

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of: :
James H. Gainey. : Case No. 08-571-TR-CVF

:
Notice of Apparent :
Violation and Intent to :
Assess Forfeiture. :

- - -

PROCEEDINGS

before Mr. Kerry H. Sheets, Attorney Examiner, at the
Public Utilities Commission of Ohio, 180 East Broad
Street, Room B, Columbus, Ohio, called at 10:00 a.m.
on Thursday, August 7, 2008.

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1 APPEARANCES:

2 Mr. James H. Gainey
4086 New State Road
3 Willard, Ohio 44890

4 Pro se.

5 Nancy H. Rogers, Ohio Attorney General
Duane W. Luckey, Senior Deputy
6 Attorney General
Public Utilities Section
7 By Mr. William Wright
and Mr. Thomas Lindgren
8 180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793

9
On behalf of the Transportation Staff of
10 the Public Utilities Commission.

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1 Thursday Morning Session,

2 August 7, 2008.

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4 THE ATTORNEY EXAMINER: The Public
5 Utilities Commission of Ohio has set for hearing at
6 this time and place case No. 08-571-TR-CVF, In the
7 Matter of the James Gainey. My name is Kerry Sheets.
8 I'm an attorney-examiner for the Commission and I
9 have been assigned to hear this case.

10 May I have the appearances of the parties
11 please, starting with staff.

12 MR. WRIGHT: Thank you, your Honor. On
13 behalf of the Transportation Staff of the Public
14 Utilities Commission, Ohio Attorney General's Office,
15 my name is Bill Wright. I'd also like to enter the
16 appearance of Thomas Lindgren, 180 East Broad Street,
17 Columbus, Ohio, 43215.

18 THE ATTORNEY EXAMINER: Thank you,
19 Mr. Wright.

20 Mr. Gainey.

21 THE RESPONDENT: Yes.

22 THE ATTORNEY EXAMINER: Please give your

23 name and address.

24 THE RESPONDENT: James Gainey, 4086 New

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1 State Road, Willard, Ohio.

2 THE ATTORNEY EXAMINER: Very good. And
3 the zip is 44890.

4 THE RESPONDENT: Yes, sir.

5 THE ATTORNEY EXAMINER: Thank you. Are
6 there any preliminary matters to take care of?

7 MR. WRIGHT: I don't believe so, your
8 Honor.

9 THE ATTORNEY EXAMINER: Do you have
10 witnesses to call, Mr. Wright?

11 MR. WRIGHT: Yes, sir. We will have two
12 witnesses today. I have Trooper Gary Wolfe and Tom
13 Forbes from the staff, and we will have a total of
14 five exhibits.

15 THE ATTORNEY EXAMINER: Very good. Go
16 ahead and call your witness.

17 MR. WRIGHT: Okay. At this time we would
18 call to the stand Trooper Gary Wolfe.

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1 GARY WOLFE

2 being first duly sworn, as prescribed by law, was
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 By Mr. Wright:

6 Q. Mr. Wolfe, would you please state your
7 full name for the record.

8 A. Gary T. Wolfe.

9 Q. And by whom are you employed?

10 A. Ohio State Highway Patrol.

11 Q. How long have you been serving in that
12 capacity?

13 A. Almost 11 years.

14 Q. Okay. Do I understand you/re a former
15 truck driver?

16 A. Yes, sir.

17 Q. Could you tell us a little bit about your
18 experience as a truck driver?

19 A. I grew up with trucks, obtained a CDL at

20 a very early age. Basically prior to the patrol I
21 worked roughly four to five years at various jobs in
22 various positions operating commercial vehicles.

23 Q. Ever haul hazardous materials?

24 A. Yes, sir.

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1 Q. And you do have a CDL?

2 A. Yes, sir.

3 Q. Okay. Over the course of your tenure

4 with the State Highway Patrol, have you had occasion

5 to perform perhaps hundreds of inspections of

6 commercial motor vehicles?

7 A. Yes, sir.

8 Q. Okay. And in this particular instance

9 you performed two inspections of the same Beaver

10 Petroleum Company; is that correct?

11 A. Yes, sir.

12 MR. WRIGHT: Your Honor, at this time I

13 would like to have marked as Staff Exhibit No. 1 an

14 inspection report -- a document captioned

15 Driver/Vehicle Examination Report dated December 19,

16 2007.

17 THE ATTORNEY EXAMINER: Very good.

18 (EXHIBIT MARKED FOR IDENTIFICATION.)

19 Q. Trooper Wolfe, do you recognize what I

20 just marked as Staff Exhibit No. 1?

21 A. Yes, I do.

22 Q. Can you tell me what that is, please?

23 A. An inspection I did 12/19/2007.

24 Q. And that was of a vehicle -- excuse me --

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1 a Beaver Petroleum Company, Inc., vehicle?

2 A. Yes, sir.

3 Q. And the driver was a James H. Gainey?

4 A. Yes, sir.

5 Q. Okay. According to the report this was a

6 level 2 walkaround inspection; is that right?

7 A. That's right.

8 Q. Could you briefly explain what that

9 means?

10 A. Basically that's, as stated, a walkaround

11 inspection. Level 2 is basically an inspection of

12 everything but the undercarriage, including the brake

13 measurements.

14 Q. Okay. Now, a question I forgot to ask

15 you, the reason for the stop in this case under

16 locally defined fields down at the bottom says

17 O-B-V-I. What does that mean?

18 A. Just an obvious violation, such as side

19 light, seat belt violation, any violation of state or

20 federal code.

21 Q. Would it be your belief that's one of the

22 violations written up here, for example, an

23 inoperable light, that may have been what it was that

24 caused you to pull the vehicle over?

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1 A. Yes, sir.

2 Q. And you did notice it was a placarded
3 vehicle carrying hazardous materials.

4 A. Yes, sir.

5 Q. All right. Now, if you could, there's a
6 section on the report talking about violations.

7 Could you very briefly indicate what some of your
8 findings were there?

9 A. Yes. I will just go through the list
10 here starting with the first one 393.48. During my
11 walkaround, basically start there at the driver, do
12 the walkaround, start having them turn the wheel from
13 the left and right, look at the tie rod ends, brake
14 hoses, things of that nature, that fall under
15 level 2 category.

16 The first violation here was written axle
17 right side brake completely extended, not moving upon
18 service brake application. This is done with the
19 driver's help. I see a brake extended like that, I

20 have them hit it, sometimes referred to as possibly a
21 cam over brake, but I'm looking to see if the brake
22 is actually working, and when he puts his foot on the
23 brake, if there are any holes in the airline as well
24 the first violation would be inoperative breaks,

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1 393.67, which is second one listed, is
2 the fuel system requirement. I noticed diesel fuel
3 leaking onto the ground. Looking at it a little
4 closer, it was determined it was leaking at the
5 injectors at the fuel pump and leaking on the motor
6 and ground, therefore, would be an out-of-service
7 violation.

8 Q. Do you recall if you pointed that out to
9 Mr. Gainey?

10 A. Yes. All violations were pointed out to
11 Mr. Gainey.

12 Q. Okay. All right.

13 A. And we had a right rear side mark light
14 393.9, inoperable, which is not a major violation but
15 it is a violation.

16 Q. That, perhaps, was the obvious reason you
17 pulled the vehicle over.

18 A. Yes, sir.

19 Q. Okay.

20 A. Next in line here would be something that
21 was probably done first. I approached the vehicle
22 and talked to the driver asked him for the shipping
23 papers, a placarded vehicle. In this case the driver
24 said he was empty, and I determined that it was full

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1 by basically tapping on the tank, feeling the lack of
2 the echo, and feeling what appeared to be a liquid in
3 one of the containers, later learning this was
4 actually loaded with 100 to 150 gallons of fuel oil
5 as per me and the driver.

6 Q. If I may ask you, that tapping on the
7 tank, is that something you have utilized in other
8 inspections.

9 A. Yes.

10 Q. And do you find that typically is a valid
11 indicator of whether or not something is full or
12 empty?

13 A. Yes, sir.

14 Q. Okay. Go ahead. And the next thing we
15 have here under 383.93 is no hazardous material
16 endorsement on the CDL, operating a loaded bulk tank
17 truck containing haz-mat without an endorsement, only
18 a tank endorsement, which is one of the requirements,
19 but no haz-mat endorsement itself.

20 And, finally, the brake violation, which
21 is a warning buzzer, buzzer and lights inop. One or
22 the other of those needs to work in the vehicle to
23 stay in operation, so with both of them not working
24 as well, it's another out-of-service violation.

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1 Q. Trooper Wolfe, I notice under the
2 violations section there's a category designated
3 "OOS." What does that mean?

4 A. Out of service.

5 Q. So the various violations where there is
6 a Y under the OSS category, those would have been
7 violations for which you deemed worthy of putting the
8 vehicle and/or driver out of service; is that
9 correct?

10 A. Yes, sir.

11 Q. Fine. Now, I'd like to direct your
12 attention specifically to the violation of
13 383.9(b)(4). Do you see that?

14 A. Yes.

15 Q. Further over there, there's a numeric
16 reference under the Citation category. Do you see
17 that?

18 A. Yes.

19 Q. What does that refer to?

20 A. That is a ticket number that I wrote
21 Mr. Gainey for that violation under the Ohio Revised
22 Code, as well as that regulation under 383. What
23 that was just a physical citation issued to him for
24 no hazardous material endorsement requiring him to

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1 appear in the jurisdiction court, to wit, Barberton

2 court.

3 Q. And that would have been based on you
4 actually viewing Mr. Gainey's license during the stop
5 and observing that it did not contain a haz-mat
6 enforcement on it?

7 A. Yes, sir.

8 Q. Okay. Do you know what the disposition
9 of the citation was?

10 A. Yes, sir.

11 Q. Could you please explain that?

12 A. I have a copy of his driving record here.
13 It would require a mandatory appearance for driving
14 without this endorsement. He was convicted 12/27/07
15 in Barberton Municipal Court with a plea of guilty
16 and the disposition received two points on his CDL
17 for that violation.

18 Q. And, again, that violation being no
19 hazardous materials endorsement on the CDL itself; is

20 that correct?

21 A. Yes, sir.

22 Q. And the information you're discussing,

23 that would have been come from the so-called LEADS

24 system?

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1 A. Yes, sir.

2 Q. Could you explain what the acronym LEADS
3 is, L-E-A-D-S? Could you explain for the record what
4 that acronym stands?

5 A. Law Enforcement Automated Data System.
6 It's basically the main computer we would use to run
7 driver licenses to gain information. It gives us
8 such things as officer safety help as far as people
9 who are wanted, things of that nature, but a tool we
10 use on every stop to determine if a person is valid,
11 what their driving record is, what endorsements they
12 have, and things such as officer safety issues if
13 they are wanted.

14 Q. So the LEADS system would have in this
15 instance confirmed what you actually observed when
16 you stopped Mr. Gainey, that is, that his license at
17 that time, that being 12/19/07 did not contain a
18 hazardous material endorsement, correct?

19 A. Yes, sir.

20 Q. Okay. Now, you said you performed two

21 inspections of the same vehicle; is that correct?

22 A. Yes, sir.

23 Q. And Mr. Gainey driving both times?

24 A. Yes, sir.

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1 MR. WRIGHT: At this time I'd like to
2 have marked as Staff Exhibit No. 2 a document
3 captioned Driver/Vehicle Examination Report for an
4 inspection dated 1/9/2008.

5 THE ATTORNEY EXAMINER: So marked.

6 MR. WRIGHT: Thank you.

7 (EXHIBIT MARKED FOR IDENTIFICATION.)

8 Q. Trooper Wolfe, could you identify that
9 document, please?

10 A. That would be a level 2 inspection that I
11 did on 1/9/2008 to the same carrier, the same
12 vehicle.

13 Q. I'm sorry, I missed a couple questions
14 from the first inspection report, if I could jump
15 back very briefly for that. So as a result of the
16 violations you found on December 19th of '07 during
17 that inspection you placed -- what was placed out of
18 service?

19 A. The driver and the vehicle.

20 Q. Let's talk about the vehicle first. What

21 did you do to place the vehicle out of service?

22 A. As indicated on the report, I had several

23 out-of-service violations, so this situation I felt

24 it was necessary to tow the vehicle and basically put

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1 a red sticker on it placing it out of service until
2 these major out-of-service violations were in
3 compliance.

4 Q. Did you fully explain to Mr. Gainey what
5 that meant?

6 A. Yes, sir.

7 Q. And what did you explain to him?

8 A. I explained to him that the truck was
9 being towed, working with carrier, Mr. Gainey, and
10 myself, you know, working together as far as where it
11 was going, making sure they were okay on that, as
12 well as explaining the citation that I gave him
13 putting him out of service, mandatory appearance in
14 court, and his requirements not to drive this
15 vehicle, as the report says, until the requirements
16 of the hazardous material endorsement that was
17 required.

18 Q. Would he also have had to have certain
19 repairs made before the vehicle would be roadworthy

20 again?

21 A. Yes, sir.

22 Q. And that would be the violations you
23 noted again with the Y under the out-of-service
24 category in your report.

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1 A. Right.

2 Q. Okay. In your opinion did Mr. Gainey
3 understand that the vehicle had been placed out of
4 service?

5 A. Yes, he did.

6 Q. Now, you explained to him what needed to
7 be done again to return that vehicle to service.

8 A. Yes, we did.

9 Q. Now, you indicated you also placed the
10 driver out of service.

11 A. Yes, sir.

12 Q. Could you explain what you did there, how
13 you did that?

14 A. We had extensive discussion, you know,
15 about some misunderstandings possibly on Mr. Gainey's
16 part believing he possibly did have that endorsement,
17 but I clearly showed him that he didn't, explained to
18 him that he couldn't drive a haz-mat vehicle without
19 the endorsement. He, in fact, stated well until this

20 was taken care of, he might drive one of their

21 nonhaz-mat vehicles they do have.

22 Q. Okay. Is that what is reflected in your

23 inspection notes in that report? Did that capture

24 what you were talking about, the misunderstanding and

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1 disagreement?

2 A. Some of that, yes. My notes state he
3 failed the the haz-mat roughly three times in Norwalk
4 but thought he got the endorsement two years ago.

5 Q. Okay. And was there any question in your
6 mind that Mr. Gainey understood that he was out of
7 service, he, himself, was out of service as it
8 related to driving hazardous material loads as a
9 result of the December 19 investigation?

10 A. No.

11 Q. Okay. Is it typically your practice,
12 Trooper Wolfe, upon completing an inspection to
13 provide a copy of that report to the driver?

14 A. Yes.

15 Q. Did you do so in this instance?

16 A. Yes, sir.

17 Q. And is it also your practice to typically
18 go through your findings with the drivers to make
19 sure they understand the results of the inspection?

20 A. Yes, sir.

21 Q. Do you typically ask a driver if they

22 have any questions before you leave?

23 A. Yes, sir.

24 Q. And any reason to believe you didn't do

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1 any of that in this instance?

2 A. No, sir.

3 Q. Okay. Now, I'd like to move to Staff

4 Exhibit No. 2. I apologize for that little break

5 there. Okay, we've established, I believe, have we

6 not, Trooper Wolfe, Staff Exhibit No. 2 is the

7 inspection report that you prepared for an inspection

8 done January 9, 2008; is that right?

9 A. Yes, sir.

10 Q. Again the same vehicle driven by

11 Mr. Gainey?

12 A. Yes, sir.

13 Q. And same protocol, I assume you have

14 would have gone over your report upon completion,

15 fully explained everything to Mr. Gainey and provided

16 him with a copy of the report; is that right?

17 A. Yes, sir.

18 Q. Okay. Now, again this was a level 2

19 walkaround. I assume I if ask you what the level 2

20 was, your answer would be same as it was for the

21 December 19 inspection; is that right?

22 A. Yes, sir.

23 Q. In this instance you indicate you stopped

24 him because you saw this fuel leakage.

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1 A. What I thought appeared to be a possible
2 fuel leak yes, sir.

3 Q. Okay. And again you checked that out and
4 I believe you showed Mr. Gainey what you were
5 observing?

6 A. Yes, sir.

7 Q. Okay. Is it fair to say that with
8 perhaps at least one notable exception, you found
9 some of the same violations as a result of the
10 January 9 inspection that you had also noted on the
11 December 19 inspection?

12 A. Yes, sir.

13 Q. And that would apply to equipment on the
14 truck as well?

15 A. Yes, sir.

16 Q. So presumably those were things that had
17 not yet been addressed from the earlier inspection?

18 A. Yes, sir.

19 Q. Now, if I could, I'm not going to walk

20 you through all these things.

21 THE RESPONDENT: Can I get a pencil out?

22 THE ATTORNEY EXAMINER: Yes.

23 Q. I'm not going to go through all the

24 violations again, but I notice we have one violation

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1 for 391.11(b)(4). Do you see that?

2 A. Yes, sir.

3 Q. And what does that entail?

4 A. That's a qualification of the drivers, in
5 this instance, hearing aid not worn as per medical
6 issued on 12/28/07. Driver was required, as per the
7 medical card, to wear his hearing aid, which in this
8 case he indicated was at home.

9 Q. So the driver neither had it on nor on
10 his person; is that right?

11 A. Yes, sir.

12 Q. Okay. Now, I would like to -- you took
13 some photographs as a result of this investigation;
14 is that right?

15 A. Yes, sir.

16 Q. We will get to those momentarily. Then
17 I'd like to direct your attention down to the
18 inspection notes, please. As a preliminary
19 question -- and, again, this was the same vehicle

20 that you had inspected in December, correct?

21 A. Yes, sir.

22 Q. Okay. The inspection notes say: Driver

23 says he physically showed up to Norwalk DX. Do you

24 see that?

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1 A. Yes, sir.

2 Q. First of all, for the record, what does
3 DX mean?

4 A. Drivers exam station.

5 Q. Okay. That would be a place where you
6 would go to take the written test?

7 A. Yes, sir.

8 Q. All right. Now, in your experience is
9 that part of or separate and distinct from a BMV
10 facility where one might go to get their license?

11 A. My experience is that it is independent
12 and separate from the BMV.

13 Q. Do you know whether or not in Norwalk
14 there is a separate location where one goes to get a
15 license that is different from the Norwalk DX?

16 A. My understanding is a driver's exam
17 station is independent and separate as well requiring
18 a test result as well in nature to go get a physical
19 license at another BMV.

20 Q. Okay. I would like you to, if you could,
21 take just a moment to read your notes, the inspection
22 notes, and then I have a couple questions for you.

23 A. I wrote down these notes. "Driver says he
24 physically showed up to Norwalk DX or license station

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1 (driver stated this was the place he took his written
2 test).

3 Q. Can I stop you there?

4 A. Yes, sir.

5 Q. Your understanding based on what
6 Mr. Gainey told you was he had gone back to the
7 location where he had taken and passed the earlier
8 hazardous materials test to obtain something
9 additional; is that right?

10 A. Yes, sir.

11 Q. Okay. Go ahead.

12 A. He indicated on Monday, 1/7/08 he was
13 told their computers were down and it was okay to
14 just come back on Saturday in reference to the
15 physical endorsement on his CDL card. Driver felt it
16 was okay to work and haul haz-mat on this date.

17 Q. Can I stop you there for a moment?

18 A. Yes.

19 Q. Do you recall whether or not Mr. Gainey

20 offered you an explanation as to why he felt he was

21 qualified to haul haz-mat at that time.

22 A. Yes, sir. I think that photos will show

23 this discussion we had in detail referenced the

24 paperwork you showed me, which you have as a separate

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1 exhibit showing he did indeed take this test and do
2 some of the requirements that are required to obtain
3 this endorsement.

4 Q. So it's your understanding that
5 Mr. Gainey's belief would have been based on the
6 paperwork he had in his possession at that time that
7 he showed you?

8 A. Yes, sir.

9 Q. Okay. All right. Monday, January 7,
10 2008, do you know -- well, strike that. You did some
11 independent verification with the DX supervisor in
12 Norwalk, did you not?

13 A. No, sir. If I can finish my note section
14 I'll explain that.

15 Q. Okay, I'm sorry.

16 A. 1/9/08 at approximately 1330 hours I
17 spoke with our District 3 driver's exam supervisor
18 Mary Ellen. She looked into this situation that I
19 had a couple questions for, and she agreed he needs

20 that physical endorsement on his CDL and stated all

21 DX stations are closed on Monday. .

22 So to answer that question that you did

23 have, I spoke to our DX supervisor, referenced the

24 situation, and basically she indicated that that

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1 particular station would not have been open on
2 Monday.

3 Q. Okay. In fact, is it your understanding
4 that's a statewide policy, that DX stations are not
5 open on Mondays?

6 A. Yes, sir, that's my understanding.

7 Q. The other thing I assume you confirmed
8 through this Mary Ellen -- does she have a last name
9 by the way; do you recall?

10 A. Yes, Mary Ellen Pratt.

11 Q. Pratt. I guess there was some question
12 at that point as to whether or not the endorsement
13 had to actually be on the license; is that right?

14 A. Yes, sir.

15 Q. And you followed up on that and, again,
16 you determined that based upon her explanation that
17 that, in fact, was the case.

18 A. Yes, sir.

19 Q. All right. Let's assume that Mr. Gainey

20 would have been precluded prior to January 9, the
21 date of the second inspection, that because state
22 computers were down Mr. Gainey would have been
23 precluded from getting the endorsement on the CDL, on
24 his CDL, to haul hazardous materials. Are you with

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1 me so far?

2 A. Yes, sir.

3 Q. Is that a justification, based on your

4 understanding of the law, to be hauling hazardous

5 materials, you know, on the road?

6 A. No, absolutely not.

7 Q. Okay. So, again, you would have

8 conducted this investigation, you would have

9 explained your results to Mr. Gainey, and he

10 understood that both he and the vehicle were still

11 out of service; is that correct?

12 A. Yes, sir.

13 Q. Okay. Incidentally, under your notes was

14 it your understanding that Mr. Gainey in the

15 discussion he had with you that he was going back

16 to -- he was going back to a state facility to obtain

17 his endorsement? Is that what you understood he was

18 attempting to do?

19 A. Yes, sir. Without the photos here it's

20 kind of hard to testify to the facts that I have to
21 give him credit for, meaning his effort of obtaining
22 the test results that he needed and things of that
23 nature, such as a background check.

24 Q. I will get into those. That will be the

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1 next series of exhibits. I'm certainly not trying to

2 detract from that.

3 Now, did I understand you to testify

4 earlier, Trooper Wolfe, that you have a CDL?

5 A. Yes, sir.

6 Q. Could you get that out, please.

7 MR. WRIGHT: We do not intend to make his

8 driver's license an exhibit, your Honor.

9 Q. Does your CDL have any endorsement on it?

10 A. Yes, sir.

11 Q. Where physically on the driver's CDL,

12 commercial driver's license, where physically on the

13 commercial driver's license does the endorsement

14 appear?

15 A. On my CDL it appears roughly beneath my

16 picture under the area that says endorsement.

17 Q. More or less the lower right-hand portion

18 of the license.

19 A. Yes, sir.

20 Q. And there's a clear indication on the
21 endorsement -- what is the indication for endorsement
22 that's on there?

23 A. Its specifically says endorse, short for
24 endorsement. In my case I have the initials M, T,

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1 and N.

2 Q. So if a CDL had one or more endorsement
3 on it, there would be the word "endorse" or words to
4 that effect, words something similar to what appear
5 on the license itself to indicate that there were
6 endorsements, and then beneath there would be letters
7 that would designate which type of endorsements
8 apply; is that right?

9 A. Yes, sir.

10 Q. And then there's an explanation on back
11 of the license which explains what the different
12 examples of endorsements are?

13 A. Yes, sir.

14 Q. And, I'm sorry, you said you actually
15 have one or two?

16 A. I have M, T, and N.

17 Q. Okay. And based on your experience I'm
18 sure you have seen hundreds, perhaps thousands of
19 commercial driver's licenses; is that right?

20 A. Yes, sir.

21 Q. And I'm sure you have seen hundreds that

22 have endorsements on it; is that correct?

23 A. Yes, sir.

24 Q. Is that typically the way they would

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1 appear on the license?

2 A. Yes, sir.

3 THE ATTORNEY EXAMINER: What do those
4 endorsements stand for, trooper?

5 THE WITNESS: Your Honor, in my case the
6 M is my motorcycle endorsement. The T, independent
7 of itself, would be doubles and triple trailers
8 endorsement, and my N endorsement would be my tank
9 vehicle endorsement. I used to have the X, which
10 would be the N and H combined, which H is hazardous
11 material CDL endorsement, which I let drop the last
12 time I renewed so it dropped just down to just an N
13 tank vehicle, and at this time I do not have
14 hazardous material endorsement myself.

15 THE ATTORNEY EXAMINER: Thank you.

16 Q. So some of those endorsements were left
17 over from your truck driving days serial?

18 A. Yes, sir.

19 Q. Okay. All right. Now, I believe we've

20 established, have we not, that you took some

21 photographs as a result of this inspection.

22 A. Yes, sir.

23 MR. WRIGHT: Okay. Your Honor, at this

24 time I'd like to have marked and I'll just mark these

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1 Staff Exhibit 3 A, B in sequence. Is that all right.

2 THE ATTORNEY EXAMINER: Yes.

3 MR. WRIGHT: These will be marked as

4 Exhibits 3A, 3B, 3C, 3D, and 3E, these photographs.

5 I'm going to provide you with a copy of these, and

6 then if I could get that copy back for the reporter.

7 THE ATTORNEY EXAMINER: Okay.

8 (EXHIBITS MARKED FOR IDENTIFICATION.)

9 Q. Okay. Trooper Wolfe, I'm handing what

10 has been marked as Staff Exhibit 3A. Do you

11 recognize that?

12 A. Yes, sir.

13 Q. Did you, in fact, take these photos?

14 A. Yes, sir.

15 Q. And were these photos taken as part of

16 the second inspection?

17 A. Yes, sir.

18 Q. And that being the one done on January 9,

19 2008?

20 A. Yes, sir.

21 Q. What does Staff Exhibit 3A depict?

22 A. The rear of the vehicle.

23 THE ATTORNEY EXAMINER: Now what is the
24 violation here?

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1 MR. WRIGHT: I'm sorry, I'm just having
2 him identify that is the vehicle.

3 THE RESPONDENT: That is the truck.

4 MR. WRIGHT: Right. Let my own witness
5 testify to that if I could.

6 THE RESPONDENT: Okay.

7 Q. Trooper Wolfe, this would have been the
8 vehicle that you inspected both back in December of
9 '07 and then January 9, 2008, driven by Mr. Gainey;
10 is that right?

11 A. Yes, sir.

12 Q. Now, this is Staff Exhibit 3B. Do you
13 recognize Staff Exhibit 3B, trooper?

14 A. Yes, sir.

15 Q. You took this picture?

16 A. Yes, sir.

17 Q. And this is a picture of Mr. Gainey's
18 medical certificate?

19 A. Yes, sir.

- 20 Q. And what did you notice on that that was
21 different from the December inspection?
22 A. As one of my requirements I routinely
23 look at the medical certificate and make sure it
24 belongs to him, looking for the issue and expiration

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1 dates to make sure it is valid, and then I go down
2 through the columns to see if there are any
3 restrictions. In this case the two that are marked
4 by the subject that performed medical evaluation has
5 marked contact lenses and wearing a hearing aid, are
6 the two requirements for Mr. Gainey.

7 Q. And the hearing aid would have been the
8 violation we talked about earlier in your testimony
9 that was new during the second inspection.

10 A. Yes, sir.

11 Q. Okay. And is this medical certificate
12 valid?

13 A. Yes, it is.

14 Q. Okay.

15 MR. WRIGHT: Off the record.

16 (Discussion off record.)

17 MR. WRIGHT: I'd like to have marked as
18 Exhibit 3C, if I may, for both the reporter and bench
19 3A through E. I think we will combine this into one

20 since this is the same document. It was just too big

21 to copy. We will mark this as Exhibit 3C.

22 THE ATTORNEY EXAMINER: So this is two

23 pages.

24 MR. WRIGHT: Let's go off the record.

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1 I'm sorry.

2 (Discussion off record.)

3 THE HEARING EXAMINER: Back on the
4 record.

5 MR. WRIGHT: I am going to mark instead
6 of what was previously 3C and 3D, I'd like to combine
7 those and make them C3 page 1 and page 2. Thank you.

8 THE HEARING EXAMINER: Very good.

9 (EXHIBIT MARKED FOR IDENTIFICATION.)

10 Q. (By Mr. Wright) Now, can you identify --
11 have you ever seen this document before? Are you
12 familiar with what this document is?

13 A. Yes, sir.

14 Q. And you, again, took a picture of this
15 during the January inspection.

16 A. Yes, sir.

17 Q. And these would have been paper and in
18 Mr. Gainey's possession.

19 A. Yes, sir.

20 Q. Okay. Now, could you describe for us

21 what 3C, pages 1 and 2, what they show?

22 A. This is just pertaining to the procedures

23 in obtaining the hazardous material endorsement, and

24 the following pages are to follow up with this as far

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1 as has he taken the test and possibly the test

2 scores.

3 Q. Okay. And we'll talk about the test

4 scores in just a moment, but what do you notice

5 about -- are there words in big bold letters across

6 the top of the document?

7 A. Yes, sir.

8 Q. And they're in red?

9 A. Yes, sir.

10 Q. And do you know if those are placed by

11 the issuer of this document?

12 A. Yes, sir.

13 Q. Which, again, would have been the Norwalk

14 DX?

15 A. Yes, sir.

16 Q. What are the words that are stamped

17 across the top of that document?

18 A. "No driving privileges."

19 Q. "No driving privileges." Again, these

20 were the papers that were presented to you during the
21 second stop that Mr. Gainey -- in your understanding
22 Mr. Gainey believed this authorized him to haul
23 hazardous materials at that time.
24 A. Possibly.

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1 Q. Possibly, you're just not sure?

2 A. Yeah. There was some confusion about
3 what I believed that he believed, as far as that
4 goes.

5 Q. Okay, that's fair. That's fair. All
6 right. I now want to show you Exhibit 3D. Do you
7 recognize that?

8 A. Yes, sir.

9 Q. And what is that?

10 A. That is the results of his test score,
11 that is, for the test that he obviously took for
12 hazardous materials.

13 Q. And on December 27, 2007, Mr. Gainey did,
14 in fact, achieve a passing score on the haz-mat test;
15 is that right?

16 A. Yes, sir.

17 Q. Okay. Now, a combination of this
18 paperwork and the passage of the haz-mat test, based
19 on your understanding of the law, does that qualify

20 you to haul hazardous materials?

21 A. No, it does not.

22 Q. Okay.

23 MR. WRIGHT: Your Honor, I'd like to have

24 marked as Staff Exhibit 4 at this time a copy of --

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1 well, yes, a copy of 49CFR 383.93.

2 THE HEARING EXAMINER: It will be so
3 marked.

4 (EXHIBIT MARKED FOR IDENTIFICATION.)

5 Q. Now, Trooper Wolfe, do you have in front
6 of you what has been marked as Staff Exhibit No. 4?

7 A. Yes, sir.

8 Q. And is that, in fact, a copy of the
9 federal regulation 49CFR 38.93?

10 A. Yes, sir.

11 Q. And under (b)(4) of that -- (b)(4) of
12 that section deals with hazardous materials, does it
13 not?

14 A. Yes, sir.

15 Q. And I believe (b)(4) was the section that
16 you cited Mr. Gainey under for failing to have the
17 endorsement; is that right?

18 A. Yes, sir.

19 Q. If you take just a moment to read that,

20 and I have a question or two.

21 A. The entire section, sir?

22 Q. I think you just need to read the

23 preamble, if you will, and then (b)(4).

24 A. Under 383 --

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1 Q. No, no. Read it to yourself, if you
2 will, and let me know and then I have a question for
3 you.

4 A. Okay, sir.

5 Q. Is it fair to say, Trooper Wolfe, that
6 you have a fairly good working understanding of what
7 the federal regulations require?

8 A. Yes, sir.

9 Q. And that's essential for you to be able
10 to effectively carry out your job; is that right?

11 A. Yes, sir.

12 Q. Now, I've asked you to take a look at
13 383.93, the preamble, Section (a), and then I guess
14 the (b)(4) section. Have you read that yet?

15 A. Yes, sir.

16 Q. Okay. Now, is it your understanding that
17 a passing grade on the haz-mat test is sufficient to
18 obtain a haz-mat endorsement?

19 A. The passing grade itself, yes, is one of

20 the stages to getting that endorsement.

21 Q. What is the final stage?

22 A. The final stage -- let me add one thing

23 that's not in here. Because of our 911 situation,

24 they're required to get a background check, different

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1 criteria, to obtain these endorsements, but that's
2 independent. But this here would be your knowledge
3 skills test required. You would have to get a
4 passing grade, and then to finish this step, as it
5 says here, you need to obtain a state-issued
6 endorsement on your CDL card itself, would be the
7 final step.

8 Q. And we already established that
9 Mr. Gainey did obtain a passing grade on the haz-mat
10 portion of the test.

11 A. Yes, sir.

12 Q. And the part that we're missing is the
13 endorsement itself.

14 A. Yes, sir.

15 Q. Not to beat this horse to death, but your
16 understanding is that the endorsement has to
17 physically appear on the commercial driver's license
18 as you described it earlier on your own CDL; is that
19 right?

20 A. Yes, sir. Also I confirmed that I
21 understand that to be the law, as the documents
22 indicated, but as my note stated earlier, I did get
23 confirmation on that to see if there were any
24 circumstances that could be waived in that scenario.

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1 The answer was no.

2 Q. Okay. All right. I'm sorry, who did you
3 contact about that?

4 A. Mary Ellen, the supervisor in my
5 district, Mary Ellen Pratt.

6 Q. And is it her responsibility to have
7 knowledge of such things as that?

8 A. Yes.

9 Q. Okay.

10 MR. WRIGHT: Your Honor, could I have one
11 moment, please?

12 THE HEARING EXAMINER: You may.

13 (Discussion off record.)

14 Q. (By Mr. Wright) Just to bring this full
15 circle, Trooper Wolfe, you indicated that based on
16 your understanding of the federal regulations, there
17 are essentially three things that would be required
18 to obtain a hazardous materials endorsement. One
19 would be to successfully pass the test, correct?

20 A. Yes.

21 Q. And you verified, personally verified,
22 that had actually occurred, and you were able to do
23 that through the paperwork that Mr. Gainey had; is
24 that right?

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1 A. Yes, sir.

2 Q. I believe the second thing you indicated
3 was that there has to be some sort of a background
4 check done.

5 A. Yes, sir.

6 Q. Were you able to verify that that was
7 done?

8 A. Yes, I did. He stated to me that he
9 believed that was done. On my computer in my car I
10 did verify that's what I believed as well, that he
11 was indeed ready to obtain the physical endorsement
12 on the CDL.

13 Q. Okay. So step two of the process was
14 taken care of by Mr. Gainey at that point?

15 A. Yes, sir.

16 Q. And step three, the actual physical
17 endorsement on the license itself, that was what was
18 missing?

19 A. Yes, sir. That was verified, again,

20 through LEADS on my computer in my patrol car.

21 Q. Why is it important, if you believe it to

22 be so, that that endorsement actually physically

23 appear on the license itself?

24 A. Because that's what puts you in

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1 compliance with the law, especially the nature of
2 this, hauling hazardous material. So you are either
3 in compliance or not in compliance. You are either
4 in service or you would be out of service.

5 Q. So it provides an objective way to
6 determine whether the driver is qualified to handle
7 hazardous materials, to haul hazardous materials or
8 not; is that what you're saying?

9 A. Yes, sir.

10 Q. And out in the field is it important for
11 you to be able to do your job efficiently,
12 effectively that you be able to ascertain the
13 driver's qualifications quickly?

14 A. Yes, sir.

15 Q. And that is achievable with, again,
16 having this endorsement on the CDL itself?

17 A. Yes, sir.

18 Q. Okay.

19 MR. WRIGHT: Your Honor, that's all I

20 believe we have.

21 THE HEARING EXAMINER: Very good.

22 Mr. Gainey, do you have any questions for

23 the trooper?

24 THE RESPONDENT: I don't have too many

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1 questions. I got a lot of statements I'd like to

2 make.

3 THE HEARING EXAMINER: We will get around

4 to your testimony. Do you have any questions for the

5 trooper at this point?

6 - - -

7 CROSS-EXAMINATION

8 By The Respondent:

9 Q. Well, the second inspection, did you find

10 on the truck that was wrong with it the first time?

11 A. The out of service were fixed. I just

12 noticed there was a side marker light that was

13 inoperable.

14 Q. A side marker light.

15 A. Yes. It may not have been fixed. I

16 mean, it's just a minor violation.

17 Q. It wasn't on the first inspection, the

18 side marker light?

19 A. Yes.

20 Q. Was it? Was it out on the second one

21 also?

22 A. Which I did not indicate anything as far

23 as it not being fixed.

24 Q. Because, like you said, I was out of -- I

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1 couldn't drive or anything until the truck was fixed,
2 right?

3 A. The out-of-service violations were
4 repaired.

5 Q. When I got it towed, it was taken right
6 down to the garage.

7 A. Yes, sir.

8 Q. And everything should have been -- the
9 truck was never moved until they okayed it to move.

10 THE HEARING EXAMINER: You have to ask
11 him questions.

12 THE RESPONDENT: I guess that's all I
13 have.

14 MR. WRIGHT: Your Honor, if I may, I
15 would like at this time to move admission of Staff
16 Exhibits 1, 2, 3A, B, C, D, and Staff Exhibit 4. And
17 I would also like to reserve the right to recall
18 Mr. Wolfe, Trooper Wolfe, if need be on rebuttal. I
19 don't imagine that's going to be necessary, but.

20 THE HEARING EXAMINER: Okay. I will

21 admit those into evidence at this time.

22 MR. WRIGHT: Thank you.

23 (EXHIBITS ADMITTED INTO EVIDENCE.)

24 THE HEARING EXAMINER: Do you have any

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1 other witnesses?

2 MR. WRIGHT: We do. Your Honor, at this
3 time we would call to the stand Tom Forbes.

4 THE HEARING EXAMINER: Very good.

5 - - -

6 TOM FORBES

7 being first duly sworn, as prescribed by law, was
8 examined and testified as follows:

9 DIRECT EXAMINATION

10 By Mr. Wright:

11 Q. Mr. Forbes, would you please state your
12 full name for the record.

13 A. Tom Forbes, F-O-R-B-E-S.

14 Q. And by whom are you employed, Mr. Forbes?

15 A. The Public Utilities Commission of Ohio,
16 Compliance Division.

17 Q. And what is your position?

18 A. Hazardous materials compliance officer.

19 Q. How long have you been in that position?

20 A. Three and a half years.

21 Q. Okay. Do you have any trucking

22 background of your own?

23 A. When I was much younger, I drove a truck

24 delivering medical oxygen and propane. Prior to the

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1 CDL back when I had a license, it was a chauffeur's

2 license.

3 Q. Do you have any law enforcement

4 experience?

5 A. I'm an auxiliary officer with the Ohio

6 State Highway Patrol. I have been with them about 14

7 years where I work with members of the Highway Patrol

8 as well in a voluntary position.

9 Q. Okay.

10 MR. WRIGHT: Your Honor, at this time I

11 would like to have marked as Staff Exhibit No. 5 a

12 one-page document captioned Forfeiture Assessment.

13 THE HEARING EXAMINER: Very good.

14 (EXHIBIT MARKED FOR IDENTIFICATION.)

15 Q. Mr. Forbes, do you recognize what has

16 just been marked as Staff Exhibit 5?

17 A. Yes, sir.

18 Q. And what is that?

19 A. It is a forfeiture assessment that I

20 prepared on January 9 for an inspection report
21 that -- excuse me. I prepared it on January 15. The
22 inspection report was completed on January 9.
23 Q. Okay. And can you provide a brief
24 explanation as to how this process works, what the

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1 purpose is?

2 A. Yes. When a motor carrier enforcement
3 officer, PUCO hazardous materials specialist, or
4 motor carrier troopers complete an inspection report
5 in the state of Ohio, it's electronically uploaded to
6 the Public Utilities Commission. Once that is
7 uploaded into the state and federal system, it comes
8 to the Compliance Division, and we review -- we
9 manually review all hazardous material inspections to
10 determine whether forfeitures need to be assessed by
11 the Commission. If there are violations that the
12 Commission normally assesses forfeitures for, we then
13 calculate the forfeiture amount using Staff Exhibit
14 No. 5 -- is that right?

15 Q. Staff Exhibit No. 5.

16 A. Staff Exhibit No. 5, which is our
17 forfeiture assessment chart. For this particular
18 inspection the report number was 0841005797, which is
19 consistent with the previous staff exhibit of an

20 inspection that was done 1/9/2008, Beaver Petroleum,

21 with Mr. Gainey as the driver.

22 Q. Would it be fair to say that this

23 assessment provides an objective way to calculate

24 forfeitures?

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1 A. Yes. It provides a system where everyone
2 with the same violation hauling the same materials
3 and with the same history is treated equally.

4 Q. And the results in this particular case
5 that are shown on Exhibit 5 are what?

6 A. A forfeiture was issued to Mr. James
7 Gainey for a violation of 383.93 (b)(4), no hazardous
8 material endorsement on the CDL, and that forfeiture
9 amount was \$82.50. A second violation was issued to
10 Mr. Gainey for violation of Administrative Code Rule
11 2-5-07D, driving while out of service, and the
12 forfeiture amount on that was \$1,000.

13 Q. Could the forfeiture amount that was
14 issued for driving while out of service have been
15 higher than \$1,000?

16 A. Yes. For hazardous material violations
17 the law allows the Commission to assess up to \$10,000
18 per violation.

19 Q. Okay.

20 MR. WRIGHT: Your Honor, I believe that's

21 all the questions we have for Mr. Forbes.

22 THE HEARING EXAMINER: Mr. Gainey, do you

23 have any questions of this witness?

24 THE RESPONDENT: Pardon?

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1 THE HEARING EXAMINER: Do you have any
2 questions of this witness?

3 THE RESPONDENT: No.

4 MR. WRIGHT: Okay. Thank you, your
5 Honor.

6 THE HEARING EXAMINER: Anything else?

7 MR. WRIGHT: I believe that would be it.

8 We move for the administration of Staff Exhibit 5 as
9 sponsored by Mr. Forbes.

10 THE HEARING EXAMINER: I'll admit Staff
11 Exhibit 5 into evidence at this time.

12 MR. WRIGHT: Thank you.

13 (EXHIBIT ADMITTED INTO EVIDENCE.)

14 THE HEARING EXAMINER: Now we will
15 proceed to your side of the case, Mr. Gainey.

16 - - -

17 JAMES H. GAINEY

18 being first duly sworn, as prescribed by law, was
19 examined and testified as follows:

20 DIRECT TESTIMONY

21 THE HEARING EXAMINER: Go ahead and tell

22 your story.

23 THE RESPONDENT: Well, I went up to --

24 the next day after -- you picked me up, right? I

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1 went up to the vehicle department in Norwalk to get
2 my license, to get it put on the CDL, on the license
3 itself. I already had my HazMat, my physical, and
4 had been fingerprinted, and all that had come back.
5 I went to get them and the state's computers were
6 down. I messed around up there for maybe three
7 hours. I thought they might come back up, but they
8 didn't.

9 So I thought, well -- I even asked a girl
10 up there: What if I get picked up tomorrow? She
11 said: Well, you got all your papers. I don't see
12 they would do anything to you.

13 The next day I go back to work, and I was
14 thinking about getting them Saturday because I didn't
15 want to take another day off because there are only
16 two people working there. So in the meantime I got
17 stopped by Mr. Wolfe over there, and that's about the
18 whole story. I could not get them. I had everything
19 to get them, but I couldn't get them.

20 THE HEARING EXAMINER: You've handed me a
21 one-page sheet of paper. What does this represent,
22 sir?

23 THE RESPONDENT: Was made out at the BMW
24 up in Norwalk.

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1 THE HEARING EXAMINER: And it says -- go
2 ahead and read it.

3 THE RESPONDENT: "On January 7, 2008, our
4 computers were down statewide. The BMW is aware of
5 the system outage. Thanks, Andrea."

6 THE HEARING EXAMINER: Would you like to
7 mark this as an exhibit?

8 THE RESPONDENT: Yes, please.

9 THE HEARING EXAMINER: I'll mark this as
10 Respondent's Exhibit 1.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 THE HEARING EXAMINER: Any other
13 statement you would like to make?

14 THE RESPONDENT: I don't think so.

15 That's the only -- just like the hearing aid

16 violation, if you wear a hearing aid in a truck, all

17 you hear is the motor. To my way of thinking, you're

18 better off not to wear it, and I've been driving

19 hazardous material trucks for 30 years, and I've

20 never been without my license.

21 THE HEARING EXAMINER: Does that conclude

22 your testimony?

23 THE RESPONDENT: That's it, sir.

24 THE HEARING EXAMINER: Mr. Wright.

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1 MR. WRIGHT: I may have a couple
2 questions. Could I see the paper, please? Thank
3 you.

4 - - -

5 CROSS-EXAMINATION

6 By Mr. Wright:

7 Q. Mr. Gainey, I'm going to -- you went back
8 to Norwalk.

9 A. Yes.

10 Q. To get something. What was it you were
11 going to Norwalk to get?

12 A. Get it put on my license.

13 Q. Okay. So you understood you were
14 required to have that on your license --

15 A. Yes, sir.

16 Q. -- to haul hazardous materials.

17 A. Yes, sir.

18 Q. Okay. And how did you obtain this
19 handwritten note from --

20 A. Well, the lady -- I went up there two or
21 three times, and I went back up to have her make that
22 out because the computers were down so I could show
23 it to you guys.

24 Q. Okay. Now, in reliance upon her

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1 statement to you that now you've had the papers,
2 don't worry about it, you proceeded on; is that
3 right?

4 A. Yes, sir.

5 Q. Okay. Even though you knew you needed to
6 obtain that.

7 A. Sure, I knew it needed to be on the
8 license, but I had all the paperwork to put it on the
9 license. But I feel it's part of the State's fault
10 why I couldn't put it on as well as it was mine.

11 Q. Okay. Now, you heard -- you have seen
12 the inspection reports and you heard Trooper Wolfe
13 testify. I'm trying to understand, I'm a little
14 confused. You went and took your test at Norwalk,
15 right?

16 A. Uh-huh.

17 Q. And, again, we established you passed
18 that test on the second try, December 27.

19 A. Yes.

20 Q. Then you went back to that location again

21 then to obtain your endorsement; is that right?

22 A. Yes, sir.

23 Q. And you don't disagree that the date was

24 January 7, 2008.

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1 A. I agree on that.

2 Q. And, in fact, that is the day that is
3 reflected in this exhibit.

4 A. Right, yes, sir.

5 Q. Okay. Just one final question or two.

6 As part of our exhibits, Mr. Gainey, Staff
7 Exhibits 3A and 3B, you have these papers I believe
8 already, these were issued to you by the DX or the
9 testing facility in Norwalk, correct, when you passed
10 the test?

11 A. Those two -- you say these were issued to
12 me? I've never --

13 Q. After having passed the test -- strike
14 the question. Strike the question. Let me try it
15 this way. As a result of the second inspection that
16 was done of your vehicle on January 9, 2008 -- are
17 you with me?

18 A. Yes.

19 Q. Officer Wolfe took photographs of

20 paperwork that you had in your possession, and you

21 don't argue with that, right? That occurred?

22 A. No.

23 Q. No, you disagree with me?

24 A. Well, this here --

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1 Q. Just answer my question first. Did
2 Trooper Wolfe take pictures when he pulled you over
3 that second time of documents you had in your
4 possession?

5 A. I don't remember if he took it. If he
6 says he did, he probably did.

7 Q. Well, okay. Have you ever seen these
8 documents before?

9 A. No, I haven't.

10 Q. You're saying that those were not papers
11 that you produced to Trooper Wolfe that these are
12 pictures of?

13 A. I don't remember if I did.

14 THE HEARING EXAMINER: We're looking at
15 staff exhibits?

16 MR. WRIGHT: 3A and B.

17 THE HEARING EXAMINER: 3A is the bus.

18 MR. WRIGHT: I'm sorry, it's 3C,
19 pages 1 and 2. My mistake, yes, you're right.

20 Q. Is that your name that appears on 3C

21 page 1 there?

22 A. Yes, it is.

23 Q. On page 2 of 3C does that indicate the

24 date on which you took the test and passed it,

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1 December 27?

2 A. I think the date is right here, if I can

3 show it to you.

4 MR. WRIGHT: Can we go off the record for

5 just a minute.

6 (Discussion off record.)

7 Q. (By Mr. Wright) Sir, you were stopped

8 initially on December 19, 2007, and you were at that

9 time placed out of service for not having a hazardous

10 material endorsement, among other things, right?

11 A. Yes, sir.

12 Q. And after that December 19 stop, you went

13 and took the hazardous materials test.

14 A. Yes, sir.

15 Q. And you failed it the first time you took

16 it.

17 A. Yes.

18 Q. And you took it a second time and passed

19 it with a score of 80.

20 A. I think it's the third time, but the two
21 there I thought, well, I don't have to study, but I
22 did.
23 Q. Okay, you passed the test. Can we agree
24 that you passed the test on December 27, 2007?

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1 A. Yes.

2 Q. Okay. And at the time you passed the
3 test -- and, again, this would have been up at the
4 Norwalk DX, right?

5 A. Yes, sir.

6 Q. -- you would have been given certain
7 papers, okay?

8 A. Right.

9 Q. And do you recall, for example, the name
10 Deena Brace as being the lady that validated your
11 test results? Does that ring a Bell?

12 A. No, I don't recall.

13 Q. Okay. Okay. The paperwork you had been
14 given at that point in time then authorized you to go
15 out and get the endorsement, correct?

16 A. Yes.

17 Q. And there's no dispute in this case that
18 either on December 19 or on January 9, neither one of
19 those inspections you did not yet have that

20 endorsement on your CDL, correct, it was not

21 physically on your CDL?

22 A. No, it was not physically on it.

23 Q. Not physically on your CDL. When, in

24 fact, did you go to get it, or do you have it?

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1 A. I got it.

2 Q. Okay. Do you know?

3 A. When did I go up there? It was on a
4 Monday. The day he pulled me over, I went up that
5 day because I was out of service then, and I went
6 straight up there to do it.

7 Q. Okay. You don't know if you got it that
8 day, though.

9 A. I couldn't get it.

10 Q. I'm sorry, you just said the day Trooper
11 Wolfe pulled you over, you went up the same day to
12 get it.

13 THE RESPONDENT: That was on a Monday,
14 wasn't it, Pat?

15 Q. The record will reflect that Trooper
16 Wolfe pulled you over on Wednesday, January 9. And
17 your allegation is on January 7, which was in fact a
18 Monday, that the State computers were down.

19 A. Right, that's when I went up to get it.

20 Q. Okay. And even though you knew it was a
21 requirement to be physically on your license, you
22 chose to go ahead and drive. You could have driven
23 nonhazardous material loads until you got the
24 endorsement, could you not?

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1 A. Yes, sir.

2 Q. Okay. And that, for whatever reason,
3 that didn't occur. You continued to drive hazardous
4 materials.

5 A. No. Because I was fingerprinted and
6 everything was done, my background checks and
7 everything. I had all my paperwork to get them on
8 there.

9 Q. To get them on there.

10 A. Right.

11 Q. Okay.

12 A. I went to get them on there and they
13 couldn't put them on.

14 Q. Okay.

15 A. That's the only reason I'm here today.

16 Q. You believe whatever caused the state
17 computers to be down that day, that that serves as a
18 justification for you to drive -- continue to drive
19 hazardous material loads even though you don't have

20 the endorsement physically on your license.

21 A. Right. Right.

22 Q. Okay. And, again, just so I'm clear,

23 when you went to obtain the endorsement, and, as you

24 say, found the computers were down, you simply

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1 returned to the same location you had previously

2 taken your written test and passed; is that right?

3 A. Where you get your license and where you

4 pass your test are two different areas.

5 Q. Okay.

6 A. Like I say, when I went up to get my

7 license, I had already gotten everything straightened

8 around to get them, but I couldn't get them.

9 Q. But you don't recognize these papers

10 as --

11 A. I don't, not at all.

12 Q. Okay.

13 A. Not that one there.

14 Q. Okay.

15 MR. WRIGHT: Your Honor, I would like to

16 request the opportunity to supplement the record with

17 an affidavit from the Norwalk DX that will establish

18 a couple things that should be incontrovertible.

19 Number one, that Mr. Gainey did, in fact, test at

20 that facility on the particular dates and that he in

21 fact passed; that Deena Brace is an employee of that

22 facility. I believe, you notice at the bottom of

23 that exhibit it says DX issuance.

24 THE HEARING EXAMINER: Are you referring

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1 to 3C page 1?

2 MR. WRIGHT: Yes, pages 1 and 2 is the
3 same. Again, it's all the same form, but at the
4 bottom it says DX issuance, a representation that
5 these papers were, in fact, issued to Mr. Gainey upon
6 his successful completion of the hazardous materials
7 exam.

8 And that's really about it. I mean,
9 there's nothing there in his testimony because I
10 believe it's important because of the notation on
11 these papers, it clearly indicates no driving
12 privileges.

13 THE RESPONDENT: Right.

14 Q. (By Mr. Wright) Mr. Gainey, what happened
15 after you completed your test and passed it? What
16 did they tell you?

17 A. What did they say?

18 Q. What did they tell me you up there at the
19 DX?

20 A. She told me, she said: Well, you got all
21 your paperwork. I can't remember the girl's name. I
22 think it was the girl --

23 Q. We're back on December 27, 2007. You
24 went in that day to take the haz-mat test again and

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1 you passed it that day, right?

2 A. Right.

3 Q. Okay. Now, after you passed the test
4 before the DX sent you away, what did they tell you?
5 Did they not explain to you that you now had taken
6 all the steps to actually obtain the endorsement and
7 you had to go to the State to obtain that? Did they
8 not tell you that?

9 A. Sure. I know I have to obtain the
10 endorsement.

11 Q. They told you that, did they not, after
12 you passed the test so you would know what to do?

13 A. Well, I knew what to do. I've been doing
14 this for 30 years. Nobody has to tell me what to do
15 about it. I have done it all my life.

16 Q. Well, Mr. Gainey, how long have you been
17 hauling hazardous materials without an endorsement
18 prior to being stopped December 19, 2007?

19 A. We'll go another step further. I can't

20 prove it because the records up at Norwalk got
21 destroyed. I have never been to this day without a
22 haz-mat endorsement, never.

23 Q. There was not an endorsement on your
24 license, was there?

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1 A. No, I know that one. But it should have
2 been on there.

3 Q. Okay.

4 A. It's not my fault it wasn't on there, but
5 it's my fault for driving, yes, I agree.

6 Q. Okay.

7 A. They should have been on there.

8 THE HEARING EXAMINER: Is there a motion
9 pending, Mr. Wright?

10 MR. WRIGHT: Well, there's a request
11 pending, and it would have been for simply -- I have
12 already cleared this with them. They said they would
13 be happy to help us, just a simple affidavit from the
14 DX, probably would come from the supervisor, would
15 identify Deena Brace, whose name appears on Staff
16 Exhibit 3C, page 1, that she is employed there; that
17 Mr. Gainey went there to take his test; that he
18 passed on December 27; and that these papers were
19 sent with him when he left. And this goes to what

20 Mr. Gainey may or may not have reasonably understood
21 to be the case when he left that day and subsequent
22 to that.

23 THE HEARING EXAMINER: Do you have any
24 comments on his request, Mr. Gainey?

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1 THE RESPONDENT: I don't think so, sir.

2 THE HEARING EXAMINER: Very well. I'll
3 grant your request. You may file that as a late
4 filed exhibit.

5 MR. WRIGHT: Thank you, very much, your
6 Honor.

7 THE ATTORNEY EXAMINER: Anything else?

8 MR. WRIGHT: I don't think so.

9 THE HEARING EXAMINER: Mr. Gainey?

10 THE RESPONDENT: No, sir. Thank you.

11 THE HEARING EXAMINER: Very good, I'll
12 admit Respondent's Exhibit 1 into evidence at this
13 time.

14 (EXHIBIT ADMITTED INTO EVIDENCE.)

15 THE HEARING EXAMINER: With that said,
16 I'll consider this matter submitted on the record and
17 thank you all for coming.

18 Just a moment. We have to discuss
19 briefs. I want staff's position in a brief.

20 MR. WRIGHT: Do you want a brief?

21 THE HEARING EXAMINER: Yes.

22 Off the record.

23 (Discussion off record.)

24 THE HEARING EXAMINER: We have agreed

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1 that the date for filing simultaneously briefs in the

2 case will be October 3.

3 Thank you, again.

4 (The hearing adjourned at 11:25 a.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a
true and correct transcript of the proceedings taken
by me in this matter on Thursday, August 7, 2008, and
carefully compared with my original stenographic
notes.

Rosemary Foster Anderson,
Professional Reporter and
Notary Public in and for
the State of Ohio.

My commission expires April 5, 2009.

(RFA-8182)

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