

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of **Marion Dougherty**, Notice :  
of Apparent Violation and Intent to Assess : Case No. 07-1218-TR-CVF  
Forfeiture. : (OH3231006763C)

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**POST-HEARING BRIEF  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS .....	2
A. Procedural History of the Case .....	2
B. Factual Background of the Violation at Issue in this Proceeding.....	2
III. LAW AND ARGUMENT .....	3
A. Carriers and drivers of commercial motor vehicles must comply with the federal motor carrier safety regulations. ....	3
B. The Respondent failed to comply with the regulations by operating a commercial motor vehicle while equipment was unsecured and in danger of falling on to the roadway. ....	4
C. The Commission has authority to assess civil forfeitures.....	8
IV. CONCLUSION .....	9
V. PROOF OF SERVICE .....	10

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**I. INTRODUCTION**

MLD & Sons Industries LLC ("Respondent") contests liability for violation of the motor carrier safety regulation at issue in this proceeding. The Respondent violated a provision of the federal motor carrier safety regulations in failing to secure equipment on a commercial motor vehicle in operation. In the company's defense, Mr. Marion Dougherty, owner of MLD & Sons Industries LLC, offered his own testimony and submitted pictures not taken at the time of the violation at issue. The record shows that the Staff of the Public Utilities Commission of Ohio ("Staff") offered the testimony of a highly qualified and credible safety inspector, as well as the testimony of an experienced compliance officer of the Transportation Compliance Division of the Public Utilities Commission of Ohio ("Commission"), to support both the apparent violation and the resulting civil forfeiture. The record supports the finding of violation of the federal motor carrier safety regulation at issue in this proceeding. Based on the evidence of record, established precedent of the Commission, and sound public policy, the total civil forfeiture of one hundred dollars (\$100.00) should be imposed against the Respondent.

## **II. STATEMENT OF FACTS**

### **A. Procedural History of the Case**

The Respondent was sent a Notice of Preliminary Determination on November 13, 2007, as required and described in Section 4901:2-7-12 of the Ohio Administrative Code.<sup>1</sup> The Notice of Preliminary Determination cited violation of Section 392.9, driver load securement.<sup>2</sup> The Respondent then filed a request for a hearing in this matter. The hearing was conducted on March 18, 2008.

### **B. Factual Background of the Violation at Issue in this Proceeding**

On September 18, 2007, Ohio State Highway Patrol Inspector Edward Wiklinski conducted a full inspection of a commercial motor vehicle operated by MLD & Sons Industries LLC and driven by Mr. Marion L. Dougherty at mile post 141 on Interstate 77.<sup>3</sup> Inspector Wiklinski had observed an unsecured dunnage board hanging under the frame of the vehicle's trailer as it traveled along the highway.<sup>4</sup> For that reason, Inspector Wiklinski stopped the vehicle for an inspection, which began at 11:00 a.m. and was completed at 11:45 a.m.<sup>5</sup> Following the inspection, Inspector Wiklinski prepared a report

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<sup>1</sup> Ohio Admin. Code § 4901:2-7-12 (Anderson 2007).

<sup>2</sup> 49 C.F.R. § 392.9.

<sup>3</sup> Staff Exhibit 1.

<sup>4</sup> Tr. at 15.

<sup>5</sup> Staff Exhibit 1.

describing the results of the inspection. The report was introduced at the hearing as Staff Exhibit 1.

As stated in his report, Inspector Wiklinski found one violation of the federal motor carrier safety regulations: 49 C.F.R. § 392.9, driver load securement: dunnage board under trailer frame unsecured, out of service.<sup>6</sup> Inspector Wiklinski noted in his report that one end of the dunnage board was hanging down and that there were no devices securing the board to the trailer.<sup>7</sup> Because the dunnage board was in danger of falling on to the roadway, Inspector Wiklinski cited the Respondent for this out-of-service violation.<sup>8</sup> The out-of-service condition was corrected at the scene of the inspection, after Mr. Dougherty secured the dunnage board to the trailer with a bungee cord or similar securement device.<sup>9</sup> The Staff is seeking a civil forfeiture for the violation of failing to secure equipment as required by Section 392.9.

### **III. LAW AND ARGUMENT**

#### **A. Carriers and drivers of commercial motor vehicles must comply with the federal motor carrier safety regulations.**

The Commission, as the lead agency for the Motor Carrier Safety Assistance Program in Ohio, regulates the operation of commercial motor vehicles. In furtherance of this obligation, the Commission has adopted an extensive body of rules to govern the

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Staff Exhibit 1; Tr. at 17. The federal motor carrier safety regulations authorize inspectors to place motor vehicles "out of service." 49 C.F.R. § 396.9(c).

<sup>9</sup> Tr. at 34.

conduct of motor transportation companies that are engaged in commerce. The Commission has adopted rules for motor carrier safety pursuant to authority delegated by the Ohio General Assembly under Ohio Revised Code Section 4923.03. These rules, which are found under Ohio Administrative Code Section 4901:2-5-02, largely adopt the U.S. Department of Transportation's motor carrier safety regulations, including Section 392.9. The state has continually sought to implement programs to ensure the safety of the motoring public and to reduce accidents involving commercial motor carriers. It is the Commission's duty to keep Ohio's roadways safe from accidents involving commercial motor vehicles. Enforcement of the regulations is fundamental in this duty. Compliance with the regulations is imperative.

**B. The Respondent failed to comply with the regulations by operating a commercial motor vehicle while equipment was unsecured and in danger of falling on to the roadway.**

The federal motor carrier safety regulations, as adopted by the Commission, provide that "[a] driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless . . . [t]he commercial motor vehicle's tailgate, tailboard, doors, tarpaulins, spare tire and other equipment used in its operation, and the means of fastening the commercial motor vehicle's cargo, are secured."<sup>10</sup> The evidence shows that the Respondent did not comply with this requirement.

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<sup>10</sup>

49 C.F.R. § 392.9(a)(2).

The Staff satisfied its burden of proof by a preponderance of the evidence that Mr. Dougherty operated a commercial motor vehicle while “other equipment used in its operation” was not secured.<sup>11</sup> Inspector Wiklinski, an experienced and credible safety inspector, testified that “[a]s the vehicle passed me, I noticed a dunnage board hanging down from one side, which is an obvious violation.”<sup>12</sup> After Inspector Wiklinski completed the inspection of Mr. Dougherty’s vehicle, he took the extra time to include lengthy notes in his report. The notes indicate that the dunnage board was hanging down and that there were no devices to secure the board to the vehicle’s trailer.<sup>13</sup> At the hearing, Inspector Wiklinski confirmed that there were no securement devices, separate from the support brackets for the trailer itself, to fasten the dunnage board to the trailer.<sup>14</sup> Inspector Wiklinski testified that the dunnage board should have been secured with at least one strap or other securement device, which is consistent with the Commission’s precedent.<sup>15</sup>

Section 392.9 is in effect for a reason. It prompts drivers and carriers to ensure that equipment does not shift on or within, or fall from, their commercial motor vehicles. The unsecured dunnage board posed just such a risk. It could have fallen on to the

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<sup>11</sup> *Id.*

<sup>12</sup> Tr. at 7-8, 15.

<sup>13</sup> Staff Exhibit 1.

<sup>14</sup> Tr. at 21, 25.

<sup>15</sup> *Arctic Express, Inc.*, Case No. 03-238-TR-CVF (Opinion and Order at 11) (March 17, 2004) (concluding that Section 392.9 requires some device, such as a chain or strap, to secure a spare tire in a tire rack beneath the vehicle); Tr. at 115.

roadway and hindered the ability of Mr. Dougherty and other drivers to control their vehicles at highway speeds. The dunnage board was not small in size; it was described as a standard 4 x 4 wood board, approximately eight feet in length.<sup>16</sup> Inspector Wiklinski indicated that the dunnage board was hanging down toward the road as Mr. Dougherty's vehicle sped along the highway at fifty-five miles per hour.<sup>17</sup> Inspector Wiklinski further testified that, when he initially stopped Mr. Dougherty's vehicle, the dunnage board was "approximately one foot off the road surface" and "[t]he only thing that kept it from falling to the surface of the road was the way it was angled in relation to when it initially fell down from one side."<sup>18</sup> An eight-foot board that is nearly scraping the surface of the highway is not "secured" as required by Section 392.9.

While there may be some question about how much the dunnage board could have moved, there is no question that it could, in fact, have moved while Mr. Dougherty was driving the vehicle. Mr. Dougherty conceded that the dunnage board can shift within the trailer's support brackets. At several points during the hearing, Mr. Dougherty admitted that the dunnage board can move vertically while the vehicle is in motion.<sup>19</sup> Further, the record demonstrates that the dunnage board must have moved from its original position. Mr. Dougherty testified that the dunnage board was in a position parallel to the vehicle's

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<sup>16</sup> Tr. at 20.

<sup>17</sup> *Id.* at 15, 116.

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Id.* at 76-77, 88, 97-98.



trailer when he left his place of origin.<sup>20</sup> Later that same morning, Inspector Wiklinski observed the dunnage board, hanging toward the roadway, as Mr. Dougherty's vehicle passed him.<sup>21</sup>

Mr. Dougherty attempted to show through his testimony and photographs taken after the inspection that the dunnage board was not in danger of falling on to the roadway. Yet, he admitted that the dunnage board can move when the vehicle is in transit.<sup>22</sup> If the dunnage board can move, it is not secured. Additionally, Mr. Dougherty failed to offer any reasonable explanation as to why Inspector Wiklinski's inspection report and testimony should not be believed. Instead, Mr. Dougherty has accused Inspector Wiklinski of "staging" the out-of-service condition.<sup>23</sup> Inspector Wiklinski had no motive to cite a violation that did not occur. In fact, Mr. Dougherty confirmed that he had never even met Inspector Wiklinski prior to the inspection.<sup>24</sup> The Staff established a prima facie case, which Mr. Dougherty failed to rebut successfully. The Commission should find in favor of the Staff as to the out-of-service violation at issue in this proceeding.

Section 392.9 plainly requires that equipment used in the operation of a commercial motor vehicle must be secured. The evidence shows that Mr. Dougherty was

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<sup>20</sup> *Id.* at 96.

<sup>21</sup> *Id.* at 15.

<sup>22</sup> *Id.* at 76-77, 88, 97-98.

<sup>23</sup> *Id.* at 80; Respondent Brief at 1.

<sup>24</sup> Tr. at 94.

driving a commercial motor vehicle while the dunnage board was not secured to the trailer of the vehicle. The total civil forfeiture of one hundred dollars (\$100.00) should be imposed against the Respondent.

**C. The Commission has authority to assess civil forfeitures.**

The Commission has statutory power to assess monetary forfeitures against drivers and carriers for non-compliance with federal motor carrier safety regulations.<sup>25</sup> The Ohio General Assembly granted the Commission the authority to assess forfeitures for violations of the motor carrier safety provisions.<sup>26</sup>

The Commission has authority to adopt safety rules applicable to motor carrier regulation and has, in fact, adopted the federal motor carrier safety regulations of the U.S. Department of Transportation in Title 49 of the Code of Federal Regulations, parts 40, 382, 383, 385, 387, and 390 through 397.<sup>27</sup> The Commission also adopted civil forfeiture and procedural rules.<sup>28</sup> The Commission enforces the motor carrier safety regulations for the State of Ohio.

Mr. Jonathan Frye, Chief of the Transportation Compliance Division of the Commission, testified that the Staff recommends a forfeiture in the amount of one

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<sup>25</sup> Ohio Rev. Code Ann. §§ 4919.99, 4921.99, 4923.99 (Anderson 2007).

<sup>26</sup> *Id.*

<sup>27</sup> Ohio Admin. Code § 4901:2-5-02 (Anderson 2007).

<sup>28</sup> Ohio Admin. Code §§ 4901:2-7-01 – 4901:2-7-22 (Anderson 2007).

hundred dollars (\$100.00) for this case.<sup>29</sup> Mr. Frye also testified that the proposed forfeiture was calculated in accordance with the Commission's standard methodology.<sup>30</sup>

#### **IV. CONCLUSION**

Based on the record produced at the hearing and for the reasons stated herein, the Staff respectfully requests that the Commission find that the Respondent violated Section 392.9 of the federal motor carrier safety regulations and that the Commission hold the Respondent liable for the civil forfeiture of one hundred dollars (\$100.00) as recommended by the Staff.

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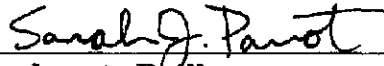
<sup>29</sup> Tr. at 54.

<sup>30</sup> *Id.*

Respectfully Submitted,

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Counsel for the Staff of the Public Utilities  
Commission of Ohio

**V. PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing **Post-Hearing Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served via regular U.S. mail, postage prepaid, upon Marion L. Dougherty, MLD & Sons Industries LLC, P.O. Box 217, Bellevue, Ohio, 44811, this 18th day of April, 2008.

  
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Assistant Attorney General