

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)

OPINION AND ORDER

The Commission, having considered the testimony and exhibits presented in this matter and the applicable law, hereby issues its opinion and order.

APPEARANCES:

Marc Dann, Attorney General, by Duane W. Luckey, Section Chief, and Sarah Parrot and Stephen A. Reilly, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, 9th Floor, Columbus, Ohio 43215, on behalf of the staff of the Commission.

Marion Lee Dougherty, P.O. Box 217, Bellevue, Ohio 44811, on his own behalf as complainant.

OPINION:

I. Procedural History

On September 18, 2007, Officer Edward S. Wiklinski, of the Ohio State Highway Patrol, observed a commercial motor vehicle (CMV) with an unsecured dunnage board under the trailer.¹ Officer Wiklinski determined that this constituted a violation of 49 Code of Federal Regulations (C.F.R.) 392.9. After conducting an inspection of the vehicle, the officer cited Mr. Marion Dougherty. Thereafter, on November 13, 2007, Mr. Dougherty was timely served a Notice of Preliminary Determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In the notice, Mr. Dougherty was informed that the Commission's staff (staff) intended to assess a civil monetary forfeiture of \$100.00 for the violation of 49 C.F.R. 392.9. Mr. Dougherty responded on November 27, 2007, by requesting an administrative hearing. In advance of the hearing, a telephonic settlement conference was held on December 20, 2007; however the parties were unable to resolve this matter and a hearing was held on March 18, 2008. At the hearing, Officer Wiklinski and Jonathan Frye testified on behalf of the staff and Mr. Dougherty testified on his own

¹ A dunnage board is a piece of wood that is used to secure cargo. In this case, the dunnage board was four inches by six inches in diameter, eight feet in length, and weighed 27 pounds (Tr. at 70, 99).

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behalf. On April 17 and 18, 2008, Mr. Dougherty and staff, respectively, filed briefs in this case.

II. The Law

Under Rule 4901:2-5-02(A), O.A.C., the Commission adopted the Federal Motor Carrier Safety Rules, 49 C.F.R., Sections 40, 42, 383, 387, 390-397, governing the transportation of persons or property in interstate commerce where such transportation takes place into or through this state. Further, Section 4919.99, Revised Code, authorizes the Commission to assess a civil forfeiture of up to \$10,000 per day, per violation, against any person who violates the safety rules adopted by the Commission when transporting persons or property in interstate commerce, in or through this state.

The rule at issue in this case is 49 C.F.R. 392.9. This rule provides, in part, that a driver may not operate a CMV and a motor carrier may not require or permit a driver to operate a CMV unless the tailgate, tailboard, doors, tarpaulins, spare tire, and other equipment used in its operation and the means of fastening the cargo are secured.

III. Evidentiary Issue

At the hearing, staff introduced photographic evidence that the staff witness claimed depicted the dunnage board in a position that constituted a violation. Mr. Dougherty also introduced photographic evidence that he claimed depicted the dunnage board in a position that proved no violation existed. These photographs were admitted into the record of this proceeding; however, considering the circumstances associated with the taking of the photographs, as discussed below, they are given no weight in our decision.

With respect to staff's photographs (Staff Exhibits 2 and 3), Officer Wiklinski testified that, during his inspection, and after he had shown Mr. Dougherty that one end of the dunnage board was one foot from the ground, he witnessed Mr. Dougherty physically move that end of the dunnage board up from its unsecured position to a secured position on the trailer (Tr. at 11). Officer Wiklinski stated that, in order to show the position of the dunnage board at the time he first observed the violation, as Mr. Dougherty traveled past him, and at the time of the inspection, Officer Wiklinski moved the dunnage board so that it was again hanging down from the trailer and then took the photographs which are Staff's Exhibits 2 and 3 (*Id.* at 19). Because Staff Exhibits 2 and 3 depict the dunnage board in a position that was created by Officer Wiklinski, we will give these exhibits no weight.

As noted earlier, Mr. Dougherty also introduced photographs (Respondent's Exhibits 1 and 2) which he claimed he took and that he claimed show the dunnage board

in relation to the same trailer involved in the violation. Mr. Dougherty maintained that his photographs showed that the dunnage board was secured to the trailer and also showed the existence of a bolt in the dunnage board and a bungee cord, both devices that he claimed secured the dunnage board to the vehicle trailer and that proved no violation existed. However, Mr. Dougherty testified that he took these photos after the inspection concluded and after the officer had left the scene (*Id.* at 95, 98). We similarly find that Respondent's Exhibits 1 and 2 should be given no weight because these photographs were taken after the inspection was finished and therefore do not show the position of the dunnage board or the existence of any securement devices at the time of the inspection.

IV. Discussion and Conclusion

The sole issue in this case is whether a dunnage board was secured to the vehicle trailer operated by Mr. Dougherty, which would constitute a violation of the Commission's rules.

Staff's Position

Officer Wiklinski testified that, on September 18, 2007, he was sitting in his vehicle on the side of Interstate 77, approximately 75 yards from the roadway with a clear and unobstructed view, where he observed a CMV, operated by MLD & Sons Industries LLC and driven by Mr. Dougherty. Officer Wiklinski stated that, as the vehicle drove by, he noticed an unsecured dunnage board hanging down from one side of Mr. Dougherty's trailer (*Id.* at 15). Officer Wiklinski indicated that, because he considered this a violation, he followed Mr. Dougherty and pulled him over at a rest stop in order to conduct an inspection of his vehicle that lasted approximately 45 minutes (*Id.* at 14-15). During his inspection, he again observed that one end of the dunnage board was angled behind a support bracket underneath the trailer and the other end was unsecured and hanging down from another support bracket, approximately one foot off the road surface (*Id.* at 17). He stated that he advised Mr. Dougherty about the violation (*Id.* at 11-12, 18). Officer Wiklinski testified that he then observed Mr. Dougherty kneel underneath his vehicle trailer and, with no effort, lift and slide the dunnage board back behind another support bracket on the vehicle trailer and that Mr. Dougherty then stated there was no out-of-service violation and he would not be placed out of service (Tr. at 25-27). The officer indicated that he didn't see either a bungee cord or a bolt in the dunnage board at the time of the inspection and noted this on his inspection report (*Id.* at 35, 112, 115, 116; Staff Ex. 1). The officer further testified that in order to show the position of the dunnage board at the time of the violation, he moved the dunnage board from the support bracket and let it hang toward the ground and then took photographs. He indicated that after taking the photographs, he directed Mr. Dougherty to put the dunnage board back behind the support bracket. The inspector claimed that, at the conclusion of the inspection, he saw

Mr. Dougherty put the dunnage board back behind the support bracket and that he also put a bungee cord on one end of the dunnage board to tie it in place. The officer also stated that, because that bungee cord was sufficient to secure the dunnage board, he left the scene knowing the violation had been corrected (Tr. at 22, 35, 114).

Mr. Dougherty's Position

Mr. Dougherty disputed the claims of the officer and maintained that the dunnage board was always secured to the support brackets of the vehicle trailer. He testified that he believed there was no reason to stop him or to conduct an inspection, that the officer did not need a reason, and that he had been stopped in the past to check the status of his permits (*Id.* at 108). Mr. Dougherty argued that the brackets on the vehicle trailer frame are stamped steel and have sharp edges and he claimed that the dunnage board cannot be easily moved against these brackets (*Id.* at 59). In addition, he claimed that, in order to move the dunnage board, he needed to put a piece of webbing between the brace and the board (*Id.* at 66). Mr. Dougherty maintained that there was a bolt at the front end of the dunnage board and a bungee cord on the other end and that these two devices held the dunnage board secured, but that they were simply not visible to the officer (*Id.* at 71, 74-75, 88, 102, 103). He also claimed that he could see the dunnage board from his cab and that the dunnage board never moved horizontally; although he acknowledged that the dunnage board could move vertically (*Id.* at 87, 98). Mr. Dougherty further argued that, even though the officer claimed that the dunnage board was loose, the officer was unable to move the board and had to ask him how to move it (*Id.* at 89).

Rule 4901:2-7-20, O.A.C., requires that, at hearing, staff prove the occurrence of a violation by a preponderance of the evidence. The Commission finds that, based upon the evidence in this proceeding, staff has proven that Mr. Dougherty violated 49 C.F.R. Section 392.9 as alleged. Staff's witness Wiklinski is a qualified officer and he presented knowledgeable, competent, and unequivocal testimony at hearing that the CMV driven by Mr. Dougherty drove past him with an unsecured dunnage board and, that, at the time of the inspection, the dunnage board was unsecured to the vehicle trailer. Officer Wiklinski also testified that he had a clear and unobstructed view of Mr. Dougherty's vehicle as it traveled by him and at the time of the inspection. Further, Officer Wiklinski testified that when he stopped Mr. Dougherty, the dunnage board was unsecured to the vehicle trailer and, that, during the inspection, he observed Mr. Dougherty physically move the dunnage board so that it was not hanging down from the vehicle trailer and claim that there was no violation. Officer Wiklinski's testimony is supported by the inspection report which was prepared by him contemporaneously with the inspection, using a laptop computer and printer. The notes on the inspection report also detail Officer's observation that the dunnage board was hanging down and that there were no devices to secure the dunnage board to the vehicle trailer. Officer Wiklinski also consistently described the dunnage

board as hanging down and unsecured. We find the testimony of Officer Wiklinski to be persuasive and that the weight of the evidence more fully supports the conclusion that the vehicle driven by Mr. Dougherty had a dunnage board that was unsecured to the vehicle trailer as alleged by staff. Further, Mr. Dougherty admitted that the dunnage board could move vertically.

Mr. Dougherty raised several defenses; however, these have no bearing on the evidence related to the violation. Mr. Dougherty claimed that he was never issued an out-of-service decal by the officer (*Id.* at 78). He also argued that he had papers that showed Officer Wiklinski had conducted over 600 inspections and had only issued an out-of-service decal to seven offending drivers (*Id.* at 42, 81). Officer Wiklinski testified that he did not issue an out-of-service decal to Mr. Dougherty because the violation had been corrected; but he acknowledged that he had "run out" of the decals (*Id.* at 44).² In this case, the issuance of an out-of-service decal had no bearing on whether the dunnage board on Mr. Dougherty's CMV was unsecured to the vehicle trailer at the time of the inspection. Because the dunnage board was secured to the trailer by Mr. Dougherty at the time the officer left the inspection spot, no out-of-service decal would have been necessary since Mr. Dougherty corrected the violation. Nevertheless, we will direct the Transportation staff to advise the Ohio State Highway Patrol about this case and to request it to remind its officers to maintain a sufficient number of out-of-service decals in the event they place a driver out-of-service.

Mr. Dougherty also argued that Officer Wiklinski failed to complete a Level One Inspection, claiming that the officer did not check for triangles, inspect his number five axle, break-away valve, check his insurance card, medical card, or registration, belts, fluids, or anything "under the hood" (*Id.* at 39, 79). The officer disputed the claims of Mr. Dougherty regarding the completeness of his inspection. While there was a disagreement between the officer and Mr. Dougherty as to whether a complete Level One Inspection was conducted, we find no merit to this defense. In this case, the issue is not the completeness of the inspection, but rather whether the dunnage board was secured to the vehicle trailer.

Finally, in his brief, Mr. Dougherty questioned the motives of the officer and wondered why the officer waited approximately 32 minutes to take the photographs and why he did not take the photographs when the inspection first began. We find the testimony of the officer reasonably explains the time frame for the photographs. According to the officer, during the 45 minute inspection, he pointed out the violation to Mr. Dougherty. Upon seeing the violation, Mr. Dougherty then moved the dunnage board up and behind the vehicle trailer bracket. Sometime later, the officer moved the dunnage

² Staff did not contest the number of inspections cited to by Mr. Dougherty.

board back to a position close to its pre-inspection location, and took the photographs to demonstrate what the dunnage board looked like at the time Mr. Dougherty initially drove past him and at the time the officer first pointed out the violation. After he had taken the photographs, he directed Mr. Dougherty to move the dunnage board back to a secured location on the vehicle trailer. We also find that, under the circumstances, the motives of the officer were merely to show what the dunnage board looked like at the time of the inspection. As we have noted previously, the photographs have been given no weight in our decision and do not form the basis of this opinion, which is based on the record evidence.

With respect to the forfeiture proposed by staff, Rule 4901:2-7-06(A), O.A.C., provides that, in assessing a civil forfeiture, the Commission shall consider the nature and circumstances of the violation, the extent and gravity of the violation, the degree of the respondent's culpability, the respondent's prior violations, the respondent's ability to pay, and all other matters as justice requires. The staff presented testimony from Jonathan Frye, the chief of the compliance division of the Commission's transportation department regarding the proposed civil forfeiture. Mr. Frye testified that, in determining the amount of the proposed forfeiture, staff considered these factors (*Id.* at 51-53). Further, Mr. Frye recommended that the proposed forfeiture of \$100.00 be assessed by the Commission in this case (*Id.* at 54). Mr. Dougherty raised no issue with regard to the amount of the civil forfeiture in this case. Therefore, the Commission finds that, based upon the record at hearing, the civil forfeiture in this case is fair, reasonable, and consistent with forfeitures proposed for drivers in similar circumstances. Accordingly, the Commission will assess a civil forfeiture of \$100.00 against Mr. Dougherty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On September 18, 2007, an Ohio State Highway Patrol officer stopped and inspected a motor vehicle operated by Mr. Marion L. Dougherty. Staff found a violation of 49 C.F.R. 392.9.
- (2) Mr. Dougherty was timely served a Notice of Preliminary Determination that set forth a civil forfeiture of \$100.00 for the violation of 49 C.F.R. 392.9.
- (3) A hearing was in this matter was held on March 18, 2008.
- (4) The evidence of record demonstrates the Mr. Dougherty violated 49 C.F.R. 392.9 by having a dunnage board unsecured to his trailer.

- (5) Pursuant to Section 4905.83, Revised Code, Mr. Dougherty must pay the State of Ohio the civil forfeiture assessed for violation of 49 C.F.R. 392.9. Mr. Dougherty shall have 30 days from the date of this opinion and order to pay the assessed forfeiture of \$100.00.
- (6) Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793.

ORDER:

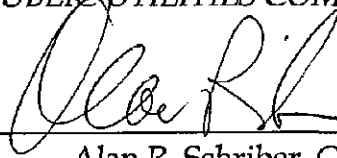
It is, therefore,

ORDERED, That Mr. Dougherty pay the assessed amount for the violation of 49 C.F.R. 392.9 within 30 days to the State of Ohio, as set forth in findings of fact and conclusions of law (5) and (6) above. It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,

ORDERED, That a copy of this opinion and order be served upon the Ohio State Highway Patrol and all parties of record.

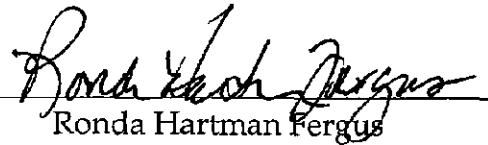
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus



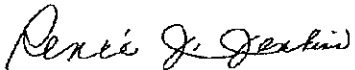
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Renee J. Jenkins
Secretary