

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Johnson Farms, Notice of)
 Apparent Violation and Intent to Assess) Case No. 05-1156-TR-CVF
 Forfeiture.)

OPINION AND ORDER

The Commission, considering the public hearings held on December 14, 2005, January 26, 2006, and March 15, 2006, issues its opinion and order in this matter.

APPEARANCES:

Ms. Sylvia Johnson, 27910 Chillicothe Pike, Williamsport, Ohio, on behalf of Johnson Farms.

Jim Petro, Attorney General of Ohio, by Duane W. Luckey, Senior Deputy Attorney General, by Thomas G. Lindgren, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215.

Nature of the Proceeding:

On September 28, 2004, a Commission investigator conducted a compliance review¹ at the office of Johnson Farms (respondent). However, the necessary records were not made available to the investigator at the compliance review. Thereafter, according to staff, despite attempts to contact the respondent and two additional visits to respondent's office, respondent still did not provide the necessary records. The compliance review subsequently was closed, and the investigator submitted her report (Staff Exhibit 1) in the case.

Johnson Farms was timely served with a Notice of Apparent Violation and Intent to Assess Forfeiture and a Notice of Preliminary Determination in accordance with Rules 4901:2-7-07 and 4901:2-7-12, Ohio Administrative Code (O.A.C.), respectively. In these notices, Johnson Farms was notified that the Commission staff (staff) intended to assess civil monetary forfeitures for the following apparent violations of the Code of Federal Regulations (C.F.R.):

¹ A compliance review is a regulatory review at the fixed facility of a motor carrier. In the review, staff investigates the motor carrier for compliance with federal and state safety regulations and hazardous materials requirements.

<u>Code</u>	<u>Violation</u>	<u>Forfeiture</u>
395.8(k)(1)	Failing to preserve driver's record of duty status	\$3,400.00
395.8(k)(1)	Failing to preserve driver's record of duty status	\$3,400.00
395.8(k)(1)	Failing to preserve driver's record of duty status	\$3,400.00
395.8(k)(1)	Failing to preserve driver's record of duty status	\$3,400.00
396.3(b)	Failing to keep minimum records of inspection	\$ 425.00
396.3(b)	Failing to keep minimum records of inspection	\$ 425.00
396.11(c)(2)	Failing to retain vehicle inspection report	\$ 0.00
396.11(c)(2)	Failing to retain vehicle inspection report	\$ 0.00

A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement at the conference. Subsequently, a hearing was convened in this matter on December 14, 2005. At the hearing, staff presented evidence in support of the civil forfeitures assessed against respondent. Respondent, however, did not appear at hearing. After the presentation of evidence, staff moved for a default judgment against the respondent. Staff's motion was taken under advisement for a Commission order in the case and the hearing was adjourned. Thereafter, respondent filed a letter stating that its representative had forgotten about the hearing and requesting that the hearing be reconvened so that she could present evidence in the case. A second hearing then was scheduled on January 26, 2006. At the second hearing, respondent's representative testified and proffered documents in support of respondent's contention that it had not violated the motor carrier safety regulations. The record of the hearing was kept open pending a review of the documents by staff.

After its review, staff filed a motion to reconvene the hearing. Staff's motion was granted and a third hearing was held on March 15, 2006. At the hearing, staff's witness testified that the documents proffered by respondent at the second hearing did not contain the necessary records sought by staff in the compliance review. Respondent did not appear at the third hearing.

Background

Johnson Farms transports primarily mulch² on intrastate and interstate hauls utilizing two drivers, two tractors, and seven trailers. In this case, as mentioned previously, despite repeated attempts by Commission staff to obtain information, necessary records pertaining to driver duty status and vehicle maintenance and inspection were not made available for staff's inspection.

² Transportation of mulch to intrastate destinations is exempt from safety regulation in Ohio under Sections 4921.02 and 4923.02, Revised Code. However, there is no exemption in the Federal Motor Carrier Safety Regulations for the interstate transportation of mulch (December 14, 2005, Tr. at 17).

Applicable Law

In Rule 4901:2-5-02, O.A.C., the Commission adopted the provisions of the Federal Motor Carrier Safety Regulations (FMCSRs) of the U.S. Department of Transportation contained in Title 49, Parts 383 and 390 through 397, C.F.R.

The Commission would also note that we adopted the civil forfeiture and compliance proceeding rules contained in Rules 4901:2-7-01 through 4901:2-7-22, O.A.C. These rules require that a respondent be afforded reasonable notice and the opportunity for a hearing where the Commission staff finds a violation of the U.S. Department of Transportation Motor Carrier Safety Regulations.

Discussion:

Staff's compliance review report (Staff Ex. 1), as well as the testimony of record in this case, note that, during the course of the compliance review, respondent did not produce duty status records for trips involving company drivers. Further, respondent did not produce vehicle maintenance and inspection records that are required to be retained by the FMCSRs. Moreover, staff testified that respondent did not produce bills of lading that would support an intrastate exemption for the transportation of mulch. (Staff Ex. 1, December 14, 2005 Tr. 15-17.) For her part, respondent's representative, who appeared at the January 26, 2006 hearing, indicated that the respondent was not in violation of the FMCSRs at issue in this case (January 26, 2006 Tr. 5-11, 13). In addition, respondent's representative proffered documents at the hearing and testified that the documents were responsive to staff's requests for documents in the compliance review (January 26, 2006 Tr. 11, 15). Respondent's representative also stated that respondent had previously made interstate hauls of mulch two to three times a week, but that it no longer performed such transportation (January 26, 2006 Tr. 12). Respondent's representative did not offer any further evidence to rebut the compliance review report submitted by staff, or to support an intrastate exemption for the transportation of mulch. Thereafter, at the March 15, 2006 hearing, staff testified that the documents proffered by respondent at the January 26, 2006 hearing were not responsive to staff's requests for records during the compliance review (March 15, 2006 Tr. at 7).

After a thorough review, the Commission finds that the evidence submitted in this case shows that the respondent did not present, during the compliance review or during the hearings in this case, records that are required to be retained by the FMCSRs. Respondent put forth no pertinent documentation or testimony that supports an intrastate exemption for the transportation of mulch, or that rebuts staff's presentation of evidence at the hearings that the respondent was in violation of the C.F.R. sections listed in the compliance review report. Accordingly, in light of the testimony and evidence of record, the Commission concludes that the respondent was subject to the Commission's

jurisdiction under the FMCSR's for the interstate transportation of mulch and that the respondent was in violation of 49 C.F.R. Section 395.8(k)(1), 49 C.F.R. Section 396.3(b), and 49 C.F.R. Section 396.11(c)(2).

Rule 4901:2-7-06, O.A.C., provides that the Commission, in determining the amount of the forfeiture to be assessed, shall consider certain factors, including nature and circumstances of the violation, extent and gravity of the violation, culpability, ability to pay, the effect on the respondent's ability to continue in business, and such other matters as justice may require. In this particular case, in light of the testimony presented by respondent's representative requesting abatement of the total assessed forfeiture of \$14,450.00, and indicating that Johnson Farms could be forced into bankruptcy by the payment of the forfeiture (January 26, 2006 Tr. at 7, 11, and 13), the Commission believes that respondent should be assessed a modified forfeiture amount of \$3,825.00 for violations of 49 C.F.R. 395.8(k)(1), failing to preserve driver's record of duty status (\$3,400.00), and 49 C.F.R. 396.3(b), failing to keep minimum records of inspection (\$425.00). In addition, two-thirds of this modified forfeiture, \$2,550.00, should be held in abeyance for one year. During that period of time, if respondent demonstrates, to the satisfaction of staff in compliance reviews, that it is in compliance with the duty status and vehicle maintenance and inspection record keeping requirements of the FMCSRs, the \$2,550.00 held in abeyance will be waived and the modified forfeiture will be reduced to the amount currently levied, \$1,275.00. However, if additional instances of the aforementioned violations are discovered, the \$2,550.00 held in abeyance will become due upon the written demand of staff. In such an eventuality, staff shall have full authority to seek any outstanding forfeiture amounts against Johnson Farms.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On September 28, 2004, Commission staff conducted a compliance review at the office of the respondent, Johnson Farms. However, necessary records were not made available to the investigator during the compliance review. Thereafter, despite attempts to contact the respondent and two additional visits to respondent's office, respondent still did not provide the necessary records. The compliance review subsequently was closed, and the investigator submitted a compliance review report (Staff Exhibit 1) in the case. In the report, staff presented a *prima facie* case that respondent was in violation of 49 C.F.R. 395.8(k)(1), 49 C.F.R. 396.3(b), and 49 C.F.R. Section 396.11(c)(2), which mandate the retention of duty status records and vehicle maintenance and inspection records, respectively.

- (2) Respondent was timely served a Notice of Apparent Violation and Intent to Assess Forfeiture (Staff Ex. 3) and a Notice of Preliminary Determination (Staff Ex. 4).
- (3) Hearings in this matter were convened on December 14, 2005, January 26, 2006, and March 15, 2006. Pursuant to the Commission's rules, prior notices of the hearings were provided to respondent.
- (4) The evidence presented in this case demonstrates that respondent did not present to staff, during the compliance review or during the hearings in this case, the records required to be maintained by the FMCSRs. Respondent did not submit any pertinent documentation or testimony that supports an intrastate exemption for the transportation of mulch, or that rebuts the evidence presented by staff that it was in violation of the C.F.R. sections listed in the compliance review report. Accordingly, in light of the testimony and evidence of record, the Commission concludes that the respondent was subject to the Commission's jurisdiction under the FMCSRs for the interstate transportation of mulch and that the respondent was in violation of 49 C.F.R. 395.8(k)(1), 49 C.F.R. 396.3(b), and 49 C.F.R. 396.11(c)(2).
- (5) Pursuant to Section 4905.83, Revised Code, respondent is liable to the State of Ohio for the \$3,825.00 modified civil forfeiture assessed for violations of 49 C.F.R. 395.8(k)(1) and 49 C.F.R. 396.3(b). However, two-thirds of the modified forfeiture, \$2,550.00, should be held in abeyance for one year. During that period of time, if respondent demonstrates, to the satisfaction of staff in compliance reviews, that it is in compliance with the duty status and vehicle maintenance and inspection record keeping requirements of the FMCSRs, the \$2,550.00 held in abeyance will be waived and the modified forfeiture will be reduced to the amount currently levied, \$1,275.00. However, if additional instances of the violations involved in this case are discovered, the \$2,550.00 held in abeyance will become due upon the written demand of staff. Further, respondent shall have 30 days from the date of this entry to pay the currently levied forfeiture amount of \$1,275.00.
- (6) 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.

ORDER:

It is, therefore,

ORDERED, That Johnson Farms be assessed a total civil forfeiture of \$3,825.00 for the violations of 49 C.F.R. 395.8(k)(1) and 49 C.F.R. 396.3(b). It is, further,

ORDERED, That Johnson Farms pay the currently levied civil forfeiture amount of \$1,275.00 within 30 days to the State of Ohio, as set forth in Findings of Fact and Conclusions of Law (5) and (6). It is, further,

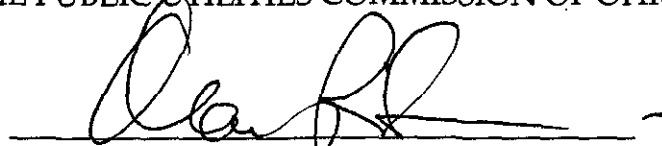
ORDERED, That a portion of the assessed civil forfeiture, \$2,550.00, be held in abeyance for one year under the terms set forth in this opinion and order. It is, further,

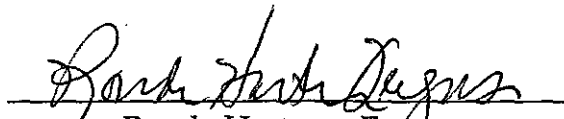
ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,


ORDERED, That this case be closed of record. It is, further,

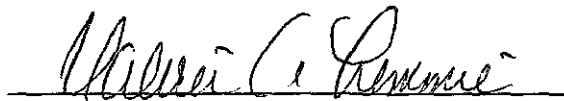
ORDERED, That copies of this Opinion and Order be served upon all parties of record.

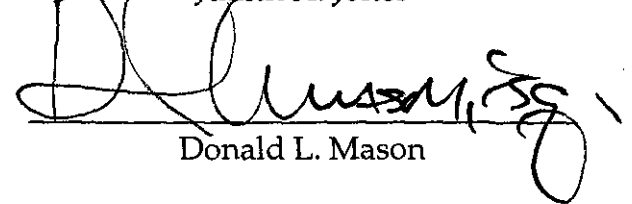
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus


Judith A. Jones

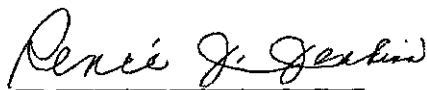

Valerie A. Lemmie


Donald L. Mason

KKS:ct

Entered in the Journal

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Renee J. Jenkins
Secretary