

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of the General Investigation)
of **Eric B. Smith of Paola, Kansas,**)
Pursuant to the Kansas Highway Patrol) Docket No. 17-GIMM-404-KHP
Issuance of a Notice of Violation(s) and)
Invoice for the Violations of the Kansas)
Motor Carrier Safety Statutes, Rules and)
Regulations.)

PETITION FOR RECONSIDERATION OF ORDER DISMISSING VIOLATIONS

The Staff of the State Corporation Commission of the State of Kansas (“Staff” and “Commission,” respectively), by and through its counsel, Ahsan A. Latif, submits its Petition for Reconsideration of the Commission’s Order Dismissing Violations against Eric B. Smith of Paola, Kansas (Respondent). In support of its motion, Staff states as follows:

1. On September 19, 2017, the Commission entered an Order Dismissing Violations¹ alleged by the Kansas Highway Patrol (“KHP”) against Respondent on the basis that Staff had not “met its evidentiary burden” because the evidence Respondent had been compensated for his transportation of clay pigeons was “hearsay, and therefore, inadmissible.”²

2. Staff petitions the Commission, pursuant to K.S.A. 77-529, to reconsider its findings regarding the evidence Respondent was transporting clay pigeons for compensation.

¹ September 19, 2017, Order Dismissing Violations. ¶10.

² September 19, 2017, Order Dismissing Violations, ¶19.

**A. The Commission Erred In Failing to Consider the Bill of Lading and
Mistakenly Concluded It Had Not Been Offered and Accepted as Exhibit 2
During the Hearing**

3. Trooper Josh Weber testified that during the inspection of Respondent's vehicle, he spoke by telephone with the manager of Hillsdale Range and confirmed that Respondent received free membership in exchange for transporting materials. Mr. Weber specifically mentions the name of the manager, "Virgil" adding "his name is on the shipping or bill of lading."³ In the Commission's Order, the Commission states that "Trooper Weber testified that Virgil's name was on the bill of lading but that document was not offered into the record by Staff."⁴

4. The Bill of Lading was offered by Staff and accepted into the record by the Commission at the hearing as Staff's Exhibit 2.⁵ Trooper Weber was specifically asked about this exhibit by Staff's Counsel during the hearing.⁶ Trooper Weber explained that the photograph depicted "the bill of lading for the product Mr. Smith was hauling."⁷ Trooper Weber went on to discuss how the size of the load signified a commercial move and posed safety concerns given the vehicle Respondent was driving did not have proper emergency braking as was required for a commercial motor vehicle.⁸

5. Furthermore, Commissioner Emler asked questions about the Bill of Lading at the hearing after it had been entered into evidence.⁹ At one point Commissioner Emler asked for confirmation about the number of pallets on the Bill of

³ Tr. p. 15, l. 1–5.

⁴ September 19, 2017, Order Dismissing Violations, ¶18.

⁵ Tr. p. 11, l. 20– p. 12, l. 10.

⁶ Tr. p. 13, l. 11– 14.

⁷ Tr. p. 13, l. 13– 14.

⁸ Tr. p. 13, l. 11– p. 14, l. 17.

⁹ Tr. p. 18, l. 25– p. 20, l. 6.

Lading. "I'm not the best at reading the bill of lading but it looks to me like there should have been 10 pallets based on the bill of lading..."¹⁰ Commissioner Emler refers specifically to the information included on the Bill of Lading, which at that point had been admitted into the record as Exhibit 2.

6. Staff alleges that the Commission erred in not considering Exhibit 2 as an admitted document and further by not considering the information provided therein in coming to its decision regarding the violations. The Bill of Lading evidences Respondent's involvement in the commercial operations of Hillside Range and confirms that he was not hauling the six pallets of clay pigeons for personal use. Additionally, it provides more information about Hillsdale Range, including their role as the purchaser of the clay pigeons, their business address, telephone number, as well as confirmation of the name of the manager of the range.

7. Exhibit 2 provides important information for the Commission in determining whether Respondent was operating commercially as well as confirmation that Trooper Weber had the contact information and name of the range manager whom he purportedly called during the inspection. Exhibit 2 was offered and accepted as an exhibit during the hearing. The Commission asked questions specifically about the content of Exhibit 2 during the hearing. The Bill of Lading was attached to the transcript produced in this case and labeled as Exhibit 2. Staff believes the Commission erred in not considering this important piece of evidence in deciding whether or not to uphold the violations alleged against Respondent.

¹⁰ Tr. p. 18, l. 25 – p. 19, l. 2.

B. The Commission Erred in Not Considering Respondent's Admission Against Interest in the Driver/Vehicle Examination Report

8. Trooper Weber prefiled testimony in this case on August 11, 2017. That testimony included eight pages of questions and answers as well as one attachment, the Driver/Vehicle Examination Report Number KSHP022550950 (hereinafter "Inspection").¹¹ At the hearing held on August 23, 2017, Trooper Weber affirmed his testimony. It was offered by Staff's Counsel and admitted by the Commission without any objection from the Respondent or the Commission.¹²

9. In the "Inspection Notes" of the Inspection, Trooper Weber noted: "Driver stated he gets free membership to range for compensation. This was confirmed by the range manager."¹³

10. Respondent's admission that he received free membership as compensation is an admission against interest and an exception to the hearsay evidence rule. K.S.A. 60-460(g) defines admission by a party as follows: "As against a party, a statement by the person who is the party to the action in the person's individual...capacity." "Admissions against interest made by a party are the strongest kind of evidence and override other factors." *Kraisinger v. C.O. Mammel Food Stores*, 203 Kan. 976, 986, 457 P.2d 678 (1969).

11. The admission appears in the Inspection, which is also admissible under an exception to the hearsay evidence rule as a business record. K.S.A. 60-450(m). The inspection was formally documented by Trooper Weber in the form of the inspection

¹¹ August 11, 2017, Direct Testimony of Trooper Josh Weber.

¹² Tr. p. 10, l. 16-22.

¹³ February 15, 2017, Driver/Vehicle Examination Report No.KSHP022550950, p. 2.

report.¹⁴ The Inspection report was created contemporaneously at the time of the inspection and in the normal course of business by Trooper Weber.

12. Police reports, such as Trooper Weber's Inspection report, are admissible as evidence of a hearsay exception at the discretion of the trial court. In *State v. Griffin*, 1997, 262 Kan. 698, 941 P.2d 941, the Court explained the standard regarding the admission of police reports:

"The admissibility of the written report was a matter of judicial discretion, and the trial court will not be reversed on appeal absent a showing of an abuse of discretion. [Citations omitted.] Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable person would take the view adopted by the trial court. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." [Citation omitted]. *State v. Baker*, 255 Kan. 680, 691, 877 P.2d 946 (1994)."

13. The Inspection report in this case is used not to admit hearsay, but to admit the written observations of Trooper Weber. At the time of the inspection he observed Respondent's admission that he was being compensated with free membership to the gun range. In the normal course of business, in his role as a Trooper for the Kansas Highway Patrol, he contemporaneously made a record of this observation. That observation is an admission against interest, which Kansas courts consider to be the "strongest kind of evidence."

14. Respondent had every opportunity to contradict the testimony of Trooper Weber and the observations included in his Inspection. Respondent chose not to prefile testimony, despite being ordered to do so in the Order Setting Hearing in this matter.¹⁵ He raised no objection to the admission of Trooper Weber's testimony, or to admission of

¹⁴ August 11, 2017, Direct Testimony of Trooper Josh Weber, p. 3, l. 7-10.

¹⁵ June 27, 2017, Order Setting Hearing, ¶7.

the Inspection report as an attachment to that testimony. He did not cross-examine Trooper Weber on his testimony or any of his findings. He did not testify on his own behalf to challenge any of the statements made by Staff's witnesses. The only evidence featuring a statement by him was admitted by the Commission in the form of Trooper Weber's Inspection report, wherein Mr. Smith admitted to receiving compensation in the form of a free membership to Hillsdale Range.

15. Staff believes that the Commission erred in stating it had "reviewed the exceptions to the rule prohibiting hearsay evidence but does not find any of the exceptions applicable."¹⁶ In fact, evidence of compensation was admitted into the record through two exceptions to the rules against hearsay. The Inspection, which falls under the business record exception, and the admission by Respondent that he was compensated for his work, which falls under the exception for admissions against interest.

C. Conclusion

16. The Commission found in its order that Staff had not met its evidentiary burden in that there was insufficient evidence to uphold the violations alleged against Respondent.

17. Staff believes that the Commission erred in that determination, first by failing to consider Exhibit 2, the Bill of Lading, which was properly offered and admitted into the evidentiary record. Exhibit 2 provides important information about the Respondent's employer that would otherwise not appear in the record.

18. Staff believes that the Commission further erred in not considering Respondent's admission against interest wherein he admitted that he was compensated with a free membership. This evidence falls within a hearsay exception and remained

¹⁶ September 19, 2017, Order Dismissing Violations. ¶17.

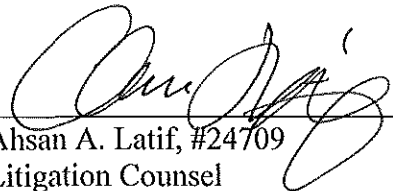
uncontradicted by Respondent who affirmatively chose not to make an opening or closing statement, failed to cross-examine any witnesses or to testify on his own behalf.

19. The admission evidences Respondent undertook this commercial move under the belief he would be compensated for his actions. Therefore, Respondent was operating as a commercial motor carrier at the time of the inspection and subject to the Commission's regulations and found to be in violation thereof.

20. Pursuant to K.S.A. 77-529(a)(l), this Petition is timely, in that Staff received the Commission's Order Dismissing Violations on September 19, 2017.

WHEREFORE, Staff petitions the Kansas Corporation Commission to reconsider the Order Dismissing Violations issued September 19, 2017.

Respectfully submitted,



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For Commission Staff

AAL

VERIFICATION

17-GIMM-404-KHP


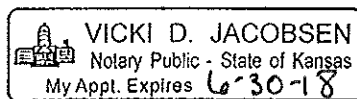
STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

Ahsan A. Latif, of lawful age, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas; that he has read and is familiar with the foregoing *Petition for Reconsideration of Order Dismissing Violations*, and attests that the statements therein are true and correct to the best of his knowledge, information and belief.



Ahsan A. Latif, S.C. # 24709
Litigation Counsel
The State Corporation Commission
of the State of Kansas

SUBSCRIBED AND SWORN to before me this 29th day of September,
2017.


Notary Public

My Appointment Expires: June 30, 2018

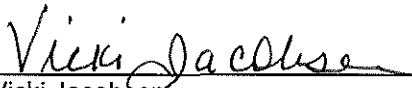
CERTIFICATE OF SERVICE

17-GIMM-404-KHP

I, the undersigned, certify that a true and correct copy of the above and foregoing Petition for Reconsideration of Order Dismissing Violations was served via electronic service this 29th day of September, 2017, to the following:

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