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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of James H. Gainey, Notice of)
Apparent Violation and Intent to Assess) Case No. 08-571-TR-CVF
Forfeiture.) (0841005797D)

OPINION AND ORDER

The Commission, considering the public hearing held on July 7, 2008, issues its opinion and order in this matter.

APPEARANCES:

James H. Gainey, 4086 New State Road, Willard, Ohio 44890, on his own behalf.

Nancy H. Rogers, Attorney General of Ohio, by Duane W. Luckey, Section Chief, and William Wright and Thomas Lindgren, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

NATURE OF THE PROCEEDING:

On January 9, 2008, the Ohio Highway Patrol (Highway Patrol) stopped and inspected a motor vehicle driven by James H. Gainey (Mr. Gainey) and operated by Beaver Petroleum Company, LLC, in the state of Ohio. The Highway Patrol found violations of the Code of Federal Regulations (C.F.R.) and the Ohio Administrative Code (O.A.C.), including the following violations relevant to this case:

49 C.F.R. Section 383.93(b)(4) - No hazardous materials endorsement on commercial driver's license.¹

¹ 49 C.F.R. Section 383.93 provides, in pertinent part, that:

- (a) ... all persons who operate or expect to operate the type(s) of motor vehicles described in paragraph (b) of this section shall take and pass specialized tests to obtain each endorsement. The State shall issue CDL endorsements only to drivers who successfully complete the tests.
- (b) ... An operator must obtain State-issued endorsements to his/her CDL to operate commercial motor vehicles which are: (4) Used to transport hazardous materials....
- (c) ... The following tests are required for the endorsements contained in paragraph (b) of this section: (4) Hazardous Materials - a knowledge test....

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Rule 4901:2-5-07(D), O.A.C. - Operating a hazmat vehicle after being placed out of service.²

Mr. Gainey was timely served a Notice of Preliminary Determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In this notice, Mr. Gainey was notified that staff intended to assess a civil monetary forfeiture of \$82.50 for violation of 49 C.F.R. Section 383.93(b)(4) (Section 383.93(b)(4)) and \$1,000.00 for violation of Rule 4901:2-5-07(D), O.A.C. (Rule 2-5-07(D)). A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement during the conference. Subsequently, a hearing was convened on August 7, 2008.

BACKGROUND:

On December 19, 2007, Mr. Gainey was hauling placarded, hazardous material, Class 3 flammable liquid from Akron, Ohio to Canton, Ohio. His bulk tank truck was stopped at Mile Post 120 on Interstate 77 because of an inoperable sidelight and inspected by Trooper Gary T. Wolfe (Tr. 8-9; Staff Exhibit 1 - Driver/Vehicle Examination Report). Due to multiple violations of the C.F.R., Trooper Wolfe placed Mr. Gainey's truck out of service until repairs were made on the truck to correct the defects found during the inspection. As a further violation, Trooper Wolfe cited Mr. Gainey under the C.F.R. for driving a truck loaded with hazardous materials without a hazardous materials endorsement on his commercial driver's license (CDL). Moreover, because Mr. Gainey lacked a hazardous materials endorsement, he was issued a citation under the Ohio Revised Code for the local municipal court. Mr. Gainey, himself, then was placed out of service and prohibited from operating a commercial motor vehicle (CMV) with a hazardous materials load until he acquired the necessary hazardous materials endorsement on his CDL. Mr. Gainey, however, was not disqualified from hauling non-hazardous materials loads (Tr. 9-12, 14-18; Staff Ex. 1 - Driver/Vehicle Examination Report).

On December 20, 2007, Mr. Gainey went to the Bureau of Motor Vehicles (BMV) testing center in Norwalk, Ohio, and attempted to pass the hazardous materials knowledge test. On December 27, 2007, he took the test again at the same facility and received a passing score. At that time, Mr. Gainey was issued papers by a testing facility official indicating that he had passed the test. These papers were stamped "No Driving Privileges" to alert Mr. Gainey that he had to present the papers at a BMV licensing

² Rule 4901:2-5-07(D), O.A.C., provides:

Vehicles declared "out of service" may be marked with an appropriate sticker, which shall not be removed until the vehicle is not longer out of service. Drivers declared "out of service" shall remain out of service until such time as they are qualified to drive a commercial motor vehicle and meet all conditions established in the law, rule, or out of service order upon which their out of service status was based.

facility³ in order to obtain the needed hazardous materials endorsement on his CDL (Staff Exhibit 3; Late-filed Exhibit - Affidavit of Lori A. Kaple). Also on December 27, 2007, Mr. Gainey appeared in Barberton, Ohio, Municipal Court, entered a guilty plea to the offense of operating a hazardous materials vehicle without a hazardous materials endorsement, and received two points on his CDL (Tr. 12-14).

On January 7, 2008, Mr. Gainey went back to the BMV⁴ in Norwalk, Ohio, in order to obtain the hazardous materials endorsement on his CDL. Mr. Gainey did not get the endorsement that day, purportedly because the BMV computers were not operating (Tr. 49).

On January 9, 2008, Mr. Gainey again was hauling placarded, hazardous material, Class 3 flammable liquid, from Canton, Ohio, to Cleveland, Ohio, when he was stopped a second time by Trooper Wolfe. This second stop was made at Mile Post 122 on Interstate 77 because Trooper Wolfe observed what looked like diesel fuel leaking from Mr. Gainey's truck. Trooper Wolfe performed another inspection of the truck, and cited Mr. Gainey for the leaking fuel and other C.F.R. violations, including operating a CMV carrying hazardous materials without a hazardous materials endorsement on his CDL. In addition, Trooper Wolfe cited Mr. Gainey for operating a CMV after he was placed out of service on December 19, 2007, due to the endorsement violation, and for failing to wear a hearing aid, a requirement listed on Mr. Gainey's medical card (Staff Ex. 2 - Driver/Vehicle Examination Report; Tr. 20-21).

ISSUE IN THE CASE:

Staff argued that Mr. Gainey, lacking a hazardous materials endorsement on his CDL, knowingly operated a CMV carrying hazardous material without authority to do so. Further, he drove the hazardous material vehicle after he was placed out of service for not having the required endorsement. Mr. Gainey, for his part, maintained that he had all the paperwork completed to get the endorsement for hazardous materials, but that he was prohibited from doing so because the BMV computers were down. Mr. Gainey argued that, due to the computer outage, it was not his fault he could not physically get the endorsement on his CDL. He noted his conversation with a BMV employee who had indicated that, because he had the papers showing that he had passed the test, nothing would happen to him if he went ahead and drove the next day. Mr. Gainey indicated that he proceeded in reliance on the employee's statement (Tr. 49, 51-52; Respondent's Exhibit

³ The BMV testing center and the BMV licensing facility are in different locations in Norwalk, Ohio (Late-filed Exhibit - Affidavit of Lori A. Kaple).

⁴ The record does not reveal whether Mr. Gainey visited the BMV testing center or the BMV licensing facility on January 7, 2008. The record, however, does show that Mr. Gainey knew that BMV testing and BMV licensing took place in different locations in Norwalk, Ohio (Tr. 59).

1⁵). Mr. Gainey also indicated that whatever caused the state's computers to be down, that served as justification for him to continue driving hazardous materials loads, even though he did not have the hazardous materials endorsement (Tr. 56).

DISCUSSION:

The Commission initially observes that the U.S. Department of Transportation Interpretations to Section 383.93 provide the following guidance: "Question 7: Must all drivers of vehicles required to be placarded have CDLs containing the HM endorsement? Guidance: Yes, unless waived." There is no evidence in this record that a waiver of Mr. Gainey's endorsement requirement for his CDL was ever granted. The evidence, however, does show that Mr. Gainey knew that both he and his truck had been placed out of service and that a hazardous materials endorsement on his CDL was required to regain his authority to haul hazardous materials (Tr. 16-18). More specifically, Mr. Gainey testified that, as a driver with 30 years of driving experience, he knew the hazardous materials endorsement needed to be on his CDL, but because he had all the necessary paperwork and BMV computers were down, he felt it was partly the state's fault that he could not get the endorsement. He also testified that it was his fault for driving, but that it was not his fault the endorsement was not on his license (Tr. 51-52, 58, 61, 62). Even assuming the truth of Mr. Gainey's assertions, that BMV computers were down on the day he visited the BMV facility in Norwalk and that a BMV employee indicated he could drive without a hazardous materials endorsement, the Commission is of the opinion that driving without the endorsement cannot be excused. We believe that Mr. Gainey was well aware that he had to obtain the endorsement physically on his CDL in order to have the authority to haul hazardous materials. Yet, after he had been placed out of service for not having the endorsement, he chose to operate a truck loaded with hazardous materials, still lacking the required endorsement (51-52, 58, 61, 62).

After a review of the testimony and evidence submitted in the case, we believe that the record is clear regarding violations of Section 383.93(b)(4) and Rule 2-5-07(D). The Commission is of the opinion that Trooper Wolfe properly cited Mr. Gainey for those violations. Mr. Gainey's arguments at hearing were not sufficient to demonstrate that he should not be held liable for the civil forfeiture assessed for violation of Section 383.93(b)(4) and Rule 2-5-07. Accordingly, the Commission finds that the respondent was in violation of Section 383.93(b)(4) and Rule 2-5-07.

⁵ Respondent's Exhibit 1 – a handwritten note stating that BMV computers were not operating on January 7, 2008. Mr. Gainey represented that the note was written by a Norwalk BMV employee (Tr. 49-51).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On January 9, 2008, the Highway Patrol stopped and inspected a motor vehicle driven by James H. Gainey in the state of Ohio. The Highway Patrol found the following violations of the Code of Federal Regulations (C.F.R.) and the Ohio Administrative Code (O.A.C.): 49 C.F.R. Section 383.93(b)(4) - no hazardous materials endorsement on commercial driver's license, and Rule 4901:2-5-07(D), O.A.C. - operating a hazardous materials vehicle after being placed out of service.
- (2) Mr. Gainey was timely served a Notice of Preliminary Determination that set forth a total civil forfeiture of \$1,082.50 for violation of 49 C.F.R. Section 383.93(b)(4) and Rule 4901:2-5-07(D), O.A.C.
- (3) A hearing in this matter was convened on July 7, 2008.
- (4) Staff demonstrated at hearing, by a preponderance of the evidence, that Mr. Gainey violated 49 C.F.R. Section 383.93(b)(4) and Rule 4901:2-5-07(D), O.A.C.
- (5) Mr. Gainey's arguments at hearing were not sufficient to demonstrate that he should not be held liable for the civil forfeiture assessed for violation of 49 C.F.R. Section 383.93(b)(4) and Rule 4901:2-5-07(D), O.A.C.
- (6) Pursuant to Section 4905.83, Revised Code, Mr. Gainey must pay the State of Ohio the civil forfeiture assessed for violation of 49 C.F.R. Section 383.93(b)(4) and Rule 4901:2-5-07(D), O.A.C. Mr. Gainey shall have 30 days from the date of this opinion and order to pay the assessed forfeiture of \$1,082.50.
- (7) 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 Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793.

It is, therefore,

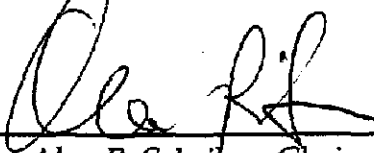
ORDERED, That Mr. Gainey pay the assessed amount of \$1,082.50 for violation of 49 C.F.R. Section 383.93(b)(4) and Rule 4901:2-5-07(D), O.A.C., as set forth in Findings (6) and (7). Payment should be made payable to "Treasurer, State of Ohio" and mailed or

delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793. In order to assure proper credit, Mr. Gainey is directed to write the case number (0841005797D) on the face of the check or money order. 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 each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Eergus

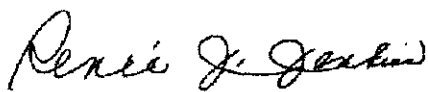

Valerie A. Lemmie


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Renee J. Jenkins
Secretary