

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Christine and Wayne )  
Davidson dba C&W Gooseneck Services, ) Case No. 05-179-TR-CVF  
Notice of Apparent Violation and Intent to )  
Assess Forfeiture. )

OPINION AND ORDER

The Commission, considering the public hearing held on November 9, 2005, issues its opinion and order in this matter.

APPEARANCES:

Mr. Wayne Davidson, 10415 Millers Fork Road, Lewisburg, Ohio 45338, on his own behalf.

Jim Petro, Attorney General of Ohio, by Mr. John Jones and Ms. Elizabeth Stevens, Assistant Attorneys General, 180 E. Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

NATURE OF THE PROCEEDING:

On October 8, 2004, the Ohio Highway Patrol (Highway Patrol) stopped and inspected a commercial motor vehicle operated by Wayne Davidson (Mr. Davidson, respondent). Mr. Davidson was timely served with a notice of preliminary determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In this notice, Mr. Davidson was notified that Commission staff (staff) intended to assess a civil forfeiture of \$100.00 for violation of the following Title 49 Code of Federal Regulation (C.F.R.) code section:

Section 392.9(A)(2): Spare Tire Insecure.

A hearing was convened on November 9, 2005.

SUMMARY OF THE TESTIMONY:

At the hearing, Inspector Corinne Cavinee (Inspector Cavinee), Motor Carrier Enforcement Inspector for the Highway Patrol, identified staff Exhibit 1, the Driver Vehicle Inspector Report prepared in this case. Inspector Cavinee stated that she observed that the spare tire on the vehicle was not secure when respondent passed through the scale

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on I-70 at Cambridge, Ohio (Tr. 10). She therefore stopped respondent and inspected his vehicle. As listed in the report, Inspector Cavinee testified that at the time of inspection she found that respondent had an insecure fire extinguisher, had not fully filled out his driver's log, and had not secured his spare tire. Of these three defects, the latter defect constituted an out-of-service violation. On cross-examination by the respondent, Inspector Cavinee confirmed that she had selected the vehicle for inspection because she had observed the insecure spare tire (*Id.* 24-25).

Mr. Jonathan Frye, Chief of the Compliance Division of the Public Utilities Commission, testified that respondents are notified of penalties through a Notice of Apparent Violation and Intent to Assess Civil Forfeiture (the Notice of Apparent Violation), which is mailed by certified mail. He stated further that such a notice was served upon Mr. Davidson by certified mail (Tr. 38, Ex. 3). Mr. Frye added that the monetary value of the fine for Mr. Davidson's violation was determined using a fine schedule consistent with the penalty recommendations of the Commercial Vehicle Safety Alliance, and was correctly assessed at \$100.00 for a loading securement type violation. Mr. Frye also testified that a Notice of Preliminary Determination (Ex. 4) was sent to respondent following the conclusion of a conference with the respondent (Tr. 40).

Mr. Davidson testified that he is a co-owner and sole driver for the respondent company (Tr. 47). Mr. Davidson stated that he had been through other inspections in Indiana and Ohio on previous occasions but had never been cited for an insecure spare on this vehicle (*Id.* at 48). Further, Mr. Davidson asserted that the inspector could not have seen any defects on his vehicle as he approached the scale due to the construction of the trailer and the location of the spare (*Id.* at 49). He further stated that the first time the inspector mentioned the tire was during the inspection when she was underneath the "tongue" of the trailer hitch, looking up. Mr. Davidson asserted that it is impossible to see the tire when standing beside the trailer (*Id.* at 51). It is Mr. Davidson's contention that Inspector Cavinee actually stopped him in the initial mistaken belief that the lack of ID lights on the cab constituted a violation (*Id.* at 50-52). On cross-examination, Mr. Davidson clarified that the tire was located in a rack in the "V" formed by the two 12-inch I-beams as they come together to form the tongue of the trailer (*Id.* at 54-57). He acknowledged that there was no strap or chain on the tire, but asserted that the tire was held in place by the design of the rack in which it lay (*Id.*). He further contended that in order to see the tire from the side you would have to be at an elevated position to see around the I-beams and the scale house where Inspector Cavinee observed his truck initially was not elevated (*Id.* at 59-61).

#### DISCUSSION:

This case presents the Commission with a two issues: (1) Whether the spare tire of Mr. Davidson's truck was not secure so as to constitute an apparent violation of 49 CFR

Section 392.9(A)(2); and (2) Whether the inspector was able to see the spare tire so as to cite Mr. Davidson for a notice of apparent violation. As to the first issue, the staff's contention is that the spare tire was not secured because "...there was nothing there to secure the tire as far as a chain or a strap or anything to secure it in that area..." (Tr. at 55). Mr. Davidson acknowledged that there were no chains or straps to secure the tire because he believed the design of the rack held the tire in place (Tr. at 55). Mr. Davidson claimed that the spare tire was held in place by the design of the tire rack and that there could be no shifting of the tire while it is in the rack. He also maintained that, in order to get the tire out of that rack, a person would have to be capable of lifting about 80 pounds and angle the tire in order to remove it (Tr. at 55). The record evidence in this case consists solely of verbal testimony from staff that the spare tire was not secured and verbal testimony from Mr. Davidson that the spare tire was secured. There are no pictures, drawings, or other evidence which show the size and design of the truck, the location of the spare tire rack in relation to the truck, the design of the spare tire rack or the relation of the spare tire to the rack, all of which would enable the Commission to evaluate whether Mr. Davidson's contention is reasonable. Absent any pictures or other physical evidence, we are unable to find that the spare tire was not secure so as to constitute a violation. Having found that there is insufficient evidence to sustain a finding that Mr. Davidson violated Section 49 C.F.R. §392.9(A)(2): Spare tire insecure, we need not reach the issue of whether the stop of Mr. Davidson was proper.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On October 8, 2004, the Highway Patrol stopped and inspected a commercial motor vehicle driven by Wayne Davidson. The Highway Patrol found Mr. Davidson to be in violation of 49 C.F.R. §392.9(A)(2), based upon the lack of securement of the spare tire.
- (2) Mr. Davidson was timely served with a notice of apparent violation and Intent to Assess Forfeiture and a Notice of Preliminary Determination.
- (3) A hearing in this matter was convened on November 9, 2005.
- (4) There is insufficient evidence to conclude that Mr. Davidson violated 49 C.F.R. §392.9(A)(2).

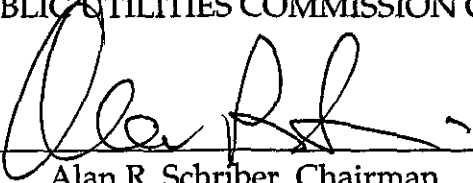
ORDER:

It is, therefore,

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

ORDERED, That copies of this entry be served upon each party of record.

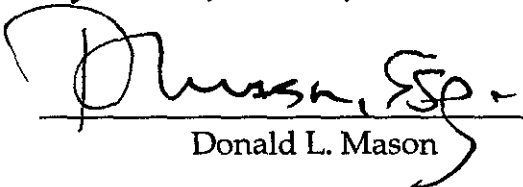
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Ronda Hartman Fergus

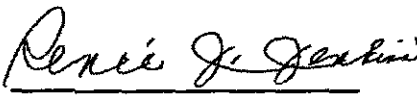
  
Judith A. Jones

  
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Renee J. Jenkins  
Secretary