

FILE

BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of: : Case No. 03-1138-TR-CVF  
: (Citation No. OH3203000268D)  
Agel Cox dba Cox's Auction House. :

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MEMORANDUM CONTRA  
MOTION TO DISMISS

INTRODUCTION

Agel Cox dba Cox's Auction House ("Agel Cox" or "Respondent") filed a motion to dismiss the present action based on a faulty interpretation of the Public Utilities Commission of Ohio's ("Commission") jurisdiction. The Respondent misapplies the facts leading to a misapplication of the applicable administrative law.

This case arises from a road side inspection. The commercial motor vehicle was traveling enroute to South Shore, Kentucky from Mansfield, Ohio at the time of the inspection. That trip qualified as an interstate trip triggering the Commission's safety regulatory authority over vehicles operating in interstate commerce. Agel Cox's reliance upon rules governing intrastate shipments of not-for-hire carriers is therefore misplaced.

STATEMENT OF FACTS

- On May 2, 2002 a vehicle operated by Agel Cox dba Cox's Auction House, and driven by Agel R. Cox, was inspected within the state of Ohio.
- As a result of the inspection, report number OH3203000268 was prepared detailing an out of service violation of the Ohio Administrative Code. Specifically, the officer recorded a violation of 49 C.F.R. 395.8(A) and 391.41(A) as adopted by O.A.C. 4901:2-5-02.
- The inspection report includes the carriers address, personal information of the driver and a list of other violations noted. The inspection report also

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lists the origin of the trip as Mansfield, Ohio and the destination as South Shore, Kentucky.

- The gross vehicle weight rating of the vehicle is listed on the report as 24,000 pounds.
- On April 10, 2002, the Staff issued a Notice of Preliminary Determination in the amount of \$150.00 for violation of C.F.R. 395.8(A) and 391.41(A) as adopted by O.A.C. 4901:2-5-02.
- On May 9, 2003, the Respondent requested an administrative hearing.
- On August 12, 2003, the Respondent filed a motion to dismiss the case from Commission review.
- The hearing before the Commission is currently set for September 11, 2003.

### **LAW AND ANALYSIS**

Determining whether the Commission has safety jurisdiction over a motor vehicle depends upon the type of commerce and the specifics of the vehicle involved, including the cargo. There is no question that the Commission has the power to regulate the safety aspects of interstate commerce on and through Ohio highways. R.C. 4919.79(B) provides:

(B) The Commission may adopt safety rules applicable to the highway transportation of persons or property in interstate commerce, which transportation takes place into or through this state.

This statute provides the Commission with the authority to adopt rules concerning interstate commerce into and through the State of Ohio.

Under the statutory authority of 4919.79(B), the Commission adopted O.A.C. 4901:2-5-01 and 4901:2-5-02. "Motor Carrier" is defined in O.A.C. 4901:2-5-01(A) to include "any and all carriers by motor vehicle operating in Ohio in interstate commerce which are subject to the regulations contained in Title 49, Parts 171 through 190, 383, or 390 through 397 CFR..."

Significant portions of the federal motor carrier safety regulations are also adopted in O.A.C. 4901:2-5-02. Among the CFR provisions adopted is 49 C.F.R. 390.5, definitions for the Federal Motor Carrier Safety Regulations; General. According to 49 C.F.R. 390.5 as adopted in Ohio, "Interstate Commerce" means trade, traffic, or transportation in the United States:

- (1) Between a place in a State and a place outside of such state (including outside of the United States);
- (2) Between two places in a state through another state or a place outside of the United States; or
- (3) Between two places in a state as part of trade, traffic, or transportation originating or terminating outside the State of the United States.

It can not be disputed that the trip in the present case was in fact a movement of goods in interstate commerce.<sup>1</sup> The same section defines "Commercial Motor Vehicle" as:

(A)ny self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle-

- (1) Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight of 4,536 kg (10,001 pounds) or more, whichever is greater; 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; or
- (4) Is used in transporting material found by the Secretary of Transportation to be hazardous under 49 U.S.C. 5103 and transported in a quantity requiring placarding under regulations prescribed by the Secretary under 49 CFR, subtitle B, chapter I, subchapter C.

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<sup>1</sup> "Intrastate Commerce" means any trade, traffic, or transportation in any state which is not described in the term 'interstate commerce.' 49 C.F.R. 390.5

In the present case it is undisputed the Agel Cox vehicle had a gross vehicle weight of 24,000 pounds, well over the 10,000 minimum outlined in the rules.

In an attempt to escape Commission jurisdiction, Agel Cox cites to the portion of O.A.C. 4901:2-5-01(B) dealing with private intrastate carriers as that term is defined under R.C. 4923.20. Motion to Dismiss at 4. A portion of O.A.C. 4901:2-5-01(B) reads: “motor vehicle does not include any vehicle operated within Ohio in intrastate commerce by a private motor carrier as defined in section 4923.20 of the Revised Code, which is not a commercial motor vehicle as defined in Title 49, Part 383.5, CFR as amended.” A close inspection of the rule highlights that R.C. 4923.20 is not invoked as an exception for private carriers unless the vehicles is being operated “**within Ohio in intrastate commerce**”. Agel Cox was not operating in intrastate commerce and therefore the exemption does not apply. The origin on the inspection report lists Mansfield, Ohio and the destination is listed as South Shore, Kentucky. The fact that the vehicle had not yet reached its destination does not change the nature of the trip. The movement was in interstate commerce on a vehicle with a gross vehicle weight of 24,000 pounds over twice the weight of regulation under the definition of a commercial motor vehicle in 390.5.<sup>2</sup> The violations found by the inspecting officer fall squarely within the Commission’s safety jurisdiction in interstate commerce.<sup>3</sup>

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<sup>2</sup> It should also be pointed out that Agel Cox is relying upon a definition of “Commercial Motor Vehicle” from 383.5, a chapter of the CFR dealing with Commercial Driver’s License Standards. While the definition used in the Staff brief is from Chapter 390, the general chapter governing federal motor carrier safety regulations.)

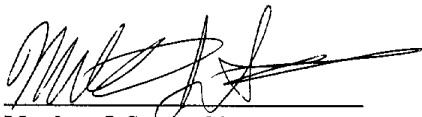
<sup>3</sup> Respondent also makes reference to Chapter 4511 of the Ohio Revised Code but fails to assert that any Commission rule affects any rights or duties granted to or imposed upon the operator by Chapter 4511. Thus, the Respondent is barred from raising any such argument in any potential reply memorandum.

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**CONCLUSION**

For the foregoing reasons, the Staff respectfully requests that the Commission deny the motion to dismiss filed by Agel Cox in this proceeding.

Respectfully submitted,

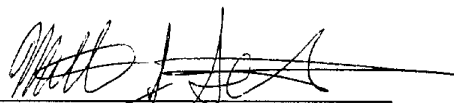
A handwritten signature in black ink, appearing to read 'Matthew J. Satterwhite', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **MEMORANDUM CONTRA MOTION TO DISMISS** was served by regular U.S. Mail, postage pre-paid, or hand-delivered upon the following parties of record this 26<sup>th</sup> day of August, 2003.



**Matthew J. Satterwhite**  
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