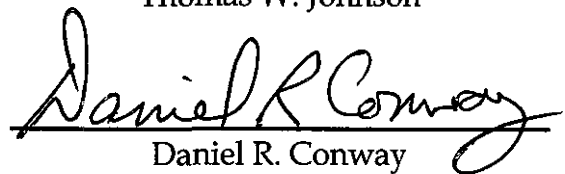
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman

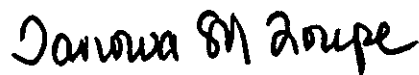


Daniel R. Conway

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Tanowa M. Troupe
Secretary