

FILE

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV  
2009 NOV 13 PM 1:39

PUCO

In the Matter of Ace Doran Hauling & )  
Rigging, Notice of Apparent Violation )  
and Intent to Assess Forfeiture. )  
)

Case No. 09-383-TR-CVF  
(OH3256005785C)

---

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

---

I. INTRODUCTION

The Federal Motor Carrier Safety Regulations ("FMCSR") require a carrier to apply a minimum number of tiedowns to secure cargo articles against movement during transport, when they are not blocked by a header board or bulkhead and the length of the articles are longer than 10 feet.<sup>1</sup> In the case at bar, the Respondent failed to maintain the required minimum number of tiedowns, when transporting steel rods that were not blocked against a header board or bulkhead and measured 22.75 feet in length.<sup>2</sup> For the Respondent's load, based on the length of the cargo and the fact it was not blocked, the FMCSR required a total of four tiedowns. The regulations require that articles longer than 10 feet shall have two straps with each additional 10 feet or fraction thereof requiring an additional strap.<sup>3</sup> Respondent's load had five straps (tiedowns) on the top of the load that were intended to secure two bundles of steel rods that

---

<sup>1</sup> 49 C.F.R. § 393.110(b)(3).

<sup>2</sup> Tr. 12-13.

<sup>3</sup> 49 C.F.R. § 393.110(b)(3).

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.  
Technician BMM Date Processed 11/13/09

were stacked over five bundles, but two of the straps were not secured, as observed by the inspecting officer.<sup>4</sup> Any carrier not meeting any or all of the requirements of the FMCSR may be assessed a monetary civil forfeiture by the Public Utilities Commission of Ohio ("Commission").<sup>5</sup>

This is a simple case. The facts are clear. The Respondent's defense is the officer never verified the measurement of the load to show that four straps or tiedowns were required for Respondent's load and he failed to establish which part of the load had two loose straps. Respondent's defense is hollow because the officer testified that he measured the steel rods and called the shipper to confirm their length after Respondent subsequently questioned the length of the rods.<sup>6</sup> As to identifying which straps and steel rods were unsecured, the officer clearly observed and identified the steel rods at the top of the load had two loose straps with air going under them and causing them to raise and physically move.<sup>7</sup> The record of evidence consisting of the officer's observations, testimony, report and pictures, proves that Respondent violated 49 C.F.R. § 392.9(a)(1) and, specifically, 49 C.F.R. § 393.104(f)(3) and 49 C.F.R. § 393.110(b)(3), by an overwhelming preponderance of the evidence.

The law is clear. The FMCSR required Respondent to have four straps to secure the steel rods at the top of his load, but Respondent only had three. Because Respondent's cargo was 22.75 feet in length and not blocked by a header

---

<sup>4</sup> Tr. 13, 19.

<sup>5</sup> R.C. §§ 4919.99, 4921.99 and 4923.99 (Baldwin 2009).

<sup>6</sup> Tr. 12-13.

<sup>7</sup> Tr. 13.

board, four straps were required to secure the top of the load at all times. The Commission should reject Respondent's argument, because it is contrary to the overwhelming evidence in this case and applicable law.

## II. STATEMENT OF FACTS

The inspection in this case occurred on August 14, 2008, by Officer Hostetler, as a result of an obvious violation that he observed.<sup>8</sup> Officer Hostetler noticed some loose strapping (Tiedowns) on Respondent's load, as he was traveling past Respondent on U.S. 30 in Stark County.<sup>9</sup> While Respondent was in transport the top part of his cargo had five straps over it, but two of the straps were loose and Officer Hostetler could see air going beneath those two straps.<sup>10</sup> Officer Hostetler observed the two straps physically move on the top of the load (covering the top layer that secured two bundles).<sup>11</sup> Officer Hostetler could see the two straps, on the top of the load or top layer, being raised from the air blowing underneath them.<sup>12</sup> Officer Hostetler initiated a traffic stop and a subsequent inspection as a result of that observation.<sup>13</sup>

At the conclusion of the inspection, Officer Hostetler had the driver exit the truck and tighten-up the two straps in his presence.<sup>14</sup> After the straps were tightened by the driver, Officer Hostetler used a digital camera and took pictures

---

<sup>8</sup> Tr. 8-9.

<sup>9</sup> Tr. 9.

<sup>10</sup> Tr. 13.

<sup>11</sup> Tr. 13.

<sup>12</sup> Tr. 13.

<sup>13</sup> Tr. 9.

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

of the vehicle and cargo.<sup>15</sup> Officer Hostetler took the following pictures: one of the side-door of the truck to identify the carrier (Exhibit 2); one of the bill of lading to identify the load (Exhibit 3); one to show the cargo and straps used to secure the load (Exhibit 4); and, one that identifies the license plate number (Exhibit 5).<sup>16</sup>

According to the bill of lading (Exhibit 3), Officer Hostetler determined that the weight of the load was 53,290 pounds.<sup>17</sup> The cargo for this load, as pictured in Exhibit 4, was described as steel rods on a flatbed trailer by Officer Hostetler.<sup>18</sup>

The Officer took a picture of the load (Exhibit 4), after the two loose straps had been tightened by the driver, which showed four separate bundles of steel rods on the bottom and two separate bundles of steel rods stacked on top.<sup>19</sup> Neither the top or bottom layers (bundles of rods) were blocked against the header board.<sup>20</sup> Both layers of steel rods measured 22.75 feet in length.<sup>21</sup> Officer Hostetler measured the length of the rods during the inspection on August 14, 2008.<sup>22</sup> Officer Hostetler subsequently confirmed his measurement by calling the

---

<sup>15</sup> Tr. 9-10.

<sup>16</sup> Tr. 10-11.

<sup>17</sup> Tr. 11.

<sup>18</sup> Tr. 12.

<sup>19</sup> Tr. 14; Staff Ex. 4.

<sup>20</sup> Tr. 12.

<sup>21</sup> Tr. 12.

<sup>22</sup> Tr. 12.

shipper, after the inspection, when the carrier questioned the Officer's measurement.<sup>23</sup>

Officer Hostetler testified that there were a total of seven straps, but only five extended over the top part of the load or layer to secure the two bundles of steel rods that were stacked on top.<sup>24</sup> Two other straps went between the top and bottom layers to secure only the bottom layer that had five bundles of steel rods.<sup>25</sup>

Heading in a direction toward the cab from the rear of the flatbed, the picture of the load shows the second and third straps being close to one another, but only the third strap is shown going over the top of the load.<sup>26</sup> The same is true for the fifth and sixth straps, where only the sixth strap is shown going over the top of the load.<sup>27</sup> The second and fifth straps don't go over the top of the load, but, instead, go between the top and bottom layers.<sup>28</sup>

Officer Hostetler generated a "Driver/Vehicle Examination Report" (Staff Exhibit 1) after his inspection of Respondent's vehicle, which identified a carrier violation under 49 C.F.R. § 392.9(a)(1) of the FMCSR. Specifically, the report shows that Respondent violated the FMCSR by failing to secure cargo as specified in 49 C.F.R. § 393.100 through § 393.142, as follows: "2 of 5 straps loose

---

<sup>23</sup> Tr.12-13.

<sup>24</sup> Tr.12; Staff Ex. 4.

<sup>25</sup> Staff Ex. 4.

<sup>26</sup> Staff Ex. 4.

<sup>27</sup> Staff Ex. 4.

<sup>28</sup> Staff Ex. 4.

(4 required) in violation of [49 C.F.R.] § 393.104(f)(3)" of the FMCSR.<sup>29</sup> As required by 49 C.F.R. § 393.110(b)(3), Respondent failed to have four straps or tiedowns to secure the top layer of steel rods he was transporting, which were 22.75 feet in length.<sup>30</sup>

After receipt and review of Officer Hostetler's "Driver/Vehicle Examination Report," the Commission Transportation Staff calculated a civil forfeiture by a common method used in all cases using a civil forfeiture schedule. Applying the fine schedule to this case, Staff assessed \$100.00 for Respondent's unsecure cargo violation. The procedure used to calculate the civil forfeiture that Staff is proposing in this case is consistent with the provisions recommended by the Commercial Motor Vehicle Safety Alliance. Respondent stipulated to the civil forfeiture amount of \$100, as assessed by Staff, pending disposition of the merits of the cargo violation by the Commission.<sup>31</sup>

### III. ARGUMENT

Ohio participates in the Federal Commercial Motor Carrier Safety Assistance Program, which can be found in the federal regulations at 49 C.F.R. § 350. This is a federal grant program that provides financial assistance to Ohio, and other states, to reduce the severity and number of accidents involving commercial motor vehicles. Not surprisingly, this federal grant program sets forth conditions that Ohio, and the other participant states, must meet. It

---

<sup>29</sup> Staff Ex. 1.

<sup>30</sup> Tr. 12-13.

<sup>31</sup> Tr. 32-33.

requires the states adopt and enforce state laws, rules and standards identical to federal motor carrier safety rules or that have an identical effect.

The Commission has adopted the Federal Motor Carrier Safety Regulations pursuant to authority delegated by the Ohio General Assembly, including the regulations involved in this case – 49 C.F.R. §§ 392.9 (a) (1), 393.104 (f) (3), and 393.110 (b) (3), for failing to secure articles of cargo with the required number of tiedowns.<sup>32</sup> The U.S. Department of Transportation (“USDOT”) commercial vehicle safety regulations have been adopted by the Commission.<sup>33</sup>

The Commission’s rules require all drivers operating in Ohio in intrastate commerce, such as Respondent, to operate in conformity with all regulations of the USDOT, including 49 C.F.R. §§ 392.9 (a) (1), 393.104 (f) (3) and 393.110 (b) (3). A violation of those regulations is a violation of the Commission’s rules. Respondent failed to meet the requirement of these regulations and rules.

**A. The Transportation Staff proved by a preponderance of the evidence that Respondent Carrier failed to secure articles of cargo, while in transport, by not having the number of tiedowns that the FMCSR required for his particular load.**

Respondent’s argument and contention that Staff (Prosecution) failed to prove that a violation exists is contrary to the overwhelming evidence presented and admitted in this case. Respondent claims that three necessary elements were not proven beyond a reasonable doubt: 1) the length of the cargo; 2) which of the

---

<sup>32</sup> Ohio Revised Code Ann. § 4923.03 (Baldwin 2009).

<sup>33</sup> Ohio Admin. Code § 4901:2-5-02 (Baldwin 2009).

seven straps were ineffective; and 3) how many straps were required for the length of the load.

To begin, Respondent cites the wrong burden of proof for the prosecution. The standard of beyond a reasonable doubt is the burden of proof that applies to the prosecution in criminal cases only. This is a civil and/or administrative proceeding, where the burden of proof must be established by the Transportation Staff of the Commission by a preponderance of the evidence.<sup>34</sup> In this case, Staff met its burden of proof, by a preponderance of the evidence, by showing that Respondent had articles of cargo (two bundles of steel rods) on the top layer of his load that failed to have the required number of tiedowns to secure his load pursuant to the FMCSR.

The "Driver/Vehicle Examination Report" clearly indicates that 2 out of 5 straps were loose and that 4 straps were required.<sup>35</sup> The violation field in the report clearly informs Respondent that his cargo was not adequately secured as specified in 49 C.F.R. §§ 392.9 (a) (1), 393.104 (f) (3), and 393.100 through 393.142.<sup>36</sup> Officer Hostetler testified that Respondent's cargo needed to have four straps securing the top tier.<sup>37</sup> He also testified that Respondent's load had five straps, but two were loose in violation of 49 C.F.R. § 393.104 (f) (3), which establishes the standards by which cargo securement devices must meet to

---

<sup>34</sup> Ohio Admin. Code § 4901:2-7-20 (A) (Baldwin, 2009).

<sup>35</sup> Staff Ex. 1.

<sup>36</sup> Staff Ex. 1.

<sup>37</sup> Tr. 24.



satisfy the requirements of the FMCSR.<sup>38</sup> Officer Hostetler testified that loose straps are not permitted as a form of cargo securement.<sup>39</sup>

Respondent attempts to confuse the finder-of-fact by suggesting that Officer Hostetler didn't know which of the seven straps were loose, but Officer Hostetler was clear that only five straps were used for the top tier and two of those five were loose.<sup>40</sup> Only the bottom layer of the load, containing four bundles of steel rods, was secured because it had seven straps, so two loose straps still gave it five straps (four were required).<sup>41</sup> For further clarification, Officer Hostetler testified that he indicated in his report that two of the five straps were loose and four were required, and this refers to the top two bundles on the load.<sup>42</sup> Officer Hostetler testified that he had no issue with the four sets of bundles on the bottom.<sup>43</sup> He made clear that it was the top layer, not the bottom layer, which was not in compliance with the FMCSR.<sup>44</sup>

As to the measurement of the length of the load, Officer Hostetler testified under cross examination that he used a measuring tape and measured the length of the steel rods.<sup>45</sup> Officer Hostetler also testified under cross examination that he talked to the shipper, who told him that the length of the rods were 22.75

---

<sup>38</sup> Tr. 24.

<sup>39</sup> Tr. 24.

<sup>40</sup> Tr. 25-26.

<sup>41</sup> Tr. 12, 28, Staff Ex. 4.

<sup>42</sup> Tr. 28.

<sup>43</sup> Tr. 28.

<sup>44</sup> Tr. 28.

<sup>45</sup> Tr. 27.

feet.<sup>46</sup> Under cross examination, Officer Hostetler "can testify for sure that the cargo is in excess of 20 but yet less than 30 feet in length for the four-strapping requirement."<sup>47</sup> And further testified "that I did determine that day the number of straps required, and I reconfirmed with the shipper to make sure the actual length of the load, which they indicated was 22.75 feet."<sup>48</sup>

Officer Hostetler testified that he observed the driver tighten-up the two straps that helped secure the top layer or tier of the load, which would give that top part of the load five secured straps.<sup>49</sup> The driver, Mr. Diuk, testified that he was aware that two of the five straps were loose and *four* were required, when Officer Hostetler issued him the examination report at the time of the inspection.<sup>50</sup> This evidence is significant because the driver knows that at least four straps secured the bottom layer, but not the top layer. Hence, the driver, who acknowledged being placed out of service during the inspection, didn't dispute the violation at the scene.<sup>51</sup> This same driver has been subject to more than 10 inspections prior to this inspection, so this inspection and report process was nothing new to him.<sup>52</sup>

On cross examination, the driver could not dispute Officer Hostetler's testimony that he called the shipper and confirmed that the measurement of the

---

<sup>46</sup> Tr. 27.

<sup>47</sup> Tr. 27-28.

<sup>48</sup> Tr. 27-28.

<sup>49</sup> Tr. 28-29.

<sup>50</sup> Tr. 38.

<sup>51</sup> Tr. 39-42.

<sup>52</sup> Tr. 41.

cargo (steel rods) was 22.75 feet.<sup>53</sup> Although he testified he didn't measure the load, the driver also testified that he didn't dispute the fact that the length of the rods in Staff's Exhibit 4 was 22.75 feet in length. The evidence is overwhelming and proves that Respondent was clearly in violation of the unsecure cargo regulations of the FMCSR at the time of the inspection.

**B. The Respondent stipulated that the civil forfeiture proposed by Staff against Respondent is both accurate and consistent with the Commercial Vehicle Safety Alliance.**

The Commission has statutory power to assess monetary forfeitures against carriers for non-compliance with federal motor carrier safety regulations.<sup>54</sup> The General Assembly has required that the Commission's civil forfeitures be consistent with the recommended fines adopted by the Commercial Vehicle Safety Alliance ("CVSA").<sup>55</sup> The civil forfeiture Staff proposed in this case is consistent with the recommended fines adopted by the CVSA, as stipulated by the Respondent.<sup>56</sup>

In addition to stipulating to the civil forfeiture calculation and assessment, Respondent stipulated to the admission of the fine schedule and notice of preliminary determination.<sup>57</sup> Based on Respondent's stipulation that the dollar amount listed within the fine schedule is consistent with the recommended fines

---

<sup>53</sup> Tr. 42.

<sup>54</sup> Ohio Revised Code Ann. §§ 4919.99, 4921.99 and 4923.99 (Baldwin 2005).

<sup>55</sup> Ohio Revised Code Ann. §§ 4919.99 and 4921.99 (Baldwin 2005).

<sup>56</sup> Tr. 32-33.

<sup>57</sup> Tr. 33.

adopted by the CVSA, the Commission should assess Staff's \$100 proposed forfeiture.

#### IV. CONCLUSION

The facts comprising Staff's case against Respondent are supported by the greater weight of the evidence presented in the case. Those facts lead only to the conclusion that Respondent violated the Commission's regulations as alleged. Nothing was presented in the hearing that would relieve Respondent from his responsibility of securing his articles of cargo, as documented and presented by the Inspecting Officer in this case. The Attorney Examiner and the Commission should find accordingly that Respondent violated the Commission's regulations as alleged.

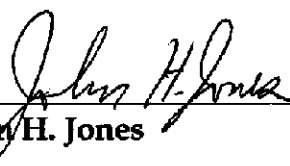
Respectfully submitted,



**John H. Jones**  
Assistant Attorney General  
Public Utilities Section  
180 E. Broad Street, 9<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone (614) 466-4395  
Facsimile (614) 644-8764

## **PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing **Post-Hearing Merit Brief**  
**Submitted on behalf of Staff of The Public Utilities Commission of Ohio** was  
served by regular U.S. mail, postage prepaid, or hand delivered, upon the  
Respondent, Dennis Nelson, this 13th day of November, 2009.

  
\_\_\_\_\_  
John H. Jones

Party of Record:

**Dennis Nelson**

On behalf of Ace Doran Hauling & Rigging Company

Respondent

1601 Blue Rock St.

Cincinnati, Ohio 45223