

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF BRIAN JOBE, NOTICE
OF APPARENT VIOLATION AND INTENT
TO ASSESS FORFEITURE.

CASE NO. 22-14-TR-CVF
(OH3209302431D)

OPINION AND ORDER

Entered in the Journal on December 13, 2023

I. SUMMARY

{¶ 1} The Commission finds that Staff has not demonstrated, by a preponderance of the evidence, that Brian Jobe violated 49 C.F.R. 391.41(a)(1) (operating a passenger-carrying commercial motor vehicle without a medical examiner's certificate).

II. PROCEDURAL HISTORY

{¶ 2} On October 10, 2021, Hazardous Materials Investigator Kevin Swartz (Investigator Swartz) of the Commission stopped and inspected a commercial motor vehicle (CMV) operated by Sportsman's Market (Sporty's or Company) and driven by Brian Jobe (Mr. Jobe or Respondent). At the time of the inspection, Investigator Swartz prepared a report indicating a violation of the Federal Motor Carrier Safety Regulations (FMCSR), as published in the Code of Federal Regulations (C.F.R.), specifically, 49 C.F.R. 391.41(a)(1) (operating a passenger-carrying CMV without a medical examiner's certificate).

{¶ 3} On December 9, 2021, Staff served a notice of preliminary determination (NPD) upon Respondent in accordance with Ohio Adm.Code 4901:2-7-12, alleging violations of the Commission's transportation regulations.

{¶ 4} On January 5, 2022, Respondent requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} Respondent participated in a settlement conference with Staff on February 24, 2022, but the parties did not resolve the matter.

{¶ 6} Subsequent scheduling of a hearing was postponed several times because of scheduling conflicts, as well as continuation of settlement negotiations. The hearing was ultimately scheduled for September 26, 2023.

{¶ 7} At the hearing on September 26, 2023, Investigator Swartz testified in support of the violation identified by Staff. Rod Moser (Mr. Moser), Chief of Compliance and Registration within the Commission's Transportation Department, testified on behalf of Staff regarding calculation of the civil forfeiture. Mr. Jobe testified on his own behalf. Mr. Michael Wolf (Mr. Wolf), Chief Executive Officer of Sporty's, testified on behalf of Sporty's. Mr. Jobe and Sporty's were represented by counsel Anna Sanyal.

III. LAW

{¶ 8} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the FMCSR, specifically, 49 C.F.R. Sections 40, 367, 380, 382, 383, 385, 386, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Through the same rule, the Commission also adopted those portions of the regulations contained in 49 C.F.R. 107, Subparts f and g, and 49 C.F.R. 171 to 180, as are applicable to transportation of hazardous materials by motor vehicle. 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 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.

{¶ 9} Specifically applicable to this case, 49 C.F.R. 390.5 defines a CMV as a “self-propelled * * * motor vehicle used on a highway * * * to transport passengers or property when the vehicle * * * (1) has a gross vehicle weight rating [GVWR] * * * of 4,536 kg (10,001 pounds) or more * * *; or (2) is designed or used to transport more than 8 passengers, (including the driver), for compensation; or * * * (3) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation * * *.” A medical examiner’s certificate required by 49 C.F.R. 391.41(a)(1) for CMV operation is not, pursuant to 49 C.F.R. 390.3(f)(6), applicable to the driver of a CMV that is “designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation, provided the vehicle does not otherwise meet the definition of a CMV * * *.”

IV. ISSUES IN THE CASE

{¶ 10} Staff has the burden to prove, by a preponderance of the evidence, that Mr. Jobe violated 49 C.F.R. 391.41(a)(1) (operating a passenger-carrying CMV without a medical examiner’s certificate).

V. SUMMARY OF THE EVIDENCE

{¶ 11} Investigator Swartz testified that on October 10, 2021, he was conducting commercial passenger bus inspections at a Cincinnati Bengals game and followed the vehicle driven by Mr. Jobe into a parking lot for recreational vehicles and buses. He added that the vehicle was marked with USDOT No. 02989162 and that there were approximately 12 passengers in the vehicle. (Tr. at 6-9, 15-16; Staff Ex. 1.)

{¶ 12} Regarding the 49 CFR 391.41(a)(1) violation, Investigator Swartz stated that a medical examiner’s certificate is required if passengers are being transported for business purposes; conversely, no medical examiner’s certificate is needed if the driver is not associated with a business. According to Investigator Swartz, the majority of non-commercial entities that use small buses to transport passengers are church groups or

scouting organizations. (Tr. at 10-11, 19-20.) Investigator Swartz stated that Mr. Jobe did not indicate that he was driving a bus for a non-commercial entity (Tr. at 10-11). Investigator Swartz added that he typically relies on vehicle markings and vehicle registration to determine if the vehicle is owned by a business (Tr. at 16). Further, Investigator Swartz stated, during inspections he will ask if passengers have paid for the transportation; if there is payment made by just one passenger, he concludes that the transportation is for a business (Tr. at 21). After discussion with Mr. Jobe and Mr. Wolf, Investigator Swartz determined that the bus passengers were company employees, and that the transportation was for business purposes (Tr. at 22).

{¶ 13} Investigator Swartz explained that, during that inspection, he was told that the Sporty's bus had recently been purchased. According to Investigator Swartz, no vehicle registration was available for examination during the inspection. (Tr. at 10-11, 13.) However, using the license plate on the vehicle, he found records of a prior Sporty's bus inspection and relied on that registration information to complete his report. Consequently, Investigator Swartz stated, the GVWR indicated on the October 10, 2021 inspection report is not from the bus that he inspected on that day (Tr. at 11-13; Staff Ex. 1).

{¶ 14} Staff witness Mr. Moser testified that the assessed forfeiture is consistent with the fine adopted by the Commercial Vehicle Safety Alliance and is applied equally to all carriers (Tr. at 25-26). He added that Mr. Jobe had received a Notice of Intent to Assess Forfeiture and an NPD, which constitute all notices that Mr. Jobe was required to receive under Commission regulations (Tr. at 27-29; Staff Ex. 2; Staff Ex. 3). Mr. Moser stated that his research of federal regulations and federal interpretations indicate that a driver of a small bus is exempt from needing a medical examiner's certificate if the driver is with a non-commercial entity, such as a charitable or scientific organization. According to Mr. Moser, an example of commercial transportation of passengers occurs when a bus is only available to company employees, with the transportation provided as a means of team building to further a commercial enterprise (Tr. at 31, 33). Mr. Moser stated that if some of the bus

passengers are not company employees, then he might conclude that the transportation does not pertain to a commercial enterprise (Tr. at 33).

{¶ 15} Mr. Jobe testified that he drives the bus most of the time. Mr. Jobe explained that Mr. Wolf had informed him that because a commercial driver's license was not necessary to drive the bus, a medical examiner's certificate was not needed either. (Tr. at 36-37, 44.) Mr. Jobe clarified that he only drives the bus to Bengals games so that he, company employees, and their guests can attend; no passengers pay for a bus ride. Members of the general public, unless invited as a guest, cannot ride the bus. According to Mr. Jobe, capacity of the bus does not exceed 15 passengers, including the driver. (Tr. at 36, 38.)

{¶ 16} Mr. Jobe stated that, on the day of the inspection, the bus passengers were company employees, their spouses, and friends of the employees (Tr. at 39-41). Driving the bus is not part of his job description, and he is not paid to do so, Mr. Jobe added; rather, he drives the bus because he does not drink and is a designated driver, and he would attend Bengals games regardless (Tr. at 36-37, 39, 72). According to Mr. Jobe, the bus is not used for any purpose other than carrying Bengals fans to their games (Tr. at 45).

{¶ 17} Mr. Wolf testified that Sporty's, which provides aviation education materials as well as "everything you need for an airplane," has, since 1968, provided Bengals tickets to employees so they can take spouses, family, and friends to games. Tickets are available via a sign-up sheet at the company. (Tr. at 47-49, 53-54.) The bus is used only for transportation to sporting events for those who have tickets provided by Sporty's (Tr. at 50). Mr. Wolf stated that Mr. Jobe, as a designated driver, is the primary driver of the bus; he receives no compensation for being the driver (Tr. at 51, 72). Mr. Wolf emphasized that the tickets are not used to develop business for Sporty's, because the company is international with "almost half a million customers"; therefore, he added, the tickets are simply for company employees, their spouses, family, and friends. According to Mr. Wolf, the few local customers "are never offered an opportunity to ever ride on the bus." Mr. Wolf added

that use of the bus is not offered to vendors, nor is it used to transport supplies, make deliveries, or for transportation to meetings or conferences. (Tr. at 52, 68-70.)

{¶ 18} After parking the bus, Mr. Wolf stated, bus passengers have a tailgate party until the game begins; only those who are bus passengers, as well as employees whose residences are downtown near the stadium, are at the party (Tr. at 69, 71). On the day of the inspection, Mr. Wolf stated, he was attending the game with his wife and a friend, as well as a flight instructor (Tr. at 57). According to Mr. Wolf, the bus that Investigator Swartz inspected was purchased in February 2021 and modified in May 2021; its capacity is 15 persons including the driver (Tr. at 55, 61). Mr. Wolf emphasized that no passenger pays to ride the bus, nor do passengers share the cost of a parking pass, and the general public cannot pay for a ride on the bus (Tr. at 54, 59, 68). As stated by Mr. Wolf, “we are a private bus for a private operation” (Tr. at 66).

{¶ 19} During his testimony, Mr. Wolf referred to the U.S. Department of Transportation Motor Carrier Identification Report that Sporty’s files every two years and is applicable to the current bus (Tr. at 55-56; Company Ex. 3). According to Mr. Wolf, counsel for Sporty’s determined that the form needed to be filed because the GVWR of the bus exceeds 10,001 GVWR (Tr. at 56, 61-62; Company Ex. 3; Company Ex. 5). Information entered on the form indicates that Sporty’s is a private non-business carrier; Mr. Wolf added that U.S. Department of Transportation officials have never contacted the company to state that the form was incorrectly filled out (Tr. at 56-57). Mr. Wolf noted that a separate exhibit, which is the State of Ohio vehicle registration for the current bus, contains the license plate number that had been on the prior bus owned by Sporty’s (Tr. at 62-63; Company Ex. 5).

VI. COMMISSION CONCLUSION

{¶ 20} Ohio Adm.Code 4901:2-7-20 requires that Staff, at a hearing, prove the occurrence of a violation by a preponderance of the evidence. The Commission finds that, based on a preponderance of the evidence, Staff has not met its burden of proving that Mr. Jobe violated 49 C.F.R. 391.41(a)(1) (operating a passenger-carrying CMV without a

medical examiner's certificate). Further, the Commission finds that the forfeiture should be deleted and the alleged violation removed from Respondent's Safety-Net record.

{¶ 21} In reaching our conclusion, we first observe that a 49 C.F.R. 390.5 defines a CMV as a "self-propelled * * * motor vehicle used on a highway * * * to transport passengers or property when the vehicle * * * (1) has a gross vehicle weight rating [GVWR] * * * of 4,536 kg (10,001 pounds) or more * * *; or (2) is designed or used to transport more than 8 passengers, (including the driver), for compensation; or * * * (3) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation * * *." Next, we note that the medical examiner's certificate required by 49 C.F.R. 391.41(a)(1) for CMV operation is not, pursuant to 49 C.F.R. 390.3(f)(6), applicable to the driver of a CMV that is "designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation, provided the vehicle does not otherwise meet the definition of a commercial motor vehicle * * *."

{¶ 22} Applying 49 C.F.R. 390.5 and 49 C.F.R. 390.3(f)(6) to the issues in this case, we first observe the testimony of Mr. Jobe and Mr. Wolf that the bus's capacity, including the driver, does not exceed 15 passengers (Tr. at 61). Second, we note the testimony of Mr. Jobe and Mr. Wolf that no passengers pay to ride the bus, nor is Mr. Jobe paid to drive the bus (Tr. at 38, 54, 72). Third, while GVWR is a factor in determining FMCSR applicability, Investigator Swartz confirmed that the vehicle registration was not available for the bus that he inspected, and he had to rely on GVWR information from a prior Sporty's bus when preparing his inspection report (Tr. at 11-12; Staff Ex. 1). We also note the testimony of Mr. Jobe and Mr. Wolf that the bus passengers were company employees, as well as their spouses and the employees' friends; no passengers pay to ride the bus; and members of the general public cannot pay for a bus ride (Tr. at 39-41, 54, 59, 68). Finally, according to Mr. Jobe and Mr. Wolf, the bus is only used to transport passengers to sports events; the bus is not offered for use to the few local vendors of the Company; and the bus does not transport supplies, make deliveries, or transport employees to meetings or conferences (Tr. at 45, 52, 68-70).

{¶ 23} Consequently, Staff did not prove by a preponderance of the evidence that Respondent violated 49 C.F.R. 391.41(a)(1) (operating a passenger-carrying CMV without a medical examiner's certificate).

{¶ 24} However, we must address several factors in the record. First, the Commission does not overlook Mr. Wolf's remarks that Sporty's files the U.S. Department of Transportation Motor Carrier Identification Report because the GVWR of the current Ford bus exceeds 10,001 lbs. (Tr. at 55-56, 61-62; Company Ex. 3). Second, at hearing, Sporty's provided the vehicle registration for the Ford bus inspected by Investigator Swartz; the registration indicates a GVWR of 14,500 lbs. (Company Ex. 5). As noted previously in this Opinion and Order, the medical examiner's certificate required by 49 C.F.R. 391.41(a)(1) for CMV operation is not, pursuant to 49 C.F.R. 390.3(f)(6), applicable to the driver of a CMV that is "designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation, **provided the vehicle does not otherwise meet the definition of a commercial motor vehicle**" (emphasis added). A CMV is defined by 49 C.F.R. 390.5 to include a "self-propelled * * * motor vehicle used on a highway * * * to transport passengers or property when the vehicle * * * (1) **has a gross vehicle weight rating * * * of 4,536 kg (10,001 pounds) or more** * * * " (emphasis added). In sum, although the current Sporty's bus capacity does not exceed 15 passengers including the driver, and the bus driver does not receive compensation, it appears that the GVWR of the bus exceeds 10,001 lbs., thereby making the FMCSR applicable to the CMV and its driver (Company Ex. 5). We take into consideration Mr. Wolf's remarks that the Ford bus was modified after its purchase by Sporty's, which could alter the GVWR initially calculated by Ford (Tr. at 53). We urge Sporty's to determine with certainty the GVWR of the current CMV in light of the modifications made to the vehicle; if the GVWR now exceeds 10,001 lbs., which is likely, the bus and its driver are subject to the FMCSR.¹

¹ We must address Mr. Wolf's remarks that U.S. Department of Transportation officials have never contacted Sporty's to indicate that Company information on the U.S. Department of Transportation Motor Carrier Identification Report is inaccurate. Sporty's information on the Motor Carrier Identification Report

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 25} On October 10, 2021, Investigator Swartz of the Commission stopped and inspected a CMV operated by Sporty's and driven by Brian Jobe. At the time of the inspection, Investigator Swartz prepared a report indicating a violation of the FMCSR, specifically, 49 C.F.R. 391.41(a)(1) (operating a passenger-carrying CMV without a medical examiner's certificate). (Staff Ex. 1.)

{¶ 26} On December 9, 2021, Staff served an NPD upon Respondent in accordance with Ohio Adm.Code 4901:2-7-12, alleging violations of the Commission's transportation regulations.

{¶ 27} On January 5, 2022, Respondent requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 28} Respondent participated in a settlement conference with Staff on February 24, 2022, but the parties did not resolve the matter.

{¶ 29} After continuances to accommodate settlement negotiations and delays due to scheduling conflicts, the evidentiary hearing was ultimately scheduled for September 26, 2023.

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

{¶ 31} Based on the record in this proceeding, the Commission finds that Staff has not proven, by a preponderance of the evidence, that Mr. Jobe violated 49 C.F.R. 391.41(a)(1) (operating a passenger-carrying CMV without a medical examiner's certificate). Further,

indicates that Sporty's is a not a carrier for business purposes; the Commission does not dispute that. (Tr. at 56-57, 61-62; Company Ex. 3.)

the Commission finds that the alleged violation should be deleted from Respondent's Safety-Net record and the civil forfeiture deleted.

VIII. ORDER

{¶ 32} It is, therefore,

{¶ 33} ORDERED, That the alleged violation be deleted from Respondent's Safety-Net record and the civil forfeiture be deleted. It is, further,

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

COMMISSIONERS:

Approving:

Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters

Recusal:

John D. Williams

JML/mef

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Summary: Opinion & Order finding that Staff has not demonstrated, by a preponderance of the evidence, that Brian Jobe violated 49 C.F.R. 391.41(a)(1) (operating a passenger-carrying commercial motor vehicle without a medical examiner's certificate) electronically filed by Debbie S. Ryan on behalf of Public Utilities Commission of Ohio.