

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

Entered: December 29, 2015

CASE NO. 15-0887-MC-FC

OWNER-OPERATOR INDEPENDENT
DRIVERS ASSOCIATION,
Grain Valley, Missouri,

Complainant,

v.

ANTHONY'S TRUCK REPAIR LTD. CO.,
a corporation,

Defendant.

RECOMMENDED DECISION

This Order requires Anthony's Truck Repair Ltd. Co. (ATR) to make a \$10,067 refund.

On June 5, 2015, the Owner-Operator Independent Drivers Association (OOIDA) filed a complaint against ATR alleging that ATR overcharged for a third-party tow.

On June 9, 2015, ATR asserted that this was not a third-party tow.

On July 14, 2015, the Commission referred the matter requiring a decision on or before January 4, 2016.

On August 27, 2015, Staff recommended that the matter be set for hearing.

On September 11, 2015, the matter was set for a hearing on October 26, 2015. The hearing was held as scheduled. Christopher D. Negley, Esquire, appeared on behalf of OOIDA. Steve Hunter, Esquire, appeared on behalf of ATR. John Little, Esquire, appeared on behalf of Staff. A briefing schedule was established. Only OOIDA filed a brief.

EVIDENCE

Ysabel Luna is the owner operator of the semi-truck which was towed. Mr. Luna has operated Luna Trucking Company out of Lubbock, Texas for nine years. (Tr. 13). Mr. Luna has

permits to operate in West Virginia and pays road taxes to West Virginia when operating in the state. (Tr. 11). Most of Mr. Luna's work is in the northeastern United States, including West Virginia. Mr. Luna hauls dry goods and frequently travels through West Virginia. He also picks up and drops off in West Virginia. (Tr. 14).

On July 5, 2015, Mr. Luna picked up garage door panels in Craigsville and was heading south along Route 20. (Tr. 15). Around 10:30 a.m. on Route 20 in a sharp curve going up a hill on a two-lane road, the passenger side tires of Mr. Luna's trailer went in a ditch. (Tr. 16, 19, 20, 27). Mr. Luna's load did not shift immediately upon the incident. (Tr. 17, 18; OOIDA Exhibit 1). An elderly couple driving by stopped and asked Mr. Luna if he wanted them to call him a tow truck. Mr. Luna asked them if they knew someone with a Bobtail (a semi-truck not connected to a trailer). (Tr. 18, 19, 46). Mr. Luna considered the ditch to be relatively minor. He thought if he could get another Bobtail, he would be able to get himself out of a ditch. (Tr. 19, 20). Mr. Luna was trying to figure out the cheapest way to get out of a problem and feared a wrecker would be too expensive. (Tr. 20, 21).

The only people Mr. Luna called that day were his wife and the insurance carrier. (Tr. 21). Mr. Luna never had a problem with one of his loads before and was quite upset. He did not want to appear to be incompetent or unprofessional to his broker. He was very concerned about delivering the product. (Tr. 21).

Mr. Luna did not know why ATR appeared at the scene. (Tr. 21). Mr. Luna did not call ATR. (Tr. 21). Mr. Luna did not request ATR and did not consent to them towing his truck. (Tr. 45, 46). Mr. Luna assumes that the elderly couple somehow called someone resulting in the tow truck showing up. (Tr. 46). When the wrecker appeared on the scene, Mr. Luna assumed that the elderly couple could not find a Bobtail. He also assumed the wrecker would simply pull him out of the ditch. (Tr. 57). He thought the wrecker would attach to the back of the trailer and pull him backwards out of the ditch. (Tr. 57). OOIDA acts as an insurer for Mr. Luna. (Tr. 50).

The first responders to the scene were the Green Sulphur District Volunteer Fire Department (VFD). (Tr. 22, 61). Mr. Luna did not direct the VFD to call ATR. (Tr. 23). The VFD directed traffic. (Tr. 29, 30).

Eventually, multiple wreckers came to the scene. (Tr. 24). The first wrecker indicated he could not pull Mr. Luna's truck out and that he would have to try to take a different course of action. Mr. Luna believes that the first wrecker's actions caused damage to his equipment.¹ He believes that the trailer was still intact until the first wrecker tried to lift the trailer with the wrecker. (Tr. 25, 26). When the trailer was lifted, it buckled because of the heavy load. (Tr. 26). The driver of the first wrecker did not ask what the load was and Mr. Luna did not tell him it was heavy. Mr. Luna's truck and trailer at the time were right at the maximum legal weight of 80,000 pounds. (Tr. 27).

¹ Whether the actions of ATR in attempting the tow were appropriate is beyond the scope of the hearing. Any claims for damages would have to be made in a court with general jurisdiction. The evidence at hearing was not convincing in either direction as to whether ATR botched the tow.

A second wrecker from an entirely different service eventually appeared. (Tr. 28). The second wrecker was tied to the truck so it wouldn't tip over when ATR continued to lift the truck. (Tr. 29). The wreckers arranged for flatbeds and they started pulling the product out of Mr. Luna's truck. (Tr. 31, 32). Mr. Luna believes that the accident went from a small incident to a huge problem, which included damaging his product. (Tr. 32). Part of the product was removed until the wrecker felt that the trailer was light enough to be lifted with its equipment. (Tr. 36, 37).

Eventually the trailer was lifted out of the ditch and completely unloaded. (Tr. 41, 42). Mr. Luna drove his semi-truck and was escorted to ATR's property, which was approximately thirty miles away. (Tr. 42). ATR did not want to talk to Mr. Luna about the bill. He gave them his insurance information. He testified that ATR would not talk to him about the matter. (Tr. 42). ATR opened the gate and Mr. Luna drove his truck in. He parked it where he was instructed to park. His truck was impounded. (Tr. 43). Mr. Luna requested permission to spend the night in his truck, but was declined by ATR. (Tr. 43, 44). ATR assisted Mr. Luna in finding a motel room, which he paid for, which was another thirty miles away from the ATR facility. He expected to be picked up the next morning, but no one showed. (Tr. 43). When no one showed, Mr. Luna called ATR. (Tr. 44). The cab was in perfect working order, but he did not receive his cab back for about five days to a week and had to stay in a hotel the entire time. (Tr. 44, 45). ATR would not release the cab until the insurance company paid. (Tr. 45). Being trapped there and paying hotel bills and buying meals was something Mr. Luna could not afford. He felt like he was a hostage. (Tr. 45).

Mr. Luna never saw his load again. It was placed on ATR's equipment. (Tr. 50, 51). He never received a copy of the bill. (Tr. 51). He personally lost business. It took a month before he could acquire another trailer. He also lost the money he spent on hotels and restaurant meals, as well as, the fuel taking his Bobtail back. (Tr. 51). Mr. Luna had to pay the amount left over for his load after the insurance made its payment. (Tr. 58). OOIDA canceled his insurance. (Tr. 51). OOIDA did not request Mr. Luna to file the action, but he does want to see if he could recover some of his losses. (Tr. 59).² Mr. Luna went from being considered a good driver to being an at-risk driver with the single accident and had to put \$5,000 down to find new insurance. (Tr. 59).

Tom Scott has been the Chief of the VFD for about seventeen years. The VFD responds to accident calls. Mr. Scott has received appropriate training. (Tr. 61). The VFD is dispatched by the 911 center. Mr. Scott remembers assisting Mr. Luna. The 911 center dispatched them by radio to a tractor trailer in the ditch in the S-curve on Route 20. (Tr. 62, 63). The dispatch center indicated that the 911 center received a call. (Tr. 64). Mr. Scott talked to Mr. Luna at the scene. Mr. Scott was in charge of the scene as captain. (Tr. 64, 65). They were on the scene at 10:50 a.m., eleven minutes after receiving the call. ATR was not on the scene at that point. Mr. Scott checked Mr. Luna, who was not hurt, and then began directing traffic. (Tr. 66). Mr. Scott did not talk to anyone from ATR or from the other wrecker. (Tr. 68). At 8:19 p.m., Mr. Scott got back to the station and reported that everything was clear. (Tr. 70).

² Any claims Mr. Luna may have against ATR for any of his losses other than charges related to the towing charge are not properly before the Commission.

Anthony Bowden is the sole stockholder of ATR. (Tr. 78). ATR received a call from the 911 center. Mr. Bowden was working in the City of Hinton at the time the call came in. Mr. Bowden is a paid member of the City of Hinton's Fire Department. (Tr. 78, 79). While Mr. Bowden is on duty for the Fire Department, he is mandated to stay inside the city limits. (Tr. 113). Mr. Bowden testified that the 911 center reported to him on the telephone that the truck driver requested that he come to the scene. (Tr. 79). Mr. Bowden's employee, William Moore, drove the truck that day. Mr. Moore is no longer employed by ATR and was not at the hearing. (Tr. 79). Mr. Moore quit working for ATR about a year ago and Mr. Bowden testified that he was unable to locate him. (Tr. 106). ATR sent a 50-ton hydraulic heavy recovery wrecker. Mr. Moore described the scene to Mr. Bowden and Mr. Bowden gave him orders on what to do. (Tr. 79, 80). Mr. Moore asked Mr. Bowden about the possibility of pulling the truck backwards. He sent Mr. Bowden pictures. Mr. Bowden instructed him to try and lift the truck. (Tr. 81, 82).³ Mr. Bowden testified that the trailer was over fifteen years old and it failed when ATR tried to lift it. (Tr. 82). After ATR attempted to lift the truck and the trailer failed, Mr. Bowden decided that they needed to call two other wrecker services and they called in Smith's Towing and Jerry's Wrecker Service. One is from near Beckley and the other is from Alta. (Tr. 83). Mr. Bowden requested that Smith's bring its heavy wrecker to hook to the trailer to keep it from tipping and requested that Jerry's Wrecker Service bring rollbacks and manpower. (Tr. 84). ATR had a second heavy wrecker, but there was not an available operator to take it to the scene. (Tr. 84).

Mr. Bowden testified that ATR took Mr. Luna to Mount Hope, about an hour and a half away, because there were no hotels with vacancies any closer. (Tr. 86). When Mr. Luna requested sleeping in his truck, Mr. Bowden told him that he could not because ATR's insurance would not allow it. (Tr. 87). Mr. Bowden said that Mr. Luna's truck "was unofficially held." (Tr. 87). Mr. Bowden said once the insurance company indicated on Monday it was going to cover the bill, Mr. Luna could have left any time. Mr. Bowden believes Mr. Luna left on Tuesday. (Tr. 87). Although Mr. Bowden testified that they did not charge Mr. Luna to take him to the hotel, there was a \$100 fee on the bill related to the service. (Tr. 92; OOIDA Ex. 9).

The first paragraph of the second page of the document generated by ATR trying to explain its invoice stated that the driver contacted ATR requesting service using someone else's phone. (OOIDA Exhibit 7). Mr. Bowden testified that that statement was "completely inaccurate." (Tr. 92). The call log from Summers County 911 reported that an emergency call was made from telephone 304-207-6465. (Tr. 95; OOIDA Exhibit 8).

On the invoice supplied to OOIDA from ATR, it indicated it was requested by Summers 911. (OOIDA Exhibit 9).

ATR ended up sending out two different bills. (Tr. 99). One was for \$30,000 and one was for \$31,660.08. (Tr. 100; OOIDA Exhibit 9). Mr. Bowden obtained the statement from Mr. Dawson supporting his contention that the tow was a consent tow and held it for the hearing. (Tr. 102, 103). Mr. Bowden also indicated that the fuel surcharge on his invoice was improper. Mr.

³ It seemed odd that Mr. Bowden would attempt to make decisions on a complicated tow recovery job without being on scene.

Moore apparently didn't realize that the other towers already had fuel surcharges. (Tr. 103). Mr. Bowden had no bills from Jerry's or Smith's with him at the hearing. (Tr. 106). Mr. Bowden indicated that the one invoice did not include the salvage that he paid for the trailer, which reduced the charge by about \$1,600. (Tr. 109). On one ATR representation to the Commission, ATR indicated that the insurance company was happy with ATR's price. (Tr. 117).

Joshua Dawson is a friend of Mr. Bowden's. (Tr. 131). He also works as one of the four paid firefighters for the Hinton Fire Department. (Tr. 131, 137). Mr. Bowden is also one of the four. (Tr. 78, 79). He talked to Mr. Bowden about his testimony prior to the hearing and had crafted a written statement. (Tr. 135; Anthony Exhibit 1). The written statement contradicted the oral testimony in that it did not mention anything about Mr. Dawson suggesting three carriers to Mr. Luna. (Tr. 131; Anthony Exhibit 1). The written statement was drafted at least a year after the accident. (Tr. 137). Mr. Dawson typed up the written statement while he was at work at the fire station where he works with Mr. Bowden. (Tr. 138). Although the statement was notarized, Mr. Dawson testified that he did not sign the document in the presence of the notary and he has no knowledge of who the notary is. (Tr. 139). Mr. Bowden and Mr. Dawson have worked together at the fire station for at least seven years and he has a friendly relationship with Mr. Bowden. (Tr. 141).

Mr. Dawson appeared on the accident scene as a member of the VFD. (Tr. 120). He arrived in his own personal vehicle. He assumed officer in charge of duty since he was the first to arrive. (Tr. 121, 122). Mr. Dawson testified that he gave Mr. Luna three difference choices for wrecker services, Jerry's, Smith's and ATR. Mr. Dawson testified that Mr. Luna instructed him to call ATR. Mr. Dawson testified that he contacted Summers 911 and instructed it to send ATR. (Tr. 122). When Chief Tom Scott arrived on the scene, the officer in charge of duty switched to Chief Scott. (Tr. 124). Mr. Scott was the third person on the scene. (Tr. 124). The VFD did all the traffic control despite the fact that ATR's invoice contains a charge of \$1,080 for traffic control/flaggers. (Tr. 127, OOIDA Exhibit 9).

Smith's, ATR and Jerry's were the three towers that eventually reported to the scene. (Tr. 133). Mr. Dawson testified that for the county, there is only one other large wrecker on the rotation list. (Tr. 136). Mr. Dawson testified that he left details out of his statement because his statement was made a year and a half after the incidents and he was "not going to be able to recall every little detail." Yet, at the hearing, which occurred even later, Mr. Dawson remembered offering the three towers. (Tr. 137). Mr. Dawson created the statement about six to eight weeks prior to the hearing. (Tr. 137). Mr. Dawson was well aware that his friend owned ATR and has been aware of it ever since Mr. Bowden opened the business. (Tr. 140). Mr. Dawson testified he was not sure whether there was even a rotation schedule in effect at the time for tows for large semis. (Tr. 142).

Jennifer Moore-Warner, a Staff analyst, works on tow cases. (Tr. 150, 151). In cases where a tow operator has no tariff on file, the statewide maximum rates apply. (Tr. 153). ATR does not have a tariff, so it would have to charge under the statewide maximum rates. (Tr. 155). If the tow is determined to be a third-party tow, Staff originally recommended a refund of \$15,087. (Staff Exhibit 1; Tr. 155). Staff testified at hearing that it looked at the calendar wrong

and that more of the hours would have been weekend hours, resulting in a higher charge. Accordingly, Staff recommended a refund, assuming the tow was found to be third-party, of \$10,067. (Staff Exhibit 2). Staff testified the difference between the two invoices appeared to be related to the storage rate and fuel surcharge and not connected to any credit for salvage to the trailer. (Tr. 159).

DISCUSSION

The only issue before the Commission is whether or not this is a third-party tow.⁴ If the Commission concludes this is a third-party tow, the evidence is clear that a \$10,067 refund is owed by ATR.

The question is a simple question of fact. Did Mr. Luna request ATR as the wrecker to assist him or did the wrecker get assigned by a third party, the Summers County 911 system?

It is quite clear that the tow involved is a third-party tow. Mr. Luna, who was quite credible on the witness stand, testified that he did not request ATR. Indeed, he was attempting to find a resolution to his problem that did not involve the use of a wrecker service. Mr. Luna's testimony is corroborated by two bills issued by ATR which list "Summers 911" as the source of the tow. It is further corroborated by the Summers County 911 log, which indicated a call about the incident from an "unknown caller" with a West Virginia area code, which resulted in the dispatch by the 911 system. In addition to the written records, Chief Tom Scott confirmed that the call came from Summers County 911.

Contrary evidence at hearing was offered by a friend and close co-worker of the owner of ATR. However, Mr. Dawson's testimony was not credible. It was also troubling that the affidavit that someone drafted failed to include crucial details that were later included in the oral testimony. It was also troubling that Mr. Dawson admitted that he did not sign the document in the presence of a notary despite the document being notarized. Additionally, the affidavit was held by ATR until the hearing. It was obvious that Mr. Dawson had close ties to Mr. Bowden and was hardly disinterested. His testimony contradicted impartial documentary evidence. Even Mr. Bowden indicated that a written document created by ATR was "completely inaccurate." Contrary to this mess of contradictions and gaps in credibility was substantial credible evidence. The affidavit apparently created by Mr. Dawson and Mr. Dawson's testimony should be given little, if any weight.

Given that the credible evidence clearly demonstrates that the tow in issue is a third-party tow, ATR should be required to issue a refund. Staff calculates the refund due at \$10,067 and no party disputed the number.

⁴ At hearing, ATR attempted to argue that OOIDA could not bring an action in West Virginia because it was not registered with the Secretary of State's Office as doing business in West Virginia. It could not cite authority for the proposition and was invited to do so in briefing. ATR did not file a brief. Its argument regarding some bar to OOIDA filing a complaint before the Commission should be deemed abandoned. In any case, it appears that OOIDA is a proper party. Mr. Luna also appeared at hearing and supported the claim against ATR.

FINDINGS OF FACT

1. The tow at issue is a third-party tow. (Tr. 18, 19, 21, 23, 45, 46, 62, 63, 64, 68, 92, 95; OOIDA Exhibit 6; OOIDA Exhibit 7; OOIDA Exhibit 8; OOIDA Exhibit 9).
2. ATR overcharged for the tow in the amount of \$10,067. (Staff Exhibit 2; Tr. 1, 53, 155, 159).

CONCLUSION OF LAW

ATR should be required to issue a refund \$10,067.

ORDER

IT IS, THEREFORE, ORDERED that Anthony's Truck Repair Ltd. Co. refund \$10,067 to Ysabel Luna and the Owner-Operator Independent Driver's Association within ten days of the date this Order becomes a final order of the Commission.

IT IS FURTHER ORDERED that the matter be removed from the open docket.

The Executive Secretary is ordered to serve this Order upon the Commission and its Staff by hand delivery, upon all parties of record who have filed an e-service agreement with the Commission by electronic service and upon all other parties by United States Certified Mail, return receipt requested.

Leave is granted to the parties to file written exceptions supported by a brief with the Executive Secretary of the Commission within fifteen days of the date of this Order. If exceptions are filed, the parties filing exceptions shall certify that all parties of record have been served the exceptions.

If no exceptions are filed, this Order shall become the order of the Commission, without further action or order, five days following the expiration of the fifteen day time period, unless it is ordered stayed by the Commission.

Any party may request waiver of the right to file exceptions by filing an appropriate petition in writing with the Executive Secretary. No such waiver, however, will be effective until approved by order of the Commission.



Keith A. George
Chief Administrative Law Judge

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