

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of James Gainey, Notice  
of Apparent Violation and Intent to  
Assess Forfeiture.

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:  
: Case No. 08-571-TR-CVF  
: (0841005797D)  
:

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

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October 3, 2008

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**Introduction**

This case is straightforward. Federal regulations require that, to operate a commercial motor vehicle hauling hazardous materials, the driver must have, among other things, the proper endorsement on his/her commercial driver's license (CDL). On two occasions that are the subject of this case, driver James Gainey was stopped and inspected, and each time he was hauling hazardous materials cargo. On neither occasion did Mr. Gainey have a CDL that had the requisite endorsement on it. These facts are *undisputed* and are sufficient for the Commission to affirm the cited violations and the civil forfeiture assessed against Mr. Gainey.

Under federal regulations, a driver must qualify to haul hazardous materials on Ohio's roadways. To qualify, a driver must: (1) pass a hazardous materials test; (2) obtain a security clearance; and, (3) obtain, from the state of Ohio, an endorsement that physically appears on the driver's commercial driver's license as notice to authorities

of the driver's training and qualifications. In light of the significant threat that hazardous materials pose to the public health and safety, these requirements are mandatory.<sup>1</sup>

Driver James Gainey was lawfully stopped and inspected twice, on December 19, 2007 and again on January 9, 2008. There is no dispute on this point. Each time, he was transporting Class 3 combustible liquid hazardous materials on behalf of Beaver Petroleum Company. It is not disputed that he did not have the required hazardous materials endorsement on his CDL on either occasion. The law is clear and he knowingly broke it. Neither ignorance nor excuse serves as justification nor does it constitute compliance with this important requirement.

The Staff respectfully requests that the Commission adopt the inspection findings of veteran State Trooper Gary T. Wolfe and uphold the forfeiture assessed in this case. The record supports such a finding and result in this case.

### **Discussion**

49 C.F.R. 383.93 controls in this case.<sup>2</sup> It mandates that a driver obtain a state-issued endorsement on his/her CDL to operate a motor vehicle used to transport hazardous materials. There is no dispute in this case that driver James Gainey has a valid CDL and that on both inspection dates in question, December 19, 2007 and January 9, 2008, he was operating a motor vehicle used to transport hazardous materials.

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<sup>1</sup> Under limited circumstances a requirement may be waived. No such circumstances are presented in this case.

<sup>2</sup> See Staff Ex. 4.

## **Qualification Requirements**

Under federal regulations, the driver must successfully complete a Hazardous Materials knowledge test.<sup>3</sup> After successfully completing testing requirements, the driver is required to obtain a state-issued endorsement to his/her CDL showing that they have met the testing proficiency requirements to operate motor vehicles used to transport hazardous materials.<sup>4</sup> The facts show, and Mr. Gainey does not dispute, that he failed to obtain the required CDL endorsement before hauling hazardous materials loads on either December 19, 2007 or January 9, 2008, and thus, under 49 C.F.R. 383.93, he was not qualified to do so on either occasion.<sup>5</sup>

Our saga begins on December 19, 2007. Mr. Gainey was operating a vehicle on behalf of Beaver Petroleum Company, LLC, carrying class 3 flammable liquids. Due to an obvious equipment malfunction (inoperable sidelight), his vehicle was stopped and inspected by Trooper Gary T. Wolfe, a veteran of the Ohio Highway Patrol and a former truck driver with experience hauling hazardous materials.<sup>6</sup> Trooper Wolfe performed a Level II walk-around inspection, prepared a report, carefully reviewed his inspection findings with the driver, and provided Mr. Gainey with a copy of the report.<sup>7</sup> Based upon

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<sup>3</sup> 49 C.F.R. § 383.93(a) and (c) (2008).

<sup>4</sup> 49 C.F.R. § 383.93(b)(4) (2008).

<sup>5</sup> *See, e.g.* Tr. at 51-52.

<sup>6</sup> *Id.* at 9; *see also* Staff Ex. 1, Driver/Vehicle Examination Report (December 19, 2007).

<sup>7</sup> *See* Staff Ex. 1, Driver/Vehicle Examination Report (December 19, 2007).

multiple mechanical violations that he found,<sup>8</sup> Trooper Wolfe placed the vehicle out of service and he explained to Mr. Gainey that the vehicle could not be moved again until needed repairs were made.<sup>9</sup>

Additionally, Mr. Gainey was cited for operating a loaded bulk tank trucker containing hazardous materials without a hazardous materials endorsement on his CDL.<sup>10</sup> Trooper Wolfe issued a citation for this violation and Mr. Gainey later pled guilty to the offense in Barberton, Ohio Municipal Court on December 27, 2007, and he paid a fine.<sup>11</sup> More important, Trooper Wolfe placed Mr. Gainey out of service, disqualifying him from further operation of commercial motor vehicles carrying hazardous materials<sup>12</sup> until he obtained the proper CDL endorsement.<sup>13</sup> Again, Trooper Wolfe fully explained the driver out-of-service status to Mr. Gainey, that it disqualified the driver from further operation of commercial motor vehicles with hazardous materials loads, and what action Mr. Gainey needed to take to remove this disqualification. The evidence shows that Mr. Gainey understood that both he and his vehicle had been placed out-of-service and what was required to restore his authority to haul hazardous materials and the nature of the repairs that were needed to restore his vehicle to roadworthy status.<sup>14</sup>

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<sup>8</sup> Tr. at 9-12.

<sup>9</sup> Staff Ex. 1, Driver/Vehicle Examination Report (December 19, 2007); *see also* Tr. 15-18.

<sup>10</sup> Tr. at 14.

<sup>11</sup> *Id.* at 12-14.

<sup>12</sup> Mr. Gainey remained qualified to transport *non-hazardous materials* loads.

<sup>13</sup> *Id.* at 15-18.

<sup>14</sup> *Id.*

Mr. Gainey's actions show that he knew what was required. On December 20, 2007, he visited the Norwalk, Ohio testing center where he unsuccessfully attempted to pass the hazardous materials knowledge test. On December 27, 2007, he retook the test, and he achieved a minimum passing score. Upon passing this test, an official at the Norwalk testing facility issued papers to Mr. Gainey and explained to him that these papers had to be presented to a state of Ohio-authorized license bureau to enable Mr. Gainey to obtain the required hazardous materials endorsement on his CDL.<sup>15</sup> The papers issued to Mr. Gainey *conferred no authority* upon him to operate a commercial motor vehicle hauling hazardous materials as noted by the "No Driving Privileges" stamp prominently displayed on the papers.<sup>16</sup>

It appears that 11 days later, on January 7, 2008, that Mr. Gainey visited Norwalk a second time, purportedly to obtain his CDL endorsement. It is not clear whether on that date he revisited the same testing center offices where he had earlier taken and passed the hazardous materials test, but Mr. Gainey claims that he was unable to get his business taken care of because the state of Ohio computers "were down" that day.<sup>17</sup> The Norwalk testing center offices are routinely closed on Mondays, as they are throughout the state of Ohio, and were closed on *Monday*, January 7, 2008, the date that Mr. Gainey went to Norwalk, Ohio.<sup>18</sup> One must visit an Ohio Bureau of Motor Vehicles (BMV) licensing

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<sup>15</sup> See Affidavit of Lori Kaple attached as Schedule I to this brief.

<sup>16</sup> *Id.*

<sup>17</sup> Tr. at 49.

<sup>18</sup> Affidavit of Lori Kaple.

facility, located in a different part of Norwalk, to obtain a driver's license or the required CDL endorsement. Although less than clear, assuming that Mr. Gainey did go to the proper BMV facility in Norwalk, and that the computers were, in fact, "down" that day, that certainly does not relieve him from compliance with federal regulations nor does it justify his returning to the highway to haul hazardous materials cargo without the required CDL endorsement *that Mr. Gainey knew was required.*<sup>19</sup> Any inconvenience to Mr. Gainey, that is "refusing to take another day off" to return to BMV, is an excuse and not justification for knowingly violating an important federal requirement.<sup>20</sup> The CDL endorsement must be obtained; 49 C.F.R. 383.93 is very clear on this point. Mr. Gainey further claims that he was told by some unknown person that he could go ahead and drive for a day or two under the authority of the papers that he had received in Norwalk after he completed the hazardous materials test two weeks earlier.<sup>21</sup> While it is impossible to test the veracity of this statement, this too is of no moment. He needed the hazardous materials endorsement on his CDL, he knew it and even though he did not have it, he persisted in operating a commercial motor vehicle carrying hazardous materials on Ohio's roadways. He knowingly violated the law.

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<sup>19</sup> Any "inconvenience" to Mr. Gainey is inexplicable. A question is fairly raised as to why Mr. Gainey did not go to the BMV facility located in Willard, Ohio, where he lived, as opposed to driving approximately 16 miles to Norwalk. Mr. Gainey produced a handwritten note purportedly provided by an employee at the Norwalk BMV. The note does not indicate that the signer was authorized to issue such a statement on behalf of the Norwalk license bureau.

<sup>20</sup> Tr. at 49.

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

Observing what he perceived to be fuel leaking from Gainey's vehicle, Trooper Wolfe pulled Mr. Gainey over two days later, on January 9, 2008, and again he performed a level II inspection of the same vehicle.<sup>22</sup> Trooper Wolfe cited Mr. Gainey for many of the *same violations* that he had earlier found during the December 19, 2007 inspection.<sup>23</sup> Additionally, he cited Mr. Gainey for failure to wear a hearing aid device as required by Mr. Gainey's updated medical card.<sup>24</sup> More germane to this case, Trooper Wolfe again cited Mr. Gainey for operating a commercial motor vehicle carrying hazardous materials without being *qualified to do so* because Gainey *still lacked* a hazardous materials endorsement on his CDL.<sup>25</sup> This repeat offense is especially egregious because Mr. Gainey knew what was required of him, that it (the CDL endorsement) was not difficult to obtain, and, yet, he chose to drive without it so as not to be inconvenienced. In other words, he knowingly operated a vehicle carrying hazardous materials without authority to do so.

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<sup>22</sup> Staff Ex. 2, Driver/Vehicle Examination Report (January 9, 2008).

<sup>23</sup> *Id.*; see also Tr. at 20.

<sup>24</sup> Tr. at 21.

<sup>25</sup> Staff Ex. 2, Driver/Vehicle Examination Report (January 9, 2008).



## **Civil Forfeiture**

Mr. Gainey was assessed a civil forfeiture totaling \$1,082.50, broken down as follows:

Driving without a hazardous materials endorsement on CDL	\$82.50
Driving after having been placed out-of-service	\$1000.00 <sup>26</sup>

Staff witness Tom Forbes testified about the objective method used by the Staff to calculate the civil forfeiture applying the Forfeiture Assessment Matrix.<sup>27</sup> This unchallenged testimony supports the assessed amount as both fair and reasonable.

## **Conclusion**

Federal requirements to authorize drivers to transport hazardous materials are clear and mandatory. Driver James Gainey knew what the requirements were that he had to meet, and he knew he had not met them all. Yet, he chose to haul hazardous materials and to assume the risk that he might be caught. Compliance with the law is important, especially where it relates to carriage of hazardous materials on Ohio's highways. Mr.

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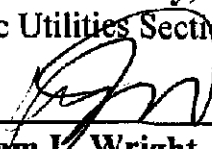
<sup>26</sup> This represents the *minimum* amount that could be assessed. Tr. at 47.

<sup>27</sup> See Staff Ex. 5, Forfeiture Assessment Matrix (January 9, 2008); Tr. at 44-47.

Gainey was caught, not once but twice, and he should now receive the applicable penalties for his conduct.

**Nancy H. Rogers**  
Attorney General of Ohio

**Duane W. Luckey**, Section Chief  
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### **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 by regular U.S. mail, postage prepaid, or hand-delivered, upon applicant, James Gainey, 4086 New State Road, Willard, Ohio, 44890, this 3<sup>rd</sup> day of October, 2008.



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**William L. Wright**  
Assistant Attorney General

**AFFIDAVIT**

Being duly sworn comes Lori A. Kaple and, based upon her personal knowledge,  
states as follows:

1. That she is the Driver License Supervisor, Bucyrus District, Ohio State Highway Patrol.
2. The Norwalk, Ohio testing facility maintains business hours Tuesday-  
~~Friday~~ <sup>Saturday</sup>, but is closed on Mondays.
3. That on or about December 27, 2007, James H. Gainey, 4086 New State Road, Willard, Ohio, 44890, achieved a passing score on the Hazardous Materials test administered by Deena Brace at our testing facility located on at 142 Cleveland Road on the east side of Norwalk, Ohio.
4. The Ohio Bureau of Motor Vehicles licensing facility is located on 130 Shady Lane Drive, Building 5, on the south end of Norwalk, Ohio.
5. That upon achieving a passing score, Mr. Gainey was given certain papers attached as Exhibit 1 to this Affidavit and made a part hereof. Mr. Gainey is required to submit this and other paperwork to an Ohio Bureau of Motor Vehicles licensing facility to obtain a hazardous materials endorsement on his commercial driver's license. Employee Deenah Brace stamped these papers "NO DRIVING PRIVILEGES" to alert Mr. Gainey that he was not authorized to haul hazardous materials until he obtained the required endorsement on his commercial driver's license.

Further, Affiant sayeth naught.

Lori A. Kaple  
Lori A. Kaple  
8-12-08  
Date

**ACKNOWLEDGEMENT**

Subscribed and sworn to before me on this 12 day of August, 2008 by  
Lori Kaple who is personally known by me to be the same person who has  
executed this Affidavit.

Andrea R. Wicken  
NOTARY PUBLIC  
My commission expires July 22 2011

[illegible]

**D. DOES NOT MEET VISION STANDARDS**

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## CONVERSION

**MOORE, MONTY SHANE**

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