BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Drayer, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture.	: : : : :	Case No. 18-1436-TR-CVF (CR201806220312)

POST-HEARING BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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I. INTRODUCTION

Drayer, Inc. ("Respondent") violated provisions of the Federal Motor Carrier Safety Regulations by failing to require its drivers to prepare a record of duty status using an appropriate method, among other violations.

The record shows that the Staff of the Public Utilities Commission of Ohio ("Staff") offered the testimony of three (3) highly-qualified and credible expert safety inspectors, 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 violations and the resulting civil forfeitures. 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 thirteen thousand one hundred seventy-five dollars ($13,175.00) should be imposed against Respondent.

II. STATEMENT OF FACTS

In June 2018, Safety Investigator Christopher Douglass, accompanied by State and Federal Programs Manager Christopher May, conducted a compliance review of Respondent. Inspector Douglass personally visited the Respondent prior to his compliance review to deliver a pre-compliance review letter. Tr. at 43.

Before actually conducting his review, Inspector Douglass obtained a copy of the company's profile from the Motor Carrier Management Information System. Tr. at 31. That report indicated that there were potential safety management issues, "Alerts," with the Respondent company. Tr. at 33, 37. Inspector Douglass also had conversations with Program Manager May and was aware that the Commission had received complaints about the Company's operations. Tr. at 41.

Following the inspection, Inspector Douglass prepared a report describing the results of the inspection. Staff Ex. 6. The inspection was performed as part of Inspector Douglass's regular assigned duties and responsibilities. Inspector Douglass reviewed Respondent's driver qualification files, drug and alcohol testing program, drivers' hours of service and all on-duty time records, and vehicle maintenance records. Investigator Douglass found the violations noted above.

III. LAW AND ARGUMENT

A. Carriers, and drivers of commercial motor vehicles, 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. R.C. 4905.80. In furtherance of this obligation, the Commission has adopted rules governing the conduct of motor transportation companies that are engaged in commerce. The Commission has adopted standards for motor carrier safety pursuant to authority delegated by the Ohio General Assembly. R.C. 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. Stipulated violations.

During the course of the hearing, counsel for Drayer indicated that the Company was stipulating to a number of the violations found during the compliance review. Specifically, the Company stipulated that it had committed the violations enumerated as items 2, 3, 4, 5, and 6 in Part B of Staff Exhibit 6. A brief description of each of those violations follows.

1. Using a motor vehicle not periodically inspected.

Staff determined that half of the records that they checked showed that the Company had failed either to require or to maintain records showing that its vehicles were inspected at least annually. This constitutes a violation of 49 C.F.R. 396.17(a), which requires that:

> Every commercial motor vehicle must be inspected as required by this section. The inspection must include, at a minimum, the parts and accessories set forth in appendix G of this subchapter. The term commercial motor vehicle includes each vehicle in a combination vehicle. For example, for a tractor semitrailer, full trailer combination, the tractor, semitrailer, and the full trailer (including the converter dolly if so equipped) must each be inspected.

The inspection report found that "Drayer does not have an effective way of checking annual inspections to ensure that they are completed in accordance with the regulations. This breakdown in monitoring and tracking annual inspections directly contributed to the violations discovered during th[e] compliance review." Staff Ex. 6.

This violation is indicative of the indifference, at best, that the Company demonstrates both toward the safety of the travelling public and the regulatory process. Despite a manageable fleet of 18 tractors and 24 trailers, no apparent effort is made to ensure that annual inspections occur. This lack of "monitoring and tracking" is at the heart of the violations discovered during the compliance review.

Staff found four (4) violations of this regulation.

2. Using a driver who has not completed a return-to-duty test with a result indicating an alcohol concentration of less than 0.02 or a negative controlled substance test result.

Staff witness Douglass testified that one of the reasons this review was initiated was because of a drug and alcohol complaint. Tr. at 44, 107. The inspection report indicates that an anonymous complaint alleged "that the owner Chris Drayer was driving a CMV after testing positive" for cocaine. Staff Ex. 6, Part C at 5-6.

The Motor Carrier Safety Regulations prohibit a driver from performing safety-related functions if the driver tests positive for controlled substances. 49 C.F.R. 382.215. They also prohibit a company from permitting a driver to operate a commercial motor vehicle during any period that a driver is not in compliance with return-to-duty requirements. "The requirements for return-to-duty testing must be performed in accordance with 49 C.F.R. part 40, subpart O." 49 C.F.R. 382.309. That subpart, and specifically 49 C.F.R. 40.23, says that an employer who receives a verified positive drug test must immediately remove the employee involved from performing safety-sensitive functions. "Safety-sensitive functions" specifically include "[a]ll time spent at the driving controls of a commercial motor vehicle in operation." 49 C.F.R. 382.107. An employee who has tested positive may not return to safety-sensitive functions until the employee has a negative drug test result. 49 C.F.R. 40.305.

As a result of the complaint received, the investigators contact the Company's drug and alcohol consortium, Marietta Occupational Health Partners, to check for positive alcohol and/or controlled substance tests. Two positive tests were discovered. Staff Ex. 6, Part C at 6. There was no evidence that the one driver, Scott Armstrong,

returned to duty prior to receiving a negative test. There was, however, evidence that the other driver returned to duty before receiving a negative test, and those facts demonstrate that 49 C.F.R. 382.309 was violated.

Not insignificantly, that other driver was Mr. Chris Drayer, the owner of the Company. He tested positive for cocaine on May 11, 2018. Mr. Drayer performed safety-sensitive functions, operated a tractor and trailer, on May 22, 2018 weeks before receiving a negative controlled substance test result. *Id*. The flagrant indifference to safety and regulatory compliance is disturbing from the owner, and his credibility in testifying in this matter should be questioned.

3. Failing to make an inquiry into the driving record of each driver to the appropriate State agencies in which the driver held a commercial motor vehicle operator's license at least once every 12 months.

One of the investigators' recommendations was that the Company "[d]evelop a system to ensure each driver's driving record is reviewed annually as required." Staff Ex. 6, Part B, page 3. That requirement is set forth in 49 C.F.R. 391.25(a), which provides that

> each motor carrier shall, at least once every 12 months, make an inquiry to obtain the motor vehicle record of each driver it employs, covering at least the preceding 12 months, to the appropriate agency of every State in which the driver held a commercial motor vehicle operator's license or permit during the time period.

The investigators found that the Company had hired eight (8) CDL drivers in the previous 365 days. In reviewing the driver qualification records for a sample of five (5)

of those drivers, they found that no driving record inquiry had been made for two (2) of them. This inaction on Drayer's part constitutes violations of 49 C.F.R. 391.25(a).

4. Requiring or permitting a property-carrying commercial motor vehicle driver to drive after the end of the 14th hour after coming on duty.

The Motor Carrier Safety Regulations govern the working hours of anyone operating a commercial motor vehicle. The main purpose of the Hours of Service ("HOS") regulations is to prevent accidents caused by driver fatigue. This is accomplished by limiting the number of driving hours per day, and the number of driving and working hours per week. Basic to these regulations is the notion of permitting 11 hours of driving within a 14-hour period, and requiring 10 hours of rest. "The 14-hour driving window and the 10-hour off-duty requirement . . . combine to move most drivers toward a 24-hour cycle, which allows the body to operate in accord with its normal circadian rhythm and the driver to sleep on the same schedule each day." 70 Fed.Reg. 49980.

Specifically, 49 C.F.R. 395.3(a)(2) provides that

> A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.

The investigators found one (1) violation of this rule in their review of a sample of driver records of duty status ("RODS"). That violation is shown in Staff Ex. 13; specifically, the trip taken by driver Ernest Henthorn on May 7, 2018 (unnumbered page

61 of that exhibit). Off duty on May 5th and 6th, Mr. Henthorn came on duty at 6:00 a.m. on May 7th, satisfying the 10 consecutive hours off duty requirement. He did not have another 10 consecutive hours off duty until the following morning. Consequently, the rule prohibited him from driving after 8:00 p.m. on May 7th. But his record of duty status ("RODS") for that date clearly shows that he continued to drive until 8:30 p.m., violating the rule.

5. Requiring or permitting a property-carrying commercial motor vehicle driver to drive after more than 8 hours have passed since the end of the driver's last off duty of sleeper berth period of at least 30 minutes.

Another paragraph of that rule requires that drivers take a 30-minute break after eight (8) consecutive hours of driving. 49 C.F.R. 395.3(a)(3)(ii) provides:

> *Rest breaks*. Except for drivers who qualify for either of the short-haul exceptions in §395.1(e)(1) or (2), driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes.

The investigators discovered two (2) violations of this rule, both of which appear in Staff Ex. 13.

On April 4, 2018 (unnumbered page 35), driver Chris Jett came on duty at 9:15 a.m. after having been in his sleeper berth since 11:15 p.m. the previous evening. Mr. Jett remained on duty until 6:00 p.m., driving for three-quarters (3/4) of an hour after 8 consecutive hours had passed without an off-duty or sleeper-berth period of at least 30 minutes, violating the rule.

The other violation again involved Mr. Henthorn. On May 1, 2018 (unnumbered page 59), Mr. Henthorn came on duty at 9:45 a.m. He recorded an off-duty break from 11:15 a.m. until 12:45 p.m. He was then on duty until 11:00 p.m., or for more than 10 hours without an off-duty or sleeper-berth period of at least 30 minutes, violating the rule.

C. The Company failed to require drivers to prepare records of duty status using an appropriate method.

1. The electronic logging device (ELD) rule.

The Motor Carrier Safety Regulations have long required carriers and drivers to track and maintain records of a driver's hours of service, known as a record of duty status ("RODS"). The central issue in this case is whether the Respondent was required to have its drivers use an electronic logging device (ELD) to record their duty status, or whether it was authorized to have them manually prepare RODS using paper logs.

The rule, 49 C.F.R. 395.8(a)(1), requires that each driver must record their duty status for each 24-hour period. Moreover, the rule specifies that the recording must be done by one of three methods: an ELD, an automatic on-board recording device (AOBRD), or manually using paper logs. Prior to December 18, 2017, the carrier was free to determine which method to use. The Federal Motor Carrier Safety Administration (FMCSA) mandated that, as of December 18, 2017, most drivers who had used paper logs to record their duty status had to switch to using an ELD. The rule reads in pertinent part as follows:

395.8(a) – Driver's record of duty status

(1) Except for a private motor carrier of passengers (nonbusiness), as defined in §390.5 of this subchapter, a motor carrier subject to the requirements of this part must require each driver used by the motor carrier to record the driver's duty status for each 24-hour period using the method prescribed in paragraphs (a)(1)(i) through (iv) of this section, as applicable.

(i) Subject to paragraphs (a)(1)(ii) and (iii) of this section, a motor carrier operating commercial motor vehicles must install and require each of its drivers to use an **ELD** to record the driver's duty status in accordance with subpart B of this part no later than December 18, 2017.

(ii) A motor carrier that installs and requires a driver to use an **automatic on-board recording device** in accordance with §395.15 before December 18, 2017 may continue to use the compliant automatic on-board recording device no later than December 16, 2019.

(iii)(A) A motor carrier may require a driver to record the driver's duty status **manually** in accordance with this section, rather than require the use of an ELD, if the driver is operating a commercial motor vehicle:

(1) In a manner requiring completion of a record of duty status on not more than 8 days within any 30-day period;

(2) In a driveaway-towaway operation in which the vehicle being driven is part of the shipment being delivered;

(3) In a driveaway-towaway operation in which the vehicle being transported is a motor home or a recreation vehicle trailer; or

(4) That was manufactured before model year 2000, as reflected in the vehicle identification number as shown on the vehicle's registration.

(B) The record of duty status must be recorded in duplicate for each 24-hour period for which recording is required. The duty status shall be recorded on a specified grid, as shown in paragraph (g) of this section. The grid and the requirements of

> paragraph (d) of this section may be combined with any company form.

(Emphasis added.)

At the outset, the record clearly demonstrates that none of the trucks, and none of the RODS at issue in this case involve the use of either an ELD, Tr. at 72, or an automatic on-board recording device (AOBRD), Tr. at 73. Nor does the record demonstrate that the Respondent was entitled to use manual recording based on any of the first three exceptions listed in 49 C.F.R. 395.8(a)(1)(iii)(A). None of the RODS demonstrate that any truck was being operated in a driveaway-towaway situation.[1] By the plain terms of the regulation, then, the central issue in this case turns on whether the Company's drivers were operating commercial motor vehicles manufactured before model year 2000.

2. The year 2000 "exception."

Section 49 C.F.R. 395.8(a)(1)(iii)(A)(4) explicitly provides that a driver may manually prepare their RODS using paper logs if that driver was operating a commercial motor vehicle that was manufactured *before* model year 2000, as reflected in the vehicle identification number as shown on the vehicle's registration. The plain language of the rule predicates compliance on the model year in which the *vehicle* was manufactured. All of the violations found in this case were found in trucks that were manufactured *after* the year 2000. Tr. at 129.

[1] In general, "driveaway-towaway operation" means any operation where a motor vehicle, trailer or semitrailer, singly or in combination, constitutes the commodity being transported when one set or more wheels of any such vehicle are on the roadway during the course of transportation.The specific operations included in the FMCSA definition are set forth in 49 C.F.R. 390.5.

In September 2018 the FMCSA published ELD FAQs that were "intended to provide plain language information regarding the ELD rule."[2] The FMCSA created a website to provide answers to frequently asked questions about ELDs.[3] Of specific relevance to this case, the site states:

> When does the pre-2000 model year exception apply?
>
> When a vehicle is registered, the model year should follow the criteria established by the National Administration (NHTSA). Generally, the model year is determined by reviewing the VIN on the vehicle registration. If the model year is pre-2000 based on the VIN, an ELD is not required. However, there may be instances when the model year reflected on the vehicle registration is not the same as the engine model year, most commonly when a vehicle is rebuilt using a "glider kit" or when an engine is swapped from one vehicle to another. Vehicles with engines predating model year 2000 are also accepted and are not required to have an ELD, even if the VIN number reported on the registration indicates that the CMV is a later model year. While the driver is not required to possess documentation that confirms the vehicle engine model year, 49 C.F.R. Part 379 Appendix A requires motor carriers to maintain all documentation on motor and engine changes at the principal place of business.[4]

It must be noted that this FAQ *had not* been issued at the time that this compliance review was conducted. Indeed, it was not issued by the FMCSA for almost a full three (3) months after this review was concluded. Furthermore, the FMCSA website explicitly notes that the FAQs "do not modify or replace applicable Federal Motor Carrier Safety Administration (FMCSA) regulations."[5]

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2 https://www.fmcsa.dot.gov/hours-service/elds/faqs.

3 https://eld.fmcsa.dot.gov/FAQ

4 https://eld.fmcsa.dot.gov/FAQ/Topics?name=ELD_Exceptions_and_Exemptions.

5 https://www.fmcsa.dot.gov/hours-service/elds/faqs

There is no exception in the rule that permits non-compliance with the requirement to use an ELD based on the date on which the *engine* was manufactured. Staff wishes to be clear on this point. Staff respectfully submits that, if a carrier cannot provide engine year documentation and the VIN reflects the CMV's model year is 2000 or newer and the carrier is not using an ELD, then the carrier should be found to have violated 49 C.F.R. 395.8(a)(1).

Nor has the FMCSA issued any regulatory guidance on this issue. From time to time, the FMCSA issues what it terms "regulatory guidance" to assist with the interpretation and implementation of its rules. When it does so, it publishes a "Notice of regulatory guidance" in the Federal Register. When adopted, that guidance, which is presented in a "Q&A" format, is published both on the FMCSA website and in its various published manuals and guidebooks. The FMCSA has *not* issued any regulatory guidance with respect to its ELD regulation as it relates to a vehicle's manufacture model year.[6]

Nonetheless, in the interest of fairness to carriers, the Commission Staff did not find violations based on the vehicle model year, but rather on the more lenient (in this instance) engine manufacturing date. As Staff witness May testified, "the reason that we look at the engines as well was to give the carrier the benefit of the doubt. They may have had a pre-2000 engine installed in an older truck. You get that exemption as an either/or if the truck is pre-2000 or if the engine is a pre-2000." Tr. at 134.

[6] https://www.fmcsa.dot.gov/regulations/title49/section/395.8.

3. All of the documented violations involve engines that were manufactured or remanufactured after the year 2000.

a. "Manufactured" and "remanufactured" are not the same.

The record demonstrates that all of the ELD violations discovered during the compliance review were for trucks operated using engines that were manufactured, or remanufactured, after the year 2000. Tr. at 129. On its ELD FAQs site, the FMCSA does not distinguish between "manufacture: and "remanufacture." It merely states that "engines predating model year 2000 are also accepted and are not required to have an ELD." The issue, then, is how the Commission should interpret FMCSA's rule where the FMCSA itself has not formally done so.

The FMCSA regulations offer no guidance as to what constitutes a "remanufactured" engine. Staff witnesses corroborated Mr. Forbes's testimony that a remanufactured engine is, for all intents and purposes, "new." Tr. at 77, 123-124. One industry representative site describes it this way:

> A remanufactured engine is not a rebuilt engine. It's not "refurbished" and it's not used. It's remanufactured – that implies a complete re-engineering of the engine from the ground up. In fact, it's new in all the ways that count.
>
> In the world of remanufacturing, only certain components are reused, and then only after being completely inspected, ground down, sanded and refinished to the identical measurements and clearances it had when it rolled off the assembly line originally. These are the exterior and housing components – all the internals are replaced with new components.
>
> All remanufacturing takes place in a factory environment, using computer-guided tools. Don't confuse it with rebuilding, which can take place at your local mechanic shop on the workbench. Remanufacturing is an intensive

> process that results in an engine that's as close to "new" as you'll ever get.[7]

This is a critical distinction, and explains why the pre-2000 "exception" from the ELD rule exists. In most cases engine manufactured before 2000 do not have the required electronic capabilities to support operating an ELD. A post-1999 remanufactured engine however consists of the latest specs, capabilities and parts, and therefore meets the ELD connectivity requirements as found in Appendix A to Subpart B of Part 395—Functional Specifications for all ELDs.

While the Commission Staff endeavored to confirm its manufacture / remanufacture date findings using documentation required to be maintained by the Respondent, no such documentation was made available. Staff respectfully submits that, if a carrier cannot provide engine year documentation, and the VIN reflects the CMV's model year is 2000 or newer and the carrier is not using an ELD, then the carrier should be found to have violated 49 C.F.R. 395.8(a)(1).

Alternatively, where the only documentary evidence of record demonstrates that engines manufactured before 2000 were remanufactured after 2000, the remanufactured date should be the relevant date for purposes of the regulatory "exception." This is especially true in circumstances where the carrier is required to maintain and produce records of its equipment acquisitions and changes but failed to do so. To find otherwise would be to allow carriers to totally evade the objective of the regulation.

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[7] https://roadmasterengineworld.com/2018/12/benefits-of-a-remanufactured-engine/.

Staff conducted a reasonable investigation and its findings were corroborated. By contrast, the Respondent offered nothing but assumptions from unreliable witnesses, and no documentation whatsoever.

b. Records produced by Respondent.

While drivers must carry a vehicle registration that shows the model year in which the vehicle was manufactured, they are not required to have documentation that shows the vehicle engine model year. This is precisely the situation that Staff witness Forbes encountered during his roadside inspection of one of Respondent's vehicles on June 7, 2018. Staff Ex. 1. Inspector Forbes undertook an independent investigation to determine the date on which the engine was manufactured. Occurring as it did just prior to the compliance review, Staff witness Douglass was well aware of the need to review engine documentation as part of his review.

Mr. Douglass asked the Respondent for documents identifying the engines in the Company's trucks. It is the Company's duty to maintain such records. The provisions from the ELD FAQs quoted above specifically notes that "49 C.F.R. Part 379 Appendix A requires motor carriers to maintain all documentation on motor and engine changes." That Appendix clarifies that "[a]ll accounts, records, and memoranda necessary for making a complete analysis of the cost or value of property shall be retained," generally for three (3) years after disposition of the property. That includes all records as to the cost of all personal property and equipment, any additions or betterments made to the property

and equipment, any equipment number changes, and records of all motor and engine changes. 49 C.F.R. Part 379 Appendix A, D. Property and Equipment.

The only document produced in response to Mr. Douglass's request was a page from a medium sized spiral notebook, introduced as Staff Ex. 8. As Mr. Douglass testified, this was "the only document that they had with those records in it." Tr. at 78.

> Q [Mr. Margard]: Is this the only record that the company was able to produce with respect to the engines in its power units?
>
> A [Mr. Douglass]: Yes.
>
> Q: They had no other records?
>
> A: No. We asked for other records. If I may explain....
>
> Q: Please.
>
> A: Because we were aware that they had indicated there were glider trucks involved. And so when you purchase a glider truck from a glider manufacturer, they're supposed to supply you with evidence of what engine is in the truck if it had an engine.
>
> And so since they didn't have any paperwork, we were left to conclude that these were either gliders that were built and sold with no paperwork or the other alternative would be they were gliders without an engine that they purchased and then they put their own engines in.

Tr. at 81-82.

Respondent's witness Mr. Owens acknowledged that the Company had no such documentation:

> Q [Mr. Margard]: Were you responsible for maintaining the records of those purchases?
>
> A [Mr. Owens]: To a certain degree, yes.
>
> Q: Did the company retain records of those purchases?
>
> A: I believe they were all in Chris' office if he had had them. I'd never seen those.

Q": Were you asked for documentation --
A: Yes.
Q: -- on the engines?
A: Yes.
Q: Did you --
A: I did not have any. I requested from Dean that worked for Matheny's several times for stuff. I've never gotten anything.
Q: You gave the investigators everything you had?
A: Right.

Tr. at 160-161.

Staff Ex. 8 shows a series of numbers purporting to be engine serial numbers associated with various enumerated Company trucks. Not all trucks have associated engine serial numbers. None of the serial numbers are associated with either a date of manufacture, remanufacture, or even a date of purchase. Indeed, after further investigation, it was discovered that not all of the serial numbers were accurately transcribed. Tr. 84.

The Company did not maintain, as required by federal regulation, records on the engines that it had in service. If such records exist, and a Company witness declared that they did not, they were not provided to the Commission Staff. Even the "record" that was produced was not accurate and required further Staff investigation.

c. Staff investigation.

The information provided by the Company was transcribed into a chart developed by Staff. That chart was admitted as Staff Ex. 9, and shows the Company's truck identification number, the truck's model year, make and vehicle identification number

(VIN), and the associated engine serial number. Because the Company was unable to provide any documentation on the manufacture or acquisition of the engines, Staff undertook to learn what it could about those engines.

Following the earlier described roadside inspection, Staff witness Forbes visited a central Ohio area engine distributorship[8] to inquire about that engine's manufacture date. Since the distributorship was then able to look up the engine on an industry database, Mr. Forbes returned to the same distributorship with the list Staff created during the compliance review. The distributorship provided him with printouts, admitted into the record as Staff Ex. 2, showing the manufacture (and, in some cases, remanufacture) date for all of the serial numbers but one. Tr. at 16-17. It was at that time, when one of the provided numbers could not be identified in the database, that Staff discovered that it had been provided incorrect information by the Company.

Unsatisfied, Staff determined to corroborate that information:

> Q [Mr. Margard]: Do you know whether any other efforts were made to identify those units?
>
> A {Mr. Douglass]: Yes, there were other efforts made to identify those units and confirm and support what the printouts demonstrated.
>
> * * *
>
> (EXHIBIT [10] MARKED FOR IDENTIFICATION.)
>
> Q: Do you recognize this document, Mr. Douglas [*sic*]?
>
> A: I do.
>
> Q: What is this, please?
>
> A: This is an e-mail string that I was cc'd on, it was actually to me, involving myself and Chris May and Tom Forbes,

[8] W. W. Williams, in Hilliard, Ohio, is an authorized parts and service dealer for Detroit Diesel engines, according to Detroit Diesel's website, https://demanddetroit.com/find-a-dealer/.

> discussions back and forth about taking additional steps to confirm that the build date of these engines were accurate and that we could base a case on them because we were... if I may expand?
>
> Q: Please.
>
> A: When we presented this information to Mr. Owens, their response was that even though -- and I'm mainly referring to the remanufactured engines at this point, but their response was that that serial number was not indicative of the true year of that engine.
>
> And, you know, just to be fair, we felt like we would go the extra step and contact Detroit Diesel because all of these engines in question were Detroit Diesel Series 60s . . .

Tr. at 84-86.

Staff witness May then went directly to a Detroit Diesel remanufacturing facility to "ask them a few questions to make sure that what we were doing was true and was accurate." Tr. at 125. At their direction he called an engineer at Daimler, the parent company of Detroit Diesel.[9] *Id*. The engineer agreed to confirm the manufacture dates of the engines, based on the serial numbers provided. With the exception of the serial number incorrectly recorded by the Company, the manufacture date information from Daimler exactly matched the manufacture date information provided by the distributor, W. W. Williams.

Staff was ultimately able to confirm the correct serial number for the engine that the Company had failed to properly record. Staff witness May inspected the truck that the engine was in and visibly located the serial number. He determined that an "8" had been

[9] https://demanddetroit.com/our-company/history/.

incorrectly recorded as a "6." Now with the correct serial number, Staff witness Douglass again contacted the distributorship, which confirmed the manufacture date for that engine. Staff Ex. 11. Staff ultimately verified all of the serial numbers by visually inspecting the trucks and they came to or left from the Company's yard. Tr. at 131-132.

Respondent will claim that these exhibits should not have been admitted, and should not be relied on by the Commission, since they constitute hearsay. In proceedings before the Commission, of course, the hearing examiner is not bound by the strict Rules of Evidence. *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm*., 163 Ohio St. 252, 263 (1955); *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm*., 2 Ohio St.3d 62, 68 (1982); *Ohio Bell Tel. Co. v. Pub. Util. Comm*., 14 Ohio St.3d 49, 50 (1984).

The Ohio Supreme Court has repeatedly recognized that the Commission has broad discretion to regulate its proceedings and manage its docket. *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 19, 734 N.E.2d 775 (2000); *Duff v. Pub. Util. Comm'n*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978). As the Court has stated, "[i]t is well settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *Toledo Coalition for Safe Energy v. Pub. Util. Comm'n*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982). The opinions of Staff witnesses, qualified to testify based on their educational backgrounds and experience in the industry, who base their opinions on resources regularly relied on in the industry, are admissible where there is no contrary evidence supporting a claim that either the resources or reports from them

are unreliable. *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN (Opinion, Order and Certificate) (May 28, 2013) at 51.

Even if the Commission were to determine that the Rules of Evidence should strictly apply to these proceedings, the distributorship printouts and e-mail correspondence are and should be admissible under Evid. R. 703 as "facts or data . . . upon which an expert bases an opinion." There is surely no question as to the expertise of Staff's witnesses. Mr. Forbes (Tr. at 8), Mr. Douglass (Tr. at 29), and Mr. May (Tr. at 117) each testified extensively as to their qualifications. All three gentlemen relied upon facts discovered in the course of their investigation in offering their opinions as to whether the engines in issue required the use of an ELD.

Staff investigators used the information obtained from industry sources to create a table of trucks and their engines, separating those engines manufactured before 2000 from those either manufactured or remanufactured after 2000. Staff Ex. 12.

Staff also used this information for distinguishing between original manufacturing dates and *re*manufacturing dates. A manufacturing date is self-evidently the date on which the engine was originally manufactured. Remanufacturing is different, and different than merely rebuilding an engine:

> Q [Mr. Margard]: Now, it's possible for engines to be altered or modified after they've been manufactured, correct?
>
> A [Mr. Forbes]: Absolutely.

Q: Are you familiar with the terms rebuilt and remanufactured?

A: Yes.

Q: What is your understanding of what those terms mean?

A: Rebuilt is an engine that a mechanic has done repair work on because of damage to the engine, using the original components and replacing specific components on the engine that were damaged. That is a rebuilt engine.

A remanufactured engine is sent back to the manufacturer, in this case Detroit Diesel, and the block is reused but the rest of the engine is built to today's standards.

Tr. at 19-20. In slightly different words, this description was confirmed by Company witness DeForrest. Tr. at 165.

There is no issue in this case regarding rebuilt engines.[10] All of the engines for which Staff found violations were either manufactured after January 1, 2000, or were remanufactured after that date. Company witness DeForrest, Drayer's mechanic, testified that he had no knowledge that the Company sent any of its engines out to be remanufactured. Tr. at 172. He also indicated that the Company rebuilds its engines itself, Tr. at 171., although it was unable to produce any documentation of any such "engine changes" at the time of the review, documentation that the Company is required to maintain pursuant to 49 C.F.R. Part 379 Appendix A.

Remanufactured Detroit Diesel engines are designated by a slight modification of the serial number. Regardless of why the manufacturer makes this change, whether for

[10] It should be noted that the FMCSA ELD FAQs do not address rebuilt engines. The only reference to rebuilding in the FAQs is to vehicles being "rebuilt using a 'glider kit.'" https://www.fmcsa.dot.gov/hours-service/elds/electronic-logging-device-exemptions, Q&A 4.

warranty purposes or otherwise, a serial number that contains an "RE" rather than an "R0" indicates that the engine was remanufactured. Tr. at 131. The Company purchased all of its "RE" engines – and there are three (3) of these engines for which violations were found – from Matheny Motors. Tr. at 155.

Based on the information obtained by Staff from Detroit Diesel, it is apparent that two (2) of the five (5) engines identified as "ELD Required" were *manufactured* after January 1, 2000. The engine in truck 2018 bears serial number 06R0655409, the "R0" indicating that the engine has not been remanufactured. The data collected by Staff demonstrates that this engine was built on July 18, 2001. Similarly, the engine in truck 2001 bears serial number 06R0594133. The data collected by Staff demonstrates that this engine was built on May 1, 2000. There is no evidence in the record contradicting these findings.

Moreover, the evidence and testimony corroborate this conclusion. Although not specifically relied on by Staff, Staff witness May testified that all Detroit Diesel series 60 engine serial numbers are sequential in order of manufacture. This was confirmed by Company witness DeForrest. Tr. at 169. If the engines in Staff Ex. 12 were to be realigned by sequential serial numbers, the following pattern appears:

Truck	Serial # Prefix	Sequence	Pre-2000 Build Date	Post-1999 Build Date	Exempt?
2013	06R0	49506	6/13/1991		ELD Exempt
2009	06R0	123342	4/21/1993		ELD Exempt
2014	06RE	143290		3/10/2015	ELD Required
2016	06RE	148115		11/3/2015	ELD Required
2017	06RE	150495		9/7/2016	ELD Required
2019	06R0	155335	12/3/1993		ELD Exempt
2012	06R0	258462	8/29/1995		ELD Exempt
2020	06R0	485989	2/17/1999		ELD Exempt
2021	06R0	529353	8/6/1999		ELD Exempt
2001	06R0	594133		5/1/2000	ELD Required
2018	06R0	655409		7/18/2001	ELD Required

If the engine in truck 2021 was manufactured in August 1999, it is reasonable to infer that the serial number sequence gap between trucks 2021 and 2001 clearly demonstrates that the engine in truck 2001 was manufactured after January 1, 2000. It is even more reasonable to make such an inference with respect to the engine in truck 2018.

Staff respectfully submits that the evidence of record demonstrates the validity of the violations found on truck 2018. Staff Ex. 13, unnumbered pages 1-15, Tr. at 95-97. As part of the sample of 150 trips, this represents 30 separate violations. Staff found no violations relating to truck 2001.

It is apparent that the other three (3) trucks for which Staff found violations were, because of the serial number sequencing, manufactured prior to 2000, but remanufactured after January 1, 2000. As part of the sample of 150 trips, this represents 90 additional separate violations.

- Unnumbered pages 16 to 32 of Staff Ex. 13 contain the RODS for driver Scott Armstrong, who operated truck 2014 during the month of April 2018. The engine in truck 2014 was remanufactured on March 10, 2015. Tr. at 97-98.

- Unnumbered pages 33 to 48 of Staff Ex. 13 contain the RODS for driver Chris Jett, who operated truck 2017 during the month of April 2018. The engine in truck 2017 was remanufactured on September 7, 2016. Tr. at 98.
- Unnumbered pages 49 to 58 of Staff Ex. 13 contain the RODS for driver Mike Snider, who operated truck 2016 during the months of December 2017 and January 2018. The engine in truck 2016 was remanufactured on November 3, 2015. Tr. at 99.

Staff respectfully submits that it is not relevant the number of RODS days may not precisely equal 120. This is a reasonable determination based on the sampling done, and would certainly have been much higher had Staff examined all of the Company's RODS records. As Staff witness Douglass described:

> Q [Mr. Margard]: . . . So you determined that there were 120 violations of the ELD regulation. How did you arrive at that number?
>
> A [Mr. Douglass]: So we just took the four drivers, the first four drivers that we just discussed, and multiplied their 30-day sample times for a total of 120 logs that were not in the appropriate method.
>
> Q. So you didn't count each and every individual day, you just took a general conclusion about four out of five drivers, 30 days of Record of Duty Status, is that how you arrived at that number?
>
> A. Yes.
>
> Q. If you had sampled additional months for these drivers, would you expect to find additional violations?
>
> A. Yes, sir.
>
> Q. If you had reviewed additional drivers for the ELD required units that appear on Staff Exhibit 12, would you have expected to find additional violations?
>
> A. Yes, sir.
>
> Q. In fact, perhaps quite a few additional violations?
>
> A. That's correct.

Tr. 101-102.

d. Respondent testimony.

The Respondent offered three witnesses to rebut Staff's findings.

Mr. Owens acknowledged that Drayer purchased the remanufactured engines from Matheny Motors. Tr. at 154-155. Mr. Owens is not a mechanic. Tr. at 160. He testified that Matheny Motors "told" him that the blocks in those engines were older than 2000. Tr. at 155. But he had never seen any records of those purchases, and could not say that any existed. Tr. at 161. The seller would provide him with no information. *Id*. Nor, apparently, would the manufacturer, Tr. at 159, although this information was easily obtained by the Staff.

Mr. DeForrest was Drayer's mechanic. Tr. at 163. He had previously worked for a year for Detroit Diesel, albeit more than 30 years ago and before Detroit Diesel started manufacturing the Series 60 engines that Drayer uses. Tr. at 164. He acknowledged that remanufacturing can use the same block. Tr. at 165. If, as Mr. Owens suggested, Matheny Motors stated that the blocks on the remanufactured engines were "older than 2000," that fact would not necessarily be relevant if the remainder was remanufactured after 2000.

The problem with Mr. DeForrest's testimony is that he was unable to say how the engines purchased were remanufactured – what may or may not have been done to them. It depends on the client; it depends on the engine. Tr. at 165. He didn't know when the engines at issue were purchased, or whether they have been remanufactured by Detroit Diesel. Tr. at 171. While he said that a remanufactured engine was not the same as a new

engine, he based his opinion solely on the number of miles that "you're going to get out of it." Tr. at 166.

Mr. Drayer is the owner of the Respondent.[11] Tr. at 172. He did not know when the engines at issue were purchased, but recalls requesting that "they were under the year 2000." Tr. at 173. He did so specifically to avoid complying using ELDs. *Id*. Although he claimed to have records of the purchased, he did not produce any of them because he "[d]idn't feel it was relevant." Tr. at 176. To the best of his knowledge, all of the *engine blocks* on the trucks at issue were pre-2000, although, like Mr. Owens, he was unable to get any information from either Matheny Motors or Detroit Diesel. Tr. at 175.

Respondent's agents bought glider kits, requesting that the engine blocks be manufactured before 2000. They acknowledged that the engines were remanufactured, although were unable to say in what manner to or to what extent. Although the owner claimed that he had paperwork, none was ever provided to the investigators. None of the Respondent's witnesses were able to get any cooperation either from the seller of the engines or the manufacturer, although the Staff had no difficulty doing so. It is clear that the Respondent endeavored to evade regulatory compliance. Staff respectfully submits that their testimony should be discounted, and that the Commission should find that the remanufactured engines should have been equipped with ELDs.

[11] Mr. Drayer is also the driver who operated a truck after having tested positive for cocaine without having first received a negative return-to-duty controlled substance test. Staff Ex. 6, Part C, pages 5-6. Staff submits that this should be considered in assessing the credibility of this witness.

D. Forfeiture Assessment

1. 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. R.C. 4923.99. The Legislature granted the Commission the authority to assess forfeitures for violations of the motor carrier safety provisions. *Id*. Pursuant to this enforcement authority, the Commission has adopted civil forfeiture and procedural rules. Ohio Admin.Code 4901:2-7-01-4901:2-7-22.

Staff witness Rod Moser described the procedure for determining forfeiture assessments for violations of the Motor Carrier Safety Regulations. Tr. 144-146. In Mr. Moser's opinion, based on his experience as a Compliance Officer in the Commission Transportation Department, the amounts assessed for the discovered violations were, with one exception, properly and fairly assessed against the Respondent. Tr. at 148-149. That one exception was the assessment for the violations of 49 C.F.R. 395.3(a)(3)(ii). Originally assessed at $500, Mr. Moser testified that the amount should have been $0, and recommended that the original amount be deleted. In his opinion, then, uncontroverted in the record, the proper assessments for the violations discovered by Inspector Douglass are as follows:

- 49 C.F.R. 395.3(a)(2) 0.00
- 49 C.F.R. 391.25(a) 0.00
- 49 C.F.R. 396.17(a) $475.00
- 49 C.F.R. 395.3(a)(3)(ii) 0.00
- 49 C.F.R. 382.309 .....$400.00
- 49 C.F.R. 395.8(a)(1) $12,300.00

TOTAL AMOUNT DUE: $13,175.00

The respondent offered no contradictory evidence. The only question asked on cross-examination was a clarification of the calculation of the proposed forfeiture for the violations of 49 C.F.R. 395.8(a)(1). Staff respectfully submits that the forfeiture amounts and the method for determining them should be found to be reasonable.

2. Procedural History of the Case

This case does pose a slight procedural wrinkle. Ordinarily, the Staff sends both a Notice of Apparent Violation and Intent to Assess Forfeiture, and a Notice of Preliminary Determination prior to a hearing being requested. The record reflects that Respondent was sent a Notice of Apparent Violation and Intent to Assess Forfeiture on July 4, 2018, as described in Ohio Admin.Code 4901:2-7-07. The Notice cited the following violations:

- 49 C.F.R. 395.3(a)(2) – Requiring or permitting a property-carrying commercial motor vehicle driver to driver after the end of the 14th hour after coming on duty.
- 49 C.F.R. 391.25(a) – Failing to make an inquiry into the driving record of each driver to the appropriate State agencies in which the driver held a commercial motor vehicle operator's license at least once every 12 months.
- 49 C.F.R. 396.17(a) – Using a commercial vehicle not periodically inspected.
- 49 C.F.R. 395.3(a)(3)(ii) – Requiring or permitting a property-carrying commercial motor vehicle driver to drive after more than 8 hours have passed since the end of the driver's last off duty or sleeper berth period of at least 30 minutes.

- 49 C.F.R. 382.309 – Using a driver who has not completed a return-to-duty test with a result indicating an alcohol concentration of less than 0-02 or a negative controlled substance test result.
- 49 C.F.R. 395.8(a)(1) - Failing to require a driver to prepare a record of duty status using appropriate method.

The Commission's rules provide that, following service of a Notice of Apparent Violation and Intent to Assess Forfeiture, "the staff *may* serve a 'notice of preliminary determination' upon the respondent." Ohio Admin.Code 4901:2-7-12 (emphasis added). No such notice was sent in this case, for multiple reasons. As Staff witness Moser explained:

> Q [Mr. Margard]: Was a Notice of Preliminary Determination issued in this case?
>
> A [Mr. Moser]: Well, yes and no. So this case originated back in 2018 prior to the implementation of Salesforce, our new operating system. When all the cases were migrated from OMCIS into our new system in this case, for whatever reason it was not migrated.
>
> When I discovered that and I discovered and realized that Mr. Yemc had requested a hearing, that he had declined a settlement, I attempted to revert the post conference summary back to the original amount rather than the agreed upon settlement amount.
>
> When I did that, I created an NPD document in order to create a new invoice at the correct amount. I attempted to catch that document so that it did not go out because it was well past the time that it should have. It may be that it slipped through, but the intention was not for them to get that.
>
> In this particular case, we had a Settlement Agreement. The Settlement Agreement was sent, and the pretty much immediate response within roughly two weeks was a response of a Request for Hearing. There was no opportunity between settlement and Request for Hearing to send an NPD.
>
> Q. So the Request for Hearing was made before an NPD could be issued?

A. Yes.

Tr. at 150-151.

The purpose of the Notice of Preliminary Determination, in addition to providing the same descriptions provided by the Notice of Apparent Violation and Intent to Assess Forfeiture, is to inform the Respondent of its right to request an administrative hearing, and the possible consequences of a failure to do so. The Respondent, through counsel, did request a hearing by a filing with the Commission's Docketing Division on September 20, 2018. The hearing was conducted on November 14, 2019. The Respondent was not prejudiced by not receiving a Notice of Preliminary Determination.

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 Sections 382.309, 391.25(a), 395.3(a)(2), 395.3(a)(3)(ii), 395.8(a)(1), and 396.17(a) of the Federal Motor Carrier Safety Regulations and that the Commission hold Respondent liable for the civil forfeiture of thirteen thousand one hundred seventy-five dollars ($13,175.00) as recommended by the Staff.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **Post Hearing Brief submitted on Behalf of the Staff of the Public Utilities Commission of Ohio** was served by electronic mail upon the following party of record, this 3rd day of January, 2020.

Respectfully Submitted,

/s/ Werner L. Margard III
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Summary: Brief Post-Hearing Brief electronically filed by Mrs. Kimberly M Naeder on behalf of PUCO