

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF MATTER OF  
WESTBROOK MONSTER MIX, LLC,  
NOTICE OF APPARENT VIOLATION AND  
INTENT TO ASSESS FORFEITURE.

CASE NO. 18-1415-TR-CVF  
(OH3274020192C)

## OPINION AND ORDER

Entered in the Journal on July 17, 2019

### I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated, by a preponderance of the evidence, that Respondent violated the Commission's transportation rules, and directs Respondent to pay the assessed \$2,750 forfeiture within 60 days of this Entry.

### II. PROCEDURAL HISTORY

{¶ 2} On April 23, 2018, Officer Douglas Bell (Officer Bell) with the Ohio State Highway Patrol (Highway Patrol) stopped and inspected a vehicle operated by Westbrook Monster Mix, LLC, (Westbrook or Respondent) and driven by James Tucker, in the State of Ohio. Officer Bell noted that the reason for the stop and subsequent inspection was that Westbrook was listed as an out-of-service carrier for failure to permit a safety audit (Staff Ex. 1.)

{¶ 3} Commission Staff timely served Westbrook with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-02, alleging a violation of 49 C.F.R. 385.337(b) for operating in violation of a Federal Motor Carrier Safety Regulations (FMCSA) operational out-of-service order. The NPD also notified Respondent that Staff intended to assess a \$2,750 civil monetary forfeiture for violating the Commission's transportation rules pursuant to Ohio Adm.Code 4901:2-7-07. (Staff Ex. 3.)

{¶ 4} On September 11, 2018, John Martin filed a request for a hearing on behalf of Westbrook in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} By Entry dated October 3, 2018, the attorney examiner scheduled a prehearing telephone conference for October 17, 2018, pursuant to Ohio Adm.Code 4901:2-7-16(B). During the prehearing conference, the attorney examiner was unable to contact Mr. Martin via telephone.

{¶ 6} By Entry dated November 14, 2018, the attorney examiner scheduled an evidentiary hearing for December 10, 2018.

{¶ 7} At the hearing, Staff witnesses Officer Bell and Rod Moser testified in support of the violation and forfeiture amount, respectively. Mr. Martin testified on behalf of Respondent.

### III. APPLICABLE LAW

{¶ 8} R.C. 4923.04 provides that the Commission shall adopt rules applicable to the transportation of persons or property by motor carriers operating in interstate and intrastate commerce. Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations (FMCSR). Specifically, the Commission adopted 49 C.F.R. Sections 40, 367, 380, 382, 383, 385, 286, 387, and 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-03(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 Ohio. 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.

{¶ 9} The specific regulation to which Staff is alleging Respondent violated is 49 C.F.R. 385.337(b), which states that if a new entrant does not agree to undergo a safety audit,

“its registration will be revoked and its interstate operations placed out-of-service effective on the 11th day from the service date of the notice” issued pursuant to C.F.R. 385.337(b).

#### **IV. ISSUE**

{¶ 10} At issue is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent engaged in interstate operations while designated out-of-service and was, thus, in violation of 49 C.F.R. 385.337(b).

#### **V. SUMMARY OF EVIDENCE**

{¶ 11} At the hearing on December 10, 2018, Staff presented the testimony of Officer Bell, a motor carrier enforcement inspector with the Highway Patrol. Officer Bell identified Staff Exhibit 1 as the driver/ vehicle examination report, which he prepared after conducting an inspection of Respondent’s vehicle, which was being driven by James Tucker, on April 23, 2018. Officer Bell stated that he stopped the vehicle because its assigned United States Department of Transportation (US DOT) number signified that it was a new entrant requiring an inspection. (Tr. at 7-13.) According to Officer Bell, after inputting the US DOT number entered into the federal database, Officer Bell determined Respondent’s CMV was under a FMSCA out-of-service order (Tr. at 12-13; Staff Ex. 2). Officer Bell further explained that because Westbrook’s CMV was a new entrant that failed to submit to a safety audit, the CMV was placed out-of-service on April 6, 2018. Further, Officer Bell testified that he called the Highway Patrol’s office in Columbus to verify that the out-of-service order was still active. (Tr. at 11-13.)

{¶ 12} Next, Staff presented the testimony of Rod Moser, who testified regarding the fine assessed to Respondent. Mr. Moser testified that, in his position within the transportation department, he oversees the civil forfeiture process related to roadside inspections of motor vehicles and compliance reviews done at carrier business addresses, which includes determining the appropriate amount of forfeitures in transportation cases. Mr. Moser stated that the Commission applies a uniform process of determining forfeitures

to all carriers. Mr. Moser identified Staff Exhibit 3 as the NPD sent to respondent following an unsuccessful conference to mediate an issue. According to Mr. Moser, the forfeiture amount of \$2,750 is appropriate given the violation and is consistent with the recommended fine schedule adopted by the Commercial Motor Vehicle Alliance. (Tr. at 14-17.)

{¶ 13} Mr. Moser identified Staff Exhibit 4 as a letter from the US DOT notifying Respondent that it required a safety audit before beginning operations, which was dated January 3, 2018 (Tr. at 17-18). The letter contains a notice that Respondent may be placed out-of-service if it failed to permit a safety audit (Staff Ex. 4). Next, Mr. Moser identified Staff Exhibit 5 as a second letter sent from the US DOT to Respondent, dated February 2, 2018. According to Mr. Moser, this second letter functions as a reiteration of the information contained in the first letter from the US DOT. Mr. Moser identified Staff Exhibit 6 as a warning letter sent to Respondent, dated March 26, 2018, advising it that it would be placed out-of-service unless it agreed in writing within 10 days from the service date of the letter to permit a safety audit. Next, Mr. Moser identified Staff Exhibit 7 as a letter sent to Respondent, dated April 6, 2018, which contains an order to revoke Respondent's operating authority, directing Respondent to cease all interstate operations. Finally, Mr. Moser identified Staff Exhibit 8 as a document from a federal database known as Motor Carrier Management and Information Systems. (Tr. at 19-22.) Mr. Moser further testified that, according to Staff Exhibit 8, there were three attempts to contact Respondent via Mr. Martin in March 2018 to advise him that a safety audit was required, and that the investigators attempting to contact him left messages each time (Tr. at 22; Staff Ex. 8).

{¶ 14} As Respondent's agent, Mr. Martin testified on behalf of Respondent. Mr. Martin stated that, as Westbrook is a new company, it experienced difficulty in taking the necessary steps to become compliant as a new entrant under the Commission's rules. However, Mr. Tucker did not deny any of the allegations contained in the driver/vehicle examination report. (Tr. at 24-26).

## VI. COMMISSION CONCLUSION

{¶ 15} Ohio Adm.Code 4901:2-7-20 requires that Staff prove the occurrence of a violation by a preponderance of the evidence at hearing. The Commission finds, based on a preponderance of the evidence, that Staff has proven that Westbrook violated 49 C.F.R. 385.337(b)

{¶ 16} The Commission finds it significant that the US DOT sent three warning letters to Respondent prior to placing Respondent as out-of-service on April 6, 2018, notifying it that a safety audit was required before Respondent could engage in interstate commerce (Tr. at 18-20; Staff Exs. 4, 5, 6). Further, US DOT investigators made three attempts to call Respondent in March 2018 in order to relay this information (Tr. at 21-22; Staff Ex. 8). Finally, the US DOT sent Respondent a letter on April 6, 2018, ordering Respondent to cease all interstate transportation pursuant to 49 C.F.R. 385.337 (Staff Ex. 7). Respondent presented no evidence to suggest that it replied to any of the US DOT's letters or phone calls. However, the Highway Patrol found Westbrook to be operating in interstate commerce despite its designation as an out-of-service carrier in the US DOT's system (Tr. at 12-13; Staff Ex. 2). Importantly, Respondent did not refute any of Staff's evidence showing that Respondent was engaging in interstate commerce in violation of Commission rules.

{¶ 17} Considering the evidence, the Commission finds that Staff has presented sufficient evidence to demonstrate that Westbrook was operating in violation of FMCSA's operational out-of-service order for failure to permit a safety audit.

{¶ 18} Based on this finding, Respondent should be assessed a \$2,750 forfeiture for a violation of C.F.R. 385.337(b) and it should pay the forfeiture within 60 days from the date of this Opinion and Order. Ohio Adm.Code 4901:2-7-22 provides that payment of such forfeitures shall be made by check or money order payable to the "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 18-

1415-TR-CVF and inspection number OH3274020192C should be written on the face of the check or money order.

## **VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶ 19} On March 26, 2018, the US DOT notified Westbrook that it was required to agree, in writing, to permit a safety audit by the FMCSA within 10 days.

{¶ 20} On April 6, 2018, the US DOT revoked Westbrook's new entrant registration, ordered it to cease all interstate transportation, and designated it as an out-of-service carrier.

{¶ 21} On April 23, 2018, Officer Douglas Bell of the Ohio State Highway Patrol stopped and inspected Westbrook's vehicle, driven by Mr. James Tucker.

{¶ 22} Westbrook was timely served with an NPD, alleging a violation of 49 C.F.R. 385.337(b), for operating in violation of an out-of-service order for failure to permit a safety audit. In the NPD, Respondent was notified that Staff intended to assess a civil monetary forfeiture of \$2,750.

{¶ 23} A prehearing settlement conference was scheduled for October 17, 2018, but the attorney examiner was unable to reach Westbrook via telephone.

{¶ 24} An evidentiary hearing was held on December 10, 2018.

{¶ 25} 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.

{¶ 26} Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Westbrook violated C.F.R. 385.337(b) for operating in violation of an out-of-service order for failure to permit a safety audit. Accordingly, Westbrook should be assessed a \$2,750 forfeiture for a violation of 49 C.F.R. 385.337(b) and it should pay the forfeiture within 60 days from the date of this Opinion and Order.

**VIII. ORDER**

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That Respondent pay a civil forfeiture of \$2,750 for violating C.F.R. 385.337(b) within 60 days of this Opinion and Order. Payment shall be made by check or money order payable to the “Treasurer, State of Ohio” and mailed or delivered to the Public Utilities Commission of Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 18-1415-TR-CVF and inspection number OH3274020192C should be written on the face of the check or money order. It is, further,

{¶ 29} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

COMMISSIONERS:

*Approving:*

Sam Randazzo, Chairman  
M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

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**Case No(s). 18-1415-TR-CVF**

Summary: Opinion & Order that the Commission finds that Staff demonstrated, by a preponderance of the evidence, that Respondent violated the Commission's transportation rules, and directs Respondent to pay the assessed \$2,750 forfeiture within 60 days of this Entry. electronically filed by Docketing Staff on behalf of Docketing