

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Brian Jobe,	:	
Apparent Violation and Intent to	:	Case No. 22-0014-TR-CVF
Assess Forfeiture.	:	(OH329302431D)
	:	

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

The Respondent, Brian Jobe, was operating a commercial motor vehicle owned by Sportsman’s Market, Inc. (Sporty’s) on October 10, 2021. He was stopped by Investigator Kevin Swartz, who inspected the vehicle and driver. As a result of the inspection, Mr. Jobe was issued a Driver/Vehicle Examination Report placing him out of service for a violation of 49 C.F.R. 391.41(a)(1), operating a passenger-carrying vehicle without possessing a valid medical certificate. Staff Ex. 1.

The facts in this case are largely not in dispute. Sporty’s has historically purchased a number of tickets to various sporting events in the greater Cincinnati, Ohio area. Tr. at 49. Although not firmly established, these are presumably business expenses, incurred and paid by the business. Sporty’s purchased a 15-person van, also as a business expense. Tr. at 53. It registered that vehicle with the Department of Transportation (D.O.T.) as a commercial motor vehicle. Tr. at 55. The vehicle clearly displays the business name and D.O.T. number. Tr. at 7-8. Even though Sporty’s owns other vans and cars, the vehicle at issue in this case is the only company-owned vehicle registered with the D.O.T. Tr. at 46.

This van was registered because of its gross vehicle weight and its interstate operation. 49 C.F.R. 392.9b(a).

The vehicle is used exclusively to transport individuals to the various sporting events to which Sporty's has purchased tickets. It is used for no other purpose. Tr. at 45, 50. It is not used to purchasing supplies, making deliveries, attending meetings or conferences, or transporting customers or vendors. Tr. at 69. It is used exclusively to shuttle individuals to and from sporting events.

According to the Company's witnesses, the only persons ever transported in the vehicle are either Sporty's employees or their guests. Tr. at 68. Tickets to sporting events, and transportation to and from those events on the vehicle, are offered to employees as "employee group activities." Tr. at 48. CEO Michael Wolfe characterized these as "group events" (Tr. at 59) and "company events" (Tr. at 66).

The group nature of these events is not limited to those employees and guests transported in the subject van. Mr. Wolfe testified that employees who may otherwise be attending the event (and, presumably, their guests, only) are encouraged to partake of tailgating activities at the van once parked. Tr. at 71.

Tickets are offered only to employees, who are permitted to invite spouses, family members and friends. Tr. at 39. Mr. Wolfe explained the process for giving away tickets:

[W]e have sign-up sheets in our locker area where people can sign up for the tickets and how many they want. And then we look at how often the people go and who they are. So it's kind of a seniority, try to make it fair to the employees so everybody gets a chance to go.

Tr. at 49-50.

Although the van in issue is almost always used to transport guests to the games, there rare occasions when employees must furnish their own transportation. Tr. at 51. When the van is used, passengers pay nothing, either for the tickets or for the transportation services. Tr. at 68.

On October 10, 2021, that commercial motor vehicle was operated by the Respondent, Brian Jobe, to transport passengers from the Sporty's business location to a Cincinnati Bengals football game. The route included a stop at the home of Sporty's CEO Michael Wolf to pick up additional passengers. Tr. at 40. Mr. Jobe then proceeded to drive the vehicle to the stadium, passing through Kentucky. Tr. at 42. Before reaching their parking location, the vehicle was stopped by PUCO Hazardous Materials Investigator Kevin Swartz. Tr. at 43.

Investigator Swartz was a part of a team of inspectors operating near the stadium that day specifically looking for commercial passenger vehicles. He testified that his team's assignment was to conduct "destination inspections," stopping commercial passenger buses at their destination rather than stopping them on the roadways where it may not be safe to conduct an inspection. The PUCO had been asked to conduct such inspections for safety enforcement at the request of the City of Cincinnati Police. Tr. at 14. Inspectors identify commercial passenger vehicles by the markings on them, and Investigator Swartz testified that he stopped the Sporty's vehicle because he clearly saw the company markings and D.O.T. number on the van. Tr. at 7-8.

He inspected the vehicle and Mr. Jobe's credentials. Mr. Jobe had neither a commercial drivers license nor a medical certificate. Investigator Swartz proceeded to

cite Mr. Jobe for operating a passenger-carrying vehicle without possessing a valid medical certificate, a violation of 49 CFR 391.41(a)(1). Tr. at 8. That section provides that:

A person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so, and, except as provided in paragraph (a)(2) of this section, when on-duty has on his or her person the original, or a copy, of a current medical examiner's certificate that he or she is physically qualified to drive a commercial motor vehicle.

49 CFR 391.41(a)(1)(i).

There is an exception to this requirement. Specifically,

The following rules in this part do not apply to a private motor carrier of passengers (nonbusiness) and its drivers:

(c) So much of §§ 391.41 and 391.45 as require a driver to be medically examined and to have a medical examiner's certificate on his/her person.

49 C.F.R. 391.68(c).

It is not disputed that the transportation of the passengers to the Bengals game in this case constituted private carriage of passengers. The regulations distinguish between private motor carrier of passengers as being either “business” or “nonbusiness.” A “private motor carrier of passengers (*business*)” requires that a driver have a medical certificate. A “private motor carriers of passengers (*nonbusiness*)” does not. The regulations define the categories in this manner:

Private motor carrier of passengers (nonbusiness) means private motor carrier involved in the interstate transportation of passengers that does not otherwise meet the definition of a private motor carrier of passengers (*business*).

Private motor carrier of passengers (business) means a private motor carrier engaged in the interstate transportation of passengers which is provided in the furtherance of a commercial enterprise and is not available to the public at large.

49 C.F.R. 390.5 (emphasis in original).

The issue in this case is whether the carriage is properly characterized as business or nonbusiness. The ultimate question that must be decided in this case is into which of these categories did this trip fall.

Three criteria must be met for a trip to be private motor carrier of passengers (business). The trip must be (1) engaged in the interstate transportation of passengers, (2) provided in furtherance of a commercial enterprise, and (3) not available to the public at large. The trip at issue in this case satisfies all three criteria, and Mr. Jobe was required to have a medical examiner's certificate on his / person.

I. THE PRIVATE MOTOR CARRIER WAS ENGAGED IN THE INTERSTATE TRANSPORTATION OF PASSENGERS.

There is no question that the trip was an interstate transportation of passengers.

The van travelled from Ohio into Kentucky and back into Ohio. As Mr. Jobe testified:

- Q. (Ms. Sanyal): And what route were you taking?
- A. (Mr. Jobe): From Michael's, we took 275 to 471 north, and then down Mehring Way.
- Q. And does this route take you into Kentucky?
- A. Yes.
- Q. Why do you take this route instead of taking a route within Ohio?
- A. Because it's all highway travel, no stops.

Tr. at 42. Mr. Wolfe confirmed that the trip was interstate in nature:

- Q. (Ms. Sanyal): What route were you taking to go to lot ERV?
- A. (Mr. Wolfe): We take, as Brian said, we take I-275 to 471 into town and cross Mehring Way and head to the parking area because it's the most efficient shortest way. We're too smart to go another way.
- Q. And that route does take you through Kentucky?
- A. Yes, it does.
- Q. But you still take it -- why do you take this route that goes through another state?
- A. Just the shortest route to Cincinnati.

Tr. at 58.

II. TRANSPORTATION WAS PROVIDED IN THE FURTHERANCE OF A COMMERCIAL ENTERPRISE.

That phrase, “furtherance of a commercial enterprise,” is not defined in the regulations. In recent guidance, the FMCSA distinguished these categories by example in this manner:

Question:

What is a private motor carrier of passengers (business) and what is a private motor carrier of passengers (non-business)?

Answer:

Private motor carrier of *passengers* (business) means a private motor carrier engaged in the interstate transportation of *passengers* which is provided in the furtherance of a commercial enterprise and is not available to the public at large.

For example, this would include a company transporting its own employees between job sites, but not selling seats to anyone else.

Private motor carrier of *passengers* (nonbusiness) means private motor carrier involved in the interstate transportation of *passengers* that does not otherwise meet the definition of a private motor carrier of *passengers* (business). (49 CFR 390.5)

For example, this would include a place of worship transporting people to services or other events, not for a profit.¹

The guidance makes two important distinctions between these categories.

“Business” involves employees, and “nonbusiness” involves enterprises that are “not for a profit.” Sporty’s employees were clearly transported, and the company is clearly a for profit enterprise. Sporty’s has some 200 employees, and CEO Michael Wolf testified that “Sporty’s is an aviation business. It started 60 plus years ago selling education materials for pilots,” and sells “everything you need for an airplane.” Tr. at 47-48.

The fact in dispute, then, is whether this transportation of passengers was “in furtherance” of Sporty’s business enterprise. Staff respectfully submits that it was.

While Sporty’s does not use the tickets that it gives away to develop business or clientele, Tr. at 52, it does offer them as perquisites to employees. In part, tickets are offered in recognition of company loyalty and length of service. Tr. at 50. Inasmuch as all employees are eligible to receive tickets, free tickets and free transportation clearly reward their work as employees of the business, and are intended to recognize and incentivize performance.

Staff submits that this is certainly in furtherance of the business enterprise. Sporty’s is engaged, considering the broader aspect of the purposes of its business, in a commercial enterprise. The goal of its endeavor is profit. Its use of sporting tickets, and

¹ <https://www.fmcsa.dot.gov/faq/what-private-motor-carrier-passengers-business-and-what-private-motor-carrier-passengers-non>

use of the van for free transportation to sporting events, is “in furtherance” of its corporate objectives.

Staff witness Rod Moser echoed Staff’s understanding of furthering a commercial enterprise:

Well, in this case, I believe that it's furthering a commercial enterprise through -- even if it's team building, you know. This is a corporate sponsored event that is only available to their employees. . . . This is just us doing good will, but it's only their employees. So I believe it's a team building and that's the furtherance of the commercial enterprise.

Tr. at 31.

This is in marked contrast to a “place of worship transporting people to services or other events.” Such charitable organizations do not depend on the labor of those they happen to transport for the profitability of their business enterprise.

Investigator Swartz acknowledged that an entity does not have to be a charitable organization to be a private motor carrier of passengers non-business. But he further testified that, in his experience, private motor carriers or passengers, non-business, are primarily churches, and occasionally Scout groups.

Q. (Ms. Sanyal): Now, Mr. Swartz, you've also kind of explained that you received a lot of training in this area about passenger vehicles specifically. Now, in your training and experience, does an entity have to be a charitable organization to be a private motor carrier of passengers non-business?

A. (Mr. Swartz): No, but it leans that way pretty heavy.

Q. And I think you also covered this with Mr. Margard, and you're aware there's a medical certificate exemption for private motor carrier of passengers non-business, right?

A. Correct.

- Q. And in your experience and training that you receive, what types of entities fall under this exemption?
- A. Usually churches, occasional scout groups, is the two main ones that I run into.

Tr. at 19.

Staff witness Moser echoed Staff's understanding that the exception for nonbusiness is intended to apply only to non-commercial activities:

- Q. (Mr. Margard): And you heard me ask him about the exception with respect to passenger vehicles, correct? Are you familiar with that exception?
- A. (Mr. Moser): I know of it, yes.
- Q. What is your understanding of that exception?
- A. That if you are operating a motor coach, that it's private, non-business, that you don't have to have a medical card.
- Q. And what is your understanding of non-business in that context?
- A. Largely the same as Mr. Swartz. My reading of the federal regs and interpretations that were available and other opinions online, largely said that it would have to be a charitable organization or they also reference a scientific organization. I'm not real sure what that would be. But if the motor coach is owned and operated by the business for a commercial purpose, then it would be a business, not a non-business.

Tr. at 30. Mr. Moser further testified that he could find no instance where the medical card exception had been applied to a business enterprise other than providing a charitable service. That was most certainly not the case here. Tr. at 32.

III. PASSAGE IN THE VAN WAS NOT AVAILABLE TO THE PUBLIC AT LARGE.

Finally, it is clear that the services offered were *not* available to the public at large. The trip was available only to employees of Sporty's, their family members and guests.

- Q. (Ms. Sanyal): Does Sporty's offer the bus transportation to any member of the public?
- A. (Mr. Jobe): No, we do not.

Tr. at 38.

- Q. (Ms. Sanyal): Can a member of the public pay to use the bus?
- A. (Mr. Wolfe): No.

Tr. at 54.

IV. CONCLUSION

Mr. Jobe was clearly an employee operating a commercial motor vehicle in interstate commerce that belonged to a for profit business providing a benefit to its employees and their guests in furtherance of its business enterprise. Respondent and his employer have failed to demonstrate that the service provided was comparable to the charitable organization exception to the medical certificate requirement. Staff respectfully requests that the Commission find, as a matter of fact, that the passenger carriage in this case was in furtherance of the business, and that the Respondent has failed to demonstrate that it was entitled to the medical certificate exception.

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 49 CFR 391.41(a)(1), and is liable for the assessed forfeiture.

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 November, 2023.

Respectfully Submitted,

/s/ Werner L. Margard III

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Summary: Brief Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio electronically filed by Mrs. Kimberly M. Naeder on behalf of PUCO.