

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Western Aries : Case No. 14-702-TR-CVF
Construction, LLC, Notice of Apparent : (OH32420091542C)
Violation and Intent to Assess Forfeiture. :

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

Michael DeWine
Ohio Attorney General

William L. Wright
Section Chief

Werner L. Margard III
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
614.466.4397 (telephone)
614.644.8764 (fax)
werner.margard@puc.state.oh.us

July 29, 2014

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Western Aries : Case No. 14-702-TR-CVF
Construction, LLC, Notice of Apparent : (OH32420091542C)
Violation and Intent to Assess Forfeiture. :

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

This case basically involves a simple factual dispute. But the record demonstrates that the inspecting officer made findings sufficient to justify the violations that he found. And a careful review of the record further demonstrates that the “contradicting” evidence is not entitled to significant weight.

On December 29, 2013, Inspector Mark Irmischer conducted a full, Level I inspection of the vehicle operated by the respondent, Wieslaw Walawender.¹ He had reason to recall the inspection since it was during a special assignment different than his usual duties.²

¹ Mr. Walawender is the sole owner of Western Aries Construction LLC. Tr. at 6.

² Tr. at 9.

Following his inspection, Inspector Irmischer prepared a Driver/Vehicle Examination Report, noting a number of violations.³ Of the eight (8) separate violations, three (3) placed the vehicle out of service.

Inspector Irmischer found violations with two (2) of the ten (10) brakes on the vehicle. As he testified, an out of service violation occurs once the number of defective brakes is equal to or greater than 20% of the service brakes on the vehicle.⁴

He measured the brakes on each of the axles. The first brake violation was on the fourth axle. He found one of the fourth axle brakes to be significantly out of adjustment.⁵ Inspector Irmischer made this determination after following a regular measurement protocol that he described in considerable detail.⁶

In addition, Inspector Irmischer was able to observe an unknown foreign substance on the brake shoes on the right side of the first axle. Although he was unable to identify the substance, he observed it both from above through the engine compartment, and from below.⁷ The brake shoes should not have any dampness on them at all.⁸

³ Staff Ex. 1.

⁴ Tr. at 17.

⁵ *Id.* at 12.

⁶ *Id.* at 12-14.

⁷ *Id.* at 14.

⁸ *Id.*

A third out of service violation was found when the left rear turn signal failed to operated properly during the inspection. Although the respondent was able to get the turn signal to work following the inspection, it is clear that the signal did not function at the time of the inspection itself:

Q. So in the course of your inspection you asked him to turn on the turn signals.

A (by Inspector Irmischer). Exactly, yes.

Q. And when he turned on the turn signal at your direction, it did not work; is that correct?

A. That's correct.⁹

There is no dispute that these were the findings made by the Inspector at the time of his inspection. There is no dispute about how Inspector Irmischer conducted his examination, or the accuracy of his measurements.

The respondent did offer evidence, however, that the conditions found by Inspector Irmischer ceased to exist at some time following the inspection. There is no evidence, however, that the findings in Staff Exhibit 1 are incorrect.¹⁰

Respondent called a mechanic to correct the violations. The gentleman arrived perhaps an hour, perhaps an hour and a half, later.¹¹ The respondent offered what appears to be a copy of his copy of the Driver/Vehicle Inspection Report as Respondent

⁹ Tr. at 19.

¹⁰ The respondent did not question or challenge the assessments recommended as a result of the violations found. Consequently, the Commission should, if it finds that its Staff has established the violations by a preponderance of the evidence, assess forfeitures against the respondent in the amount of \$300.

¹¹ *Id.* at 37.

Exhibit 8. He acknowledged that it was a poor copy, but said that it clearly bore the findings of the mechanic who responded to the repair call. This document purports to claim that the brake shoes were dry, and that the offending 4th axle brakes were not, in fact, out of adjustment.

If this is the case, and we have only the driver's say so, then the writings are clearly hearsay and should be given minimal weight at best. Respondent had the opportunity to call witnesses to testify on his behalf, including "Ernie" the mechanic, and chose not to do so.

Be that as it may, there is no evidence in the record that the inspector's observations and measurements were inaccurate or mistaken at the time that they were made. Without any evidence of what may have occurred in the intervening hours from the time of the inspection until the remarks made by the mechanic, the inspector's findings should be accorded the appropriate weight, and the violations should be upheld.

While no-one was able to identify what substance may have been on the brakes, respondent acknowledged that he, too, had seen wetness on the brake shoes. Indeed, he testified that:

I crawled on my knees around the truck on the driver's side and I am looking and I see some wetness there but I -- it was from the bottom up. It wasn't from the top. It was actually a little bit on the side too. . . ¹²

¹²

Tr. at 32-33.

He further acknowledged that a leaking hub will cause “all kinds of problems.”¹³ And while it is barely legible, it appears that Respondent’s Exhibit 8 confirms that the “wheel seal [was] leaking.”

Respondent took photos of the brake drums after they had been removed. Although the drums appear to be dry in the photos, it is important to note that the pictures were taken some hours (for all anyone knows) after the inspection occurred. There were not other witnesses to testify what may have occurred during the interim. Respondent had previously testified that he had taken a napkin and tried to wipe off the shoes to determine what the substance was prior to calling the mechanic.¹⁴ Neither Staff nor the Commission has any means to determine whether any more was done either before or after the mechanic arrived.

Finally, respondent acknowledged that the defective turn signal may not have been working at the time of the inspection. After reviewing the inspection report with Inspector Irmischer, he went to his trailer and “pushed on the cable” to reconnect his blinkers. He later testified that he “put it back together and the light went back.”¹⁵ He went so far as to say that he had “actually pulled the whole light out because [he] thought there was a wiring problem.”¹⁶

¹³ Tr. at 33.

¹⁴ *Id.*

¹⁵ *Id.* at 43.

¹⁶ *Id.* at 32.

Inspector Irmischer, a veteran of more than 23 years, conducted a full inspection. Following standard procedures, he ascertained that one of the trailers brakes was out of adjustment. Although the respondent later came up with a different measurement, there is no evidence that the inspector's measurements were improperly made or inaccurate at the time they were made. Inspector Irmischer also observed a foreign substance on the shoes of one of the tractor's brakes. He visually observed that the brake shoes were wet both from above and from below. Although the respondent later took photographs showing dry brake shoes, he himself acknowledged dampness, as did the repairing mechanic. He also acknowledged that he himself may have disconnected the turn signal, even if inadvertently, prior to the inspection.

In short, the inspector's findings justify a determination that the violations occurred. There is no credible evidence to the contrary. The Commission should assess the uncontroverted sum of \$300 for these violations.

Respectfully submitted,

Michael DeWine
Ohio Attorney General

William L. Wright
Section Chief

/s/ Werner L. Margard III

Werner L. Margard III
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
614.466.4397 (telephone)
614.644.8764 (fax)
werner.margard@puc.state.oh.us

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Post-Hearing Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via U.S. mail, postage prepaid, upon Respondent Wieslaw Walawender, 2919 Birch Avenue, Niagara Falls, New York, 14305, this 29th day of July, 2014.

/s/ Werner L. Margard III

Werner L. Margard III
Assistant Attorney General

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/29/2014 12:52:42 PM

in

Case No(s). 14-0702-TR-CVF

Summary: Brief Post-Hearing Brief submitted by Assistant Attorney General Werner L. Margard III on behalf of the Staff of the Public Utilities Commission of Ohio. electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio