

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Western Aries )  
Construction LLC, Notice of Apparent ) Case No. 14-702-TR-CVF  
Violation and Intent to Assess ) (OH3242009152C)  
Forfeiture. )

OPINION AND ORDER

The Commission, considering the evidence of record, the applicable law, and being otherwise fully advised, issues its Opinion and Order in this matter.

APPEARANCES:

Wieslaw J. Walawender, 2919 Birch Avenue, Niagara Falls, New York 14305, on behalf of Western Aries Construction LLC.

Mike DeWine, Ohio Attorney General, by Werner L. Margard, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

NATURE OF THE PROCEEDING:

On December 29, 2013, Inspector Mark Irmscher of the Ohio State Highway Patrol (Highway Patrol) stopped and inspected a commercial motor vehicle (CMV), operated by Western Aries Construction LLC (Respondent) and driven by Wieslaw J. Walawender, in the state of Ohio. The Highway Patrol found the following apparent violations of the Code of Federal Regulations (C.F.R.):

49 C.F.R. 393.47(e) - Clamp or roto type brake out of adjustment.

49 C.F.R. 393.51 - No or defective brake warning device - no audible.

49 C.F.R. 393.9 - Inoperable required lamp (four separate apparent violations).

49 C.F.R. 393.48(a) - Inoperative/defective brakes - contaminated with grease or oil.

49 C.F.R. 396.3(a)(1) - Brakes out of service - the number of defective brakes is equal to or greater than 20 percent of the service brakes on the vehicle or combination.

Respondent was timely served a notice of preliminary determination (Staff Ex. 2), in accordance with Ohio Adm.Code 4901:2-7-12. In the notice, Respondent was informed that Staff intended to assess a civil monetary forfeiture totaling \$300.00 for the apparent violations of 49 C.F.R. 393.9, 393.48(a), and 396.3(a)(1). A prehearing conference was held on May 20, 2014. The parties, however, failed to reach a settlement agreement during the conference. Subsequently, a hearing was convened on July 2, 2014. A briefing schedule was established at the conclusion of the hearing, and Staff filed its brief on July 29, 2014. Respondent did not file a brief.

#### Background:

The roadside inspection in this case took place along Interstate 71 in Delaware County, Ohio. At the time of the inspection, Respondent was transporting fresh produce from Elba, New York, to Austin, Texas.

#### Issues:

Staff maintains that Inspector Mark Irmscher, a motor carrier enforcement inspector with the Highway Patrol, observed Respondent operating a CMV with an inoperable left identification light on the trailer. Inspector Irmscher then stopped and inspected the CMV, and cited Respondent for the lamp- and brake-related violations at issue in this case. (Staff Ex. 1; Tr. at 15.) Respondent contests the alleged violations, although Respondent does not dispute or otherwise question Staff's calculation of the assessed civil forfeiture.

#### DISCUSSION:

Staff witness Mark Irmscher, an inspector with the Motor Carrier Enforcement Division of the Highway Patrol, testified that, on December 29, 2013, he inspected, during a special assignment conducted along Interstate 71, a CMV operated by Respondent and driven by Wieslaw Walawender. Following his full inspection of the CMV, Inspector Irmscher prepared a Driver/Vehicle Examination Report, noting eight separate violations, three of which constituted out-of-service violations. Inspector Irmscher testified that, using his standard protocol, he measured the brakes on each of the axles, and discovered that the right brake on the fourth axle was out of adjustment, in violation of 49 C.F.R. 393.47(e). Further, Inspector Irmscher testified that he observed, both from above through the engine compartment and from beneath the CMV, an unknown foreign substance, which appeared to be some type of grease or oil, on the brake on the right side of the first axle. Inspector Irmscher explained that brakes should not be damp and, therefore, he considered the brake in question contaminated and defective, in violation of 49 C.F.R. 393.48(a). As a result of the discovered brake violations, Inspector Irmscher testified that Respondent was

also in violation of 49 C.F.R. 396.3(a)(1), because two of the ten brakes on the CMV were defective and, thus, the number of defective brakes was equal to or greater than 20 percent of the service brakes on the vehicle. Finally, Inspector Irmischer testified that he discovered an inoperable audible alarm for the braking system on the CMV, in violation of 49 C.F.R. 393.51, as well as four inoperable lamps on the vehicle, in violation of 49 C.F.R. 393.9, including the left rear turn signal, which constituted an out-of-service violation. Inspector Irmischer explained that the left rear turn signal failed to operate when he instructed Mr. Walawender to engage it during the inspection, although Inspector Irmischer later observed the turn signal function correctly. (Staff Ex. 1; Tr. at 7, 9, 11-17, 19.)

Staff witness Joseph Turek, a staff attorney and supervisor within the Compliance Division of the Transportation Department, testified that a notice of preliminary determination was issued to Respondent with a total civil forfeiture of \$300.00 assessed for the violations in this case (Staff Ex. 2; Tr. at 20, 22-25). Mr. Turek also testified that the monetary value of the forfeiture for Respondent's violations was determined by using a fine schedule (Tr. at 23-24). Further, Mr. Turek explained that the Commission applies the fine schedule and the procedures used in determining the forfeitures in the fine schedule uniformly to motor carriers and drivers, and that Respondent's assessed forfeiture is consistent with the recommended fine schedule and civil penalty procedures adopted by the Commercial Vehicle Safety Alliance (Tr. at 25).

Mr. Walawender stated that he is Respondent's sole owner, and appeared on its behalf before the Commission (Tr. at 6). Mr. Walawender testified that, on the morning of the inspection, he examined the CMV and did not observe anything that would render the vehicle inoperable or unsafe on the roadways. Upon exiting the CMV for the inspection, Mr. Walawender stated that, from the rear of the vehicle, he witnessed the rear turn signals in operation. Mr. Walawender, however, explained that, in order to disconnect the red line during the brake inspection, he had to pull out the trailer's electrical cable at one point. Mr. Walawender further explained that, following completion of the inspection and the Driver/Vehicle Examination Report, he pushed the electrical cable back into position, activated the rear turn signals, and informed the inspector that they were working. With respect to the other lamp violations, Mr. Walawender acknowledged that the light on the top of the trailer had burned out, although the light on the right side functioned correctly after he pushed the bracket back into place. Mr. Walawender also testified that it was not dark enough for the lights on the CMV to be turned on and, therefore, he questioned the inspector's reason for stopping the vehicle for inspection. (Tr. at 28-32, 43.)

Regarding the brake violations, Mr. Walawender testified that most of the parts for the brakes on the CMV were fairly new and that he did not have a

measuring tape to confirm the inspector's measurements, although Mr. Walawender stated that he did observe one chalk mark that was farther than the other marks. Further, Mr. Walawender stated that he observed some wetness on the first axle right brake at the bottom and the side, but not on the top. According to Mr. Walawender, he ran a white napkin around inside the brake drum, which came out with some dust, but no wetness. Mr. Walawender testified that, at that point, he requested that the inspection be repeated or that the inspector accompany the CMV to a repair facility, both of which the inspector declined to do. Mr. Walawender also testified that the mechanic who arrived to repair the brakes found no leakage, only "a little bit of sweat on the inside of the hub," and measured the chalk mark for the fourth axle right brake at one inch, rather than two and a quarter inches as noted on the Driver/Vehicle Examination Report. In support of his testimony, Mr. Walawender offered copies of the Driver/Vehicle Examination Report with handwritten notes, receipts for the repair work and parts, and photographs of the brake drum and shoes, which, according to Mr. Walawender, show no grease or other contamination. (Respondent Ex. 2 to 8; Tr. at 32-34, 38-44.)

Mr. Thomas Hendler also offered testimony in support of Respondent. Mr. Hendler testified that he is a longtime friend of Mr. Walawender and that Mr. Walawender is an experienced mechanic who thoroughly inspects his CMV while on road trips. Mr. Hendler further testified that, although he was not with Mr. Walawender during the inspection or the trip in question, Mr. Hendler believes that Mr. Walawender's photographs reflect that there was no leaking oil, although there may have been "a grease seal issue." (Tr. at 52-55.)

#### CONCLUSION:

Ohio Adm.Code 4901:2-7-20(A) requires that, at the hearing, Staff prove the occurrence of a violation by a preponderance of the evidence. Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Respondent violated 49 C.F.R. 393.9 (four separate violations for inoperable required lamps), 393.51 (defective audible brake warning device), and 393.47(e) (brake out of adjustment), but has not proven that Respondent violated 49 C.F.R. 393.48(a) (inoperative/defective brake contaminated with grease or oil) and 396.3(a)(1) (two of the ten brakes were defective).

With respect to the four separate violations of 49 C.F.R. 393.9, which pertain to inoperable turn signals and other lamps, the evidence of record reflects that, during the time of the inspection, none of the lamps in question were in operation, as confirmed by Inspector Irmischer's testimony and the Driver/Vehicle Examination Report that he completed following the inspection (Staff Ex. 1; Tr. at 15-16). Although Mr. Walawender testified that, after he reinserted the electrical cable and

pushed in a loose bracket, all but one of the lamps were fully functioning, the fact remains that none of the four lamps in question were operating correctly during the inspection. Mr. Walawender asserted that the CMV should have been inspected a second time, after he had time to review the Driver/Vehicle Examination Report and make the necessary adjustments to the lighting on the vehicle. There is, however, no requirement that a second inspection be performed at the driver's request nor do we believe that it would be reasonable to place such an obligation on the Highway Patrol. Further, although Mr. Walawender questioned whether it was dark enough that his lights were even turned on while on the roadway, he did not unequivocally testify that the lights on the CMV were, in fact, turned off when Inspector Irmischer first observed and stopped the vehicle (Tr. at 43). Inspector Irmischer explained that, when Respondent's CMV passed by him on the roadway, he noticed that one of the three identification lights in the center of the trailer was out, which is why the vehicle was stopped for inspection (Tr. at 15).

Turning to the alleged brake-related violations, the Commission finds, based on the evidence of record, that Respondent was in violation of 49 C.F.R. 393.51 and 393.47(e), but not in violation of 49 C.F.R. 393.48(a) and 396.3(a)(1). Regarding the violation of 49 C.F.R. 393.51, Inspector Irmischer testified that a CMV must be equipped with a signal that provides a warning to the driver when a failure occurs in the vehicle's service brake system. Inspector Irmischer further testified that the audible alarm did not function when tested in Respondent's CMV, which Mr. Walawender did not dispute or even address during the hearing. With respect to the alleged violation of 49 C.F.R. 393.47(e), Inspector Irmischer described, in detail, the procedure used to measure the brakes and testified that his measurements revealed that the right brake on the fourth axle was out of adjustment at two and a quarter inches (Staff Ex. 1; Tr. at 11-14, 16). Mr. Walawender testified that he did not confirm Inspector Irmischer's measurements, because he did not have a measuring tool. Mr. Walawender admitted, however, that one of Inspector Irmischer's chalk marks was farther than the other marks, which is consistent with Inspector Irmischer's measurements indicating that the fourth axle right brake on the trailer was out of adjustment at two and a quarter inches, while the other brakes on the trailer were all measured at one and a half inches. (Staff Ex. 1; Tr. at 32.) Mr. Walawender also testified that a mechanic was called to the scene following the inspection. According to Mr. Walawender, the mechanic measured the brake in question at one inch, which the mechanic purportedly indicated on Mr. Walawender's copy of the Driver/Vehicle Examination Report (Respondent Ex. 8; Tr. at 37, 42). This measurement, however, was allegedly taken at some point well after the inspection and the mechanic did not testify at the hearing to verify or explain the handwritten notes on the Driver/Vehicle Examination Report. On balance, Inspector Irmischer's testimony, as well as Mr. Walawender's own

observation of the inspector's chalk marks, reflects that, at the time of the inspection, the brake in question was out of adjustment, in violation of 49 C.F.R. 393.47(e).

Next, in regard to the alleged violation of 49 C.F.R. 393.48(a), Inspector Irmscher testified that there appeared to be oil or grease on the first axle right brake (Tr. at 14-15). Inspector Irmscher also testified that the brake in question was not out of adjustment, which is confirmed by the Driver/Vehicle Examination Report. For his part, Mr. Walawender claimed that the brake drum and brake shoes were dry, although he conceded that there may have been some sweat on the inside of the wheel hub, which he asserted would explain the wetness (Tr. at 32-33, 38). As noted above, Mr. Walawender offered photographs of the brake drum, which were taken by him after the drum was removed from the CMV by the mechanic. Mr. Walawender also offered a copy of the Driver/Vehicle Examination Report provided to him by Inspector Irmscher, which includes handwritten notes, purportedly from the mechanic, indicating that the brake shoes and brake drum were dry and that the wheel seal was leaking sweat. Although the Commission declines to afford much weight to the notes allegedly from the mechanic who did not testify at the hearing, or to Mr. Walawender's photographs, as they do not conclusively establish the absence of oil or grease on the drum or shoes of the brake in question, we find that Staff has failed to provide sufficient evidence to refute Mr. Walawender's testimony that the wheel hub was sweating, while the brake drum and brake shoes were dry and, therefore, were not repaired by the mechanic (Tr. at 38, 49).

The Commission also notes that, as a result of the alleged grease or oil contamination on the brake, Inspector Irmscher cited Respondent for violation of 49 C.F.R. 393.48(a), which only addresses the operability of brakes. The regulation generally requires that all brakes with which a CMV is equipped must at all times be capable of operating. Inspector Irmscher testified that the brake in question was in proper adjustment, as reflected in the Driver/Vehicle Examination Report, and did not testify that the right brake on the first axle was otherwise inoperable (Tr. at 14). There is no evidence that the operability of the brake was impeded from the sweat on the wheel hub or on the brake drum or brake shoes, if it is assumed that the wetness was, in fact, on the brake itself. Although there may have been other regulations under which Respondent could have been appropriately cited for oil or grease contamination,<sup>1</sup> 49 C.F.R. 393.48(a) does not appear to provide a proper basis for the citation in this case.

Accordingly, although the Commission concludes that Respondent was in violation of 49 C.F.R. 393.9 (four separate violations), 393.51, and 393.47(e), we find

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<sup>1</sup> For example, 49 C.F.R. 396.5(b) requires that a CMV be free of oil and grease leaks.

that Staff presented insufficient evidence with respect to the violation of 49 C.F.R. 393.48(a). In light of our conclusion, the Commission also finds that there is insufficient evidence that more than 20 percent of the service brakes on Respondent's CMV were defective, as Inspector Irmischer cited under 49 C.F.R. 396.3(a)(1). Staff has, therefore, failed to prove, by a preponderance of the evidence, the alleged violation of 49 C.F.R. 393.48(a) and 396.3(a)(1).

Finally, with regard to the civil forfeiture recommended by Staff, the evidence of record demonstrates that \$50.00 of the total civil forfeiture of \$300.00 was assessed for the violation of 49 C.F.R. 393.9 related to the inoperable left rear turn signal, while no civil forfeiture amount was assessed for the other lamp violations under 49 C.F.R. 393.9, the defective audible brake warning device under 49 C.F.R. 393.51, or the out-of-adjustment right brake on the fourth axle under 49 C.F.R. 393.47(e). The remaining \$250.00 of the total civil forfeiture was assessed for the alleged violations of 49 C.F.R. 393.48(a) and 396.3(a)(1), regarding which we have determined that Staff provided insufficient evidence. (Staff Ex. 2.) Accordingly, the Commission finds that Respondent should be assessed a civil forfeiture of \$50.00 for the violation of 49 C.F.R. 393.9. Respondent is directed to make payment of the assessed civil forfeiture of \$50.00 by certified check or money order payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. The inspection number (OH3242009152C) should be written on the face of the certified check or money order to ensure proper credit. Payment must be made within 30 days of this Opinion and Order. The remaining civil forfeiture of \$250.00 should not be assessed for Respondent's alleged violation of 49 C.F.R. 393.48(a) and 396.3(a)(1). The alleged violations of 49 C.F.R. 393.48(a) and 396.3(a)(1) should also be deleted from Respondent's Safety-Net record and history of violations.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On December 29, 2013, the Highway Patrol stopped and inspected a CMV operated by Respondent in the state of Ohio. The Highway Patrol found the following apparent violations: 49 C.F.R. 393.47(e) - clamp or roto type brake out of adjustment; 49 C.F.R. 393.51 - no or defective brake warning device - no audible; 49 C.F.R. 393.9 - inoperable required lamp (four separate apparent violations); 49 C.F.R. 393.48(a) - inoperative/defective brakes - contaminated with grease or oil; and 49 C.F.R. 396.3(a)(1) - brakes out of service - the number of defective brakes is equal to or greater than 20 percent of the service brakes on the vehicle or combination.

- (2) Respondent was timely served a notice of preliminary determination that set forth a total civil forfeiture of \$300.00 for the violations.
- (3) A prehearing conference was held on May 20, 2014.
- (4) A hearing in this matter was convened on July 2, 2014.
- (5) Ohio Adm.Code 4901:2-7-20(A) requires that, at the hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.
- (6) Based upon the record in this proceeding, Staff has proven, by a preponderance of the evidence, that Respondent violated 49 C.F.R. 393.9 (four separate violations), 393.51, and 393.47(e).
- (7) Staff has not proven, by a preponderance of the evidence, that the alleged violations of 49 C.F.R. 393.48(a) and 396.3(a)(1) occurred.
- (8) A civil forfeiture of \$50.00 should be assessed against Respondent for the violation of 49 C.F.R. 393.9.
- (9) The alleged violations of 49 C.F.R. 393.48(a) and 396.3(a)(1) should be deleted from Respondent's Safety-Net record and history of violations.

It is, therefore,

ORDERED, That Respondent pay a civil forfeiture of \$50.00 for the violation of 49 C.F.R. 393.9, in accordance with this Opinion and Order. Payment shall be made by check or money order payable to "Treasurer, State of Ohio," and mailed to PUCO Fiscal, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. In order to ensure proper credit, Respondent is directed to write the inspection number (OH3242009152C) on the face of the check or money order. It is, further,

ORDERED, That the alleged violations of 49 C.F.R. 393.48(a) and 396.3(a)(1) be removed from Respondent's Safety-Net record and history of violations. It is, further,

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

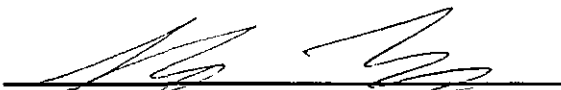


ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

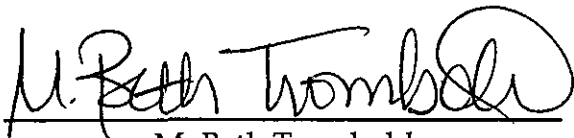
THE PUBLIC UTILITIES COMMISSION OF OHIO



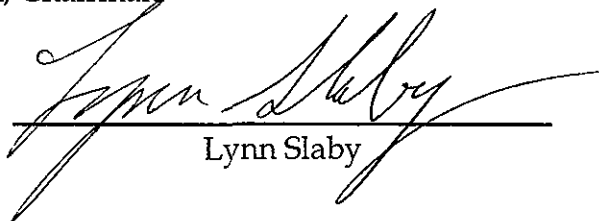
Thomas W. Johnson, Chairman



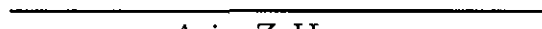
Steven D. Lesser



M. Beth Trombold



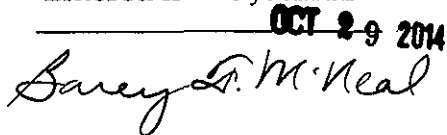
Lynn Slaby



Asim Z. Haque

SJP/sc

Entered in the Journal

**OCT 29 2014**  


Barcy F. McNeal  
Secretary