

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

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

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

ORDER DISMISSING VIOLATIONS

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration. Having examined its files and records, and being duly advised in the premises, the Commission finds and concludes as follows:

I. BACKGROUND

1. On February 17, 2017, the Kansas Highway Patrol (KHP) issued a Notice of Violation(s) against Eric B. Smith (Respondent), for alleged violations found during a February 15, 2017, routine motor carrier stop and inspection conducted by the KHP. Respondent was assessed \$550 in civil fines, comprised of the following violations: (1) a \$150.00 fine for No/Improper Breakaway or Emergency Braking, citing 49 C.F.R. 393.43;(2) a \$150.00 fine for Inoperative Turn Signal, citing 49 C.F.R. 393.9TS; and (3) a \$250.00 fine for No Drivers Record of Duty Status, citing 49 C.F.R. 395.8A.

2. On March 3, 2017, Respondent initiated a formal challenge with the KHP.¹

¹ Letter from Eric Smith contesting KHP fines, p. 1 (Mar. 3, 2017).

3. On March 7, 2017, the KHP denied Respondent's challenge and advised Respondent of his right to an administrative hearing before the Commission.²

4. Also on March 7, 2017, Respondent verbally requested a hearing before the Commission.³

5. On June 27, 2017, the Commission issued an Order Setting Hearing, scheduling a hearing for August 23, 2017.

6. On August 11, 2017, Commission Staff filed the Direct Testimony of Deputy Director of Transportation, Gary Davenport, and KHP Trooper, Josh Weber.

7. On August 23, 2017, the Commission held a hearing on this matter.

II. LEGAL STANDARD

8. The Commission is given full power, authority and jurisdiction to supervise and control motor carriers,⁴ doing business or procuring business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.⁵ The Commission may fine, sanction, suspend, cancel or revoke the authority of any motor carrier operating by Commission certificate, license or permit or subject to Commission safety rules and regulations.⁶ Further, the Commission has the authority to investigate a party.⁷

9. Under K.S.A. 66-1,111, “[N]o public motor carrier of property or passengers or private motor carrier of property or local cartage carrier shall operate any motor vehicle for the transportation of either persons or property on any public highway in this state except in accordance with the provisions of this act, and amendments thereto, and other applicable laws.”

² *Order Setting Hearing*, ¶ 3 (June 27, 2017).

³ *Id.* at ¶ 4.

⁴ *See*, K.S.A. 2016 Supp. 66-1,108b.

⁵ *See*, K.S.A. 2016 Supp. 66-1,108b, 66-1,111, 66-1,112, 66-1,114, 66-1,114b and 66-1,115.

⁶ *See*, K.S.A. 2016 Supp. 66-1,129a, 66-1,130 and 66-1,142b.

⁷ *See*, K.A.R. 82-1-237.

10. “Motor carrier” is defined as a for-hire motor carrier or a private motor carrier. The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories.⁸

11. “Public motor carrier of property” is defined as any person who undertakes for hire to transport by commercial motor vehicle, from place to place, the property other than household goods of others who may choose to employ or contract with the motor carrier.⁹

III. FINDINGS AND CONCLUSIONS

12. The Commission finds there is sufficient evidence from which to make a decision in this matter.

13. Staff's case against the Respondent is straightforward in that Staff argued Mr. Smith was a public motor carrier because he utilized a commercial motor vehicle to transport property for compensation.¹⁰

14. Staff alleged the Respondent was stopped at mile post 56 on K-68 highway in Miami County, Kansas, while transporting six pallets, each containing about forty-two boxes of clay targets from Webb City, Missouri to Hillsdale, Kansas.¹¹ Staff further alleged the Respondent was using a vehicle and trailer with a gross combined weight rating of 24,002 pounds.¹² The Commission finds sufficient evidence to support these allegations.

⁸ See, K.S.A. 66-1,108b; 49 C.F.R. § 390.5

⁹ K.S.A. 66-1,108(f).

¹⁰ Direct Testimony of Gary Davenport, p. 5 (August 11, 2017).

¹¹ Direct Testimony of Trooper Josh Weber, pp. 2-3, 5 (August 11, 2017).

¹² *Id.* p. 5.

15. Staff further alleged the Respondent was transporting the clay targets for a gun range in exchange for free membership and use of the range, a \$175 value.¹³ The Commission finds this factual allegation to be critical to Staff's case, because Staff alleges that the Respondent was transporting property "for compensation," a necessary element for being a "public motor carrier."¹⁴ Mr. Davenport indicated that, had the Respondent not been compensated for transporting the clay targets, the violations would not have occurred.¹⁵ The Commission finds insufficient evidence to support this critical allegation in Staff's case because the only evidence offered by Staff that the Respondent was compensated was offered in the form of inadmissible hearsay testimony.

16. The evidence Staff relied on in support of the allegation that Mr. Smith was compensated for transporting the clay targets was the testimony of Trooper Weber. Trooper Weber testified that he had spoken with "Virgil," the manager of the gun range, by telephone and was told that Mr. Smith often hauls for the range in exchange for free membership and use of the range.¹⁶ The evidence in question is in the form of a statement made by Virgil, who did not testify at the hearing. Staff's reliance on the statement made by Virgil to prove the truth of the matter is demonstrated by Mr. Davenport's testimony that, "[i]n Trooper Weber's testimony, he stated that the owner of the shooting range told him Mr. Smith was compensated with free membership at the range. The fact Mr. Smith was compensated confirms this is a commercial trip."¹⁷

17. The Commission's regulations state, "[t]he rules of evidence as stated in article four of the Kansas code of civil procedure shall be applied by the commission at all of its

¹³ Tr. Vol. 1 pp. 14-15, 17-18, 25.

¹⁴ Direct Testimony of Gary Davenport, pp. 5-6.

¹⁵ Tr. at pp. 23 ln. 25-p.24 ln. 7, 23.

¹⁶ Direct Testimony of Trooper Josh Weber, p. 5; Tr. Vol. 1 pp. 14-15, 17-18.

¹⁷ Direct Testimony of Gary Davenport, p. 5 (emphasis added).

hearings.”¹⁸ The Kansas code of civil procedure defines hearsay evidence as “... a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated.”¹⁹ Under the Kansas code of civil procedure, hearsay evidence is generally inadmissible.²⁰ The Commission has reviewed the exceptions²¹ to the rule prohibiting hearsay evidence but does not find any of the exceptions to be applicable. However, evidence need not be excluded solely because it is hearsay.²²

18. The Commission concludes the statement made by the manager of the gun range alleging that Mr. Smith was compensated with free membership to the gun range in exchange for transporting the clay pigeons is hearsay, and therefore, inadmissible. Despite the Commission’s statutory discretion to accept hearsay evidence, the Commission finds in this present case because Staff did not provide sufficient evidence to identify who exactly Trooper Weber spoke to from the gun range. Trooper Weber refers to the manager as Virgil but did not provide a surname.²³ Additionally, Trooper Weber testified that Virgil’s name was on the bill of lading but that document was not offered into the record by Staff.²⁴ The Commission further finds Staff offered no other evidence in support of the allegation that Mr. Smith was compensated for transporting the clay pigeons. The Commission is, therefore, disinclined to accept hearsay evidence when it is the only evidence offered in support of a key element of the violations alleged.

¹⁸ K.A.R. 82-1-230(a).

¹⁹ K.S.A. 60-460.

²⁰ *Id.*

²¹ *Id.*

²² K.S.A. 77-524(a)

²³ Tr. Vol. 1 pp. 14-15.

²⁴ *Id.*

19. In light of Staff's testimony that the alleged violations would not have occurred had Mr. Smith not received compensation,²⁵ the Commission finds Staff has not met its evidentiary burden, and there is insufficient evidence to uphold the violations issued to Mr. Smith. Therefore, the Commission finds the case against Mr. Smith should be dismissed, with prejudice.

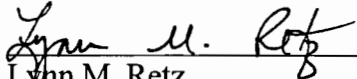
IT IS, THEREFORE, BY THE COMMISSION ORDERED:

- A. The case against Mr. Smith is dismissed, with prejudice.
- B. The parties have fifteen (15) days, plus three (3) days if service of this order is by mail, from the date this order was received in which to petition the Commission for reconsideration of any issue or issues decided herein.²⁶
- C. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Apple, Chairman (recused); Albrecht, Commissioner; Emler, Commissioner

Dated: SEP 19 2017


Lynn M. Retz
Secretary to the Commission

SRF

Order Mailed Date
SEP 19 2017

²⁵ *Id.* at pp. 23-24.

²⁶ *See*, K.S.A. 2013 Supp. 66-118b; K.S.A. 2013 Supp. 77-529(a)(1).

CERTIFICATE OF SERVICE

17-GIMM-404-KHP

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of first class mail/hand delivered on SEP 19 2017.

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/S/ DeeAnn Shupe

DeeAnn Shupe

Order Mailed Date

SEP 19 2017