

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of **Wild Rose** : Case No. 07-836-TR-CVF  
**Transportation Services** Apparent :  
 Violation and Intent to Assess Forfeiture. :

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

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Date Submitted: December 7, 2007

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**I. INTRODUCTION**

Mr. Rene Roos, aka Wild Rose Transportation, contests liability for violation of the motor carrier safety regulation at issue in this proceeding. Mr. Roos violated a provision of the federal motor carrier safety regulations by operating a commercial motor vehicle while failing to secure its vehicle equipment. In his defense Respondent only offered his own testimony of lack of knowledge or lack of notice and submitted pictures not taken at the time he was cited. The record shows that the Staff of the Public Utilities Commission of Ohio ("Staff") offered the testimony of a highly qualified and credible safety inspector, as well as the testimony of an experienced compliance inspector of the Commission's Transportation Compliance Division, to support both the apparent violation and the resulting civil forfeiture. The record supports the finding of violation of the federal motor carrier safety regulation at issue in this proceeding. Based on the evidence of record, established precedent of the Public Utilities Commission of Ohio ("Commission"), and on sound public policy, the total monetary civil forfeiture of one hundred dollars (\$100.00) should be imposed against Respondent.

## **II. STATEMENT OF FACTS**

### **A. Procedural History of the Case**

Respondent was sent a Notice of Preliminary Determination on June 13, 2007, as required and described in Section 4901:2-7-12 of the Ohio Administrative Code (“O.A.C.”).<sup>1</sup> The Notice of Preliminary Determination cited violation of Section 392.9, driver load securement.<sup>2</sup> Respondent then filed a request for a hearing in this matter. The hearing was conducted on October 18, 2007.

### **B. Factual Background of the Violations at Issue in this Proceeding**

On October 26, 2006, at 09:05 a.m. Ohio State Highway Patrol (“OSHP”) Inspector Edward S. Wiklinski conducted a roadside walk-around inspection of a vehicle operated by Wild Rose Transportation Ltd. and driven by Mr. Rene J. Roos at mile post 191 on interstate 71.<sup>3</sup> Inspector Wiklinski observed the vehicle’s open storage compartment door after he pulled from the median into traffic behind Mr. Roos.<sup>4</sup> As a result, he pulled the vehicle over for inspection.

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<sup>1</sup> Ohio Admin. Code § 4901:2-7-12 (Anderson 2007).

<sup>2</sup> 49 C.F.R. § 392.9.

<sup>3</sup> Staff Ex. 1.

<sup>4</sup> Tr. at 19.

Following the inspection, Inspector Wiklinski prepared a report describing the results of the inspection. The report was introduced at the hearing as Staff Exhibit 1. The inspection was completed at 09:50 a.m.<sup>5</sup>

As stated in his report, Inspector Wiklinski found two violations of the federal motor carrier safety regulations: (1) 49 C.F.R. §393.45(d), brake connections with leaks/constrictions: audible air leak right steer axle brake hose connection and (2) 49 C.F.R. §392.9, driver load securement: right side storage compartment door left open, vehicle equipment in danger of falling into roadway, out of service (OOS).<sup>6</sup> As a result of the open storage compartment door and the equipment being in danger of falling onto the roadway, Inspector Wiklinski cited Mr. Roos for this out of service violation.<sup>7</sup> Inspector Wiklinski directed Mr. Roos to close the door and told him he could then be on his way.<sup>8</sup> Inspector Wiklinski found two violations of the federal motor carrier safety regulations, as stated in his report. The Staff is only seeking a forfeiture for one violation: failure to secure equipment as required by 49 C.F.R. §392.9.

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<sup>5</sup> Staff Exhibit 1.

<sup>6</sup> *Id.*

<sup>7</sup> Tr. at 16.

<sup>8</sup> *Id.* at 24.

### **III. LAW AND ARGUMENT**

#### **A. Drivers of commercial motor vehicles must comply with the Motor Carrier Safety Regulations.**

Section 396.9(c)(2) of the federal motor carrier safety regulations authorizes motor carrier inspectors to place motor carriers in violation, “out of service”. The Commission, as the lead agency for the Motor Carrier Safety Assistance Program (“MCSAP”) in Ohio regulates drivers of commercial motor vehicles. In furtherance of this obligation, the Commission has adopted an extensive body of rules to govern the conduct of motor transportation companies that are engaged in commerce. The Commission has adopted “Safety Rules” for motor carrier safety pursuant to authority delegated by the Ohio General Assembly under Ohio Revised Code § 4923.03. These rules, which are found under Ohio Administrative Code § 4901:2-5-02, largely adopt the U.S. Department of Transportation (“USDOT”) commercial vehicle safety regulations including 49 C.F.R. 396.9. The state has continually sought to implement programs to ensure the safety of the motoring public and to reduce accidents involving commercial motor carriers. It is the Commission’s duty to keep Ohio’s roadways safe from accidents involving commercial motor vehicles is fundamental in this duty. Compliance with the regulations is imperative.

**B. Respondent failed to comply with the regulations by operating a motor vehicle while equipment was unsecured and in danger of falling onto the roadway.**

Section 392.9(a)(2) provides that “[a] driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless – (2) The Commercial motor vehicle’s tailgate, tailboard, doors, tarpaulins, spare tire and other equipment used in its operation, and the means of fastening the commercial motor vehicle’s cargo are secured....<sup>9</sup> When Inspector Wiklinski issued the report to Mr. Roos, the vehicle was placed out of service until the storage compartment door was secured to Inspector Wiklinski’s satisfaction.<sup>10</sup> The record shows that Mr. Roos closed the compartment door after the inspection was completed.<sup>11</sup> While there may be some question about when the door was closed, there is no question that the compartment door was open while Mr. Roos drove the vehicle. In fact, Mr. Roos testified that he saw the open compartment door in his mirror while operating the vehicle.<sup>12</sup> Therefore, the evidence shows that Respondent was operating the vehicle when other equipment used in its operation was not secured. This alone is sufficient for the violation to stand. The total monetary civil forfeiture of one hundred dollars (\$100.00) should be imposed against Respondent.

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<sup>9</sup> 49 C.F.R. §392.9(a)(2) (emphasis added).

<sup>10</sup> Tr. at 21.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 43.

In *GrosJean v. The Pennsylvania Rd. Co.*, 146 Ohio St. 643, 646, 67 N.E. 2d 623, 624 (1946), the Court held in the syllabus that a *prima facie* case is made by a party where evidence is offered to support that party's claim. To rebut such *prima facie* case it is incumbent on the other party to produce evidence that counterbalances the evidence by which the *prima facie* case was made.<sup>13</sup> In this case, the Transportation Staff satisfied its burden of proof by a preponderance of the evidence that Mr. Roos operated the vehicle in an unsafe operating condition due to the open storage compartment. The danger presented by the open storage compartment is that the insecure equipment it contained could fall onto the roadway and hinder another driver's ability to control his vehicle at highway speeds.<sup>14</sup> The compartment was described as approximately one foot high and two feet wide with a two inch lip around the opening.<sup>15</sup> Miscellaneous tools and vehicle fluids were in the compartment.<sup>16</sup> Inspector Wiklinski indicated that the compartment door was open as the truck travelled down the highway in front of him. *Id.* Inspector Wiklinski found that the bottles stood above the lip around the doorway and were in danger of falling out of the open compartment.<sup>17</sup>

Mr. Roos attempted to show through his testimony and photographs taken several days before the hearing that the contents of the open compartment were not in danger of

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<sup>13</sup> *GrosJean v. The Pennsylvania Rd. Co.*, 146 Ohio St. 643, 646, 67 N.E. 2d 623, 624 (1946).

<sup>14</sup> Tr. at 13.

<sup>15</sup> *Id.* at 14.

<sup>16</sup> *Id.* at 15.

<sup>17</sup> *Id.* at 15-16.

falling onto the roadway. Yet, he admitted both that the compartment door was open and “that that is not a condition that is desirable or safe condition.”<sup>18</sup> Mr. Roos also stated that the reason the compartment door is kept shut and locked is so that nothing can fall out or that no one can enter the compartment.<sup>19</sup> Mr. Roos’ exhibit shows that the bottles and tools sat at a level above the lip around the door and could fall out the open door as described by Inspector Wiklinski.<sup>20</sup> The Transportation Staff made a *prima facie* case, which Mr. Roos failed to successfully rebut. The Commission should find in favor of the Transportation Staff, as to this OOS violation.

Mr. Roos alleges in his Statement filed on December 5, 2007 that the Fine Schedule for Out of Service Violations does not list the violation for which he was cited.<sup>21</sup> Yet, the facts of record are uncontroverted and show that page three of Staff Exhibit 2 lists Section 392.9(a) as a Group 1 out of service violation for which a \$100.00 forfeiture can be levied.<sup>22</sup> Mr. Frye testified that he used Staff Exhibit 2 to determine the appropriate civil forfeiture in this case and that he followed the procedure consistently used by Staff to do so.<sup>23</sup> Mr. Roos argument otherwise is mistaken and should be denied.

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<sup>18</sup> Tr. at 38.

<sup>19</sup> *Id.* at 45.

<sup>20</sup> Respondent’s Ex. 4; Tr. at 15-16; Staff Ex. 2.

<sup>21</sup> Respondent’s Statement (December 5, 2007).

<sup>22</sup> Staff Ex. 2; Tr at 28

<sup>23</sup> Tr. at 28-29.

**C. The Commission has authority to assess civil forfeitures.**

The Commission has statutory power to assess monetary forfeitures against drivers for non-compliance with federal motor carrier safety regulations.<sup>24</sup> The Legislature granted the Commission the authority to assess forfeitures for violations of the motor carrier safety provisions.<sup>25</sup>

The Commission has authority to adopt safety rules applicable to motor carrier regulation and has, in fact, adopted the federal motor carrier safety regulations of the U.S. Department of Transportation in Title 49 of the C.F.R., parts 40, 382, 383, 387 and 390 through 397.<sup>26</sup> The Commission also adopted civil forfeiture and procedural rules.<sup>27</sup> The Commission enforces the motor carrier safety regulations for the State of Ohio.

Mr. Jonathan Frye, Chief of the Transportation Compliance Division of the Commission, testified that the staff recommends a forfeiture in the amount of one hundred dollars (\$100.00) for this case.<sup>28</sup> Mr. Frye also testified that the proposed forfeiture was calculated in accordance with the Commission's standard methodology.<sup>29</sup>

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<sup>24</sup> Ohio Rev. Code Ann. §§ 4919.99, 4921.99, 4923.99 (Anderson 2007).

<sup>25</sup> *Id.*

<sup>26</sup> Ohio Admin. Code § 4901:2-5-02 (Anderson 2007).

<sup>27</sup> Ohio Admin. Code §§ 4901:2-7-01 – 4901:2-7-22 (Anderson 2007).

<sup>28</sup> Tr. at 29.

<sup>29</sup> *Id.*

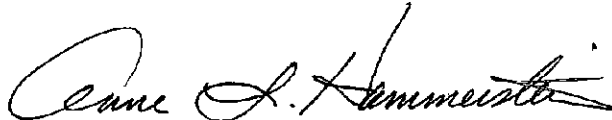
#### **IV. CONCLUSION**

Based on the record produced at the hearing and for the reasons stated herein, the Staff respectfully requests that the Commission find that the Respondent violated Section 392.9(a)(2) of the Federal Motor Carrier Safety Regulations and that the Commission hold Respondent liable for the civil forfeiture of one hundred dollars (\$100.00) as recommended by the Staff.

Respectfully Submitted,

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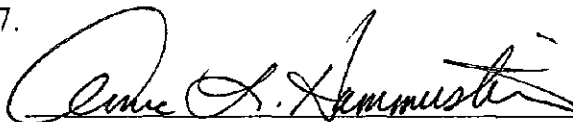
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Counsel for the Staff of the Public Utilities  
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**V. PROOF OF SERVICE**

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 by electronic mail at [rene@wildrosetransportation.com](mailto:rene@wildrosetransportation.com) and via regular U.S. mail, postage prepaid, upon Rene Roos, Wild Rose Transportation, 15 Glen Village Road, Markham, ON, L6C1Z2 this 7th day of December, 2007.

  
Anne L. Hammerstein