

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Timothy Shoffner, Shoffner) Case No. 09-47-TR-CVF
Logging, Notice of Apparent Violation and) (OH3242005057D)
Intent to Assess Forfeiture.) Case No. 09-48-TR-CVF
) (OH3242005057C)

OPINION AND ORDER

The Commission, considering the public hearing held on July 28, 2009 and December 17, 2009, issues its opinion and order in this matter.

APPEARANCES:

Timothy Shoffner, 10970 State Route 47, Mansfield, Ohio 43358, on his own behalf and on behalf of Shoffner Logging.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and John H. Jones and Werner Margard III, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

NATURE OF THE PROCEEDING:

On June 26, 2008, the Ohio State Highway Patrol (Highway Patrol) stopped and inspected a motor vehicle, driven by Timothy Shoffner (Mr. Shoffner or respondent), operating as Shoffner Logging, in the state of Ohio. The Highway Patrol found various violations of Title 49 of the Code of Federal Regulations (C.F.R.), including the following violations that are relevant to these cases:

<u>C.F. R. Section</u>	<u>Violation</u>
391.41(a)	No medical certificate in driver's possession - at time of inspection. ¹
392.9(a)(1)	Failing to secure cargo as specified in 49 CFR 393.100 through 393.142 - machine articulating, no tiedown. ²

¹ Section 391.41(a) states, in pertinent part, that: A person.... must not operate a commercial motor vehicle unless he/she is medically certified as physically qualified to do so, and....has on his or her person the original, or a copy of a current medical examiner's certificate that he/she is physically qualified to drive a commercial motor vehicle.

392.9(a)(2)	Failing to secure vehicle equipment - 8 pcs. of steel tube unsecured. ³
393.48(a)	Inoperative Brakes - axle #1 right side. ⁴
393.205(c)	Wheel fasteners missing - axle #3 left side 3 of 10 ⁵
396.3(a)(1)	Inspection, repair and maintenance of parts & accessories - axle #3 left side rust hole in brake chamber. ⁶
393.45(d)	Brake connections with leaks or constrictions - air valve left frame rail midway leaking, will not maintain air. ⁷

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- ² Section 392.9(a)(1) states, in pertinent part, that: (a) General. 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—(1) The commercial motor vehicle's cargo is properly distributed and adequately secured as specified in Sec. 393.100 through 393.136 of this subchapter.
Section 393.100(a)(2) states, in pertinent part, that: (a) Applicability. The rules in this section apply to the transportation of heavy vehicles, equipment and machinery which operate on wheels or tracks, such as front end loaders, bulldozers, tractors, and power shovels and which individually weigh 4,536 kg (10,000 lb.) or more. (2) Articulated vehicles shall be restrained in a manner that prevents articulation while in transit.
- ³ Section 392.9(a)(2) states, in pertinent part, that: (a) General. 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.
- ⁴ Section 393.48(a) states, in pertinent part, that: (a) General rule....all brakes with which a motor vehicle is equipped must at all times be capable of operating.
- ⁵ Section 393.205(c) states, in pertinent part, that: Wheels. (c) Nuts or bolts shall not be missing or loose.
- ⁶ Section 396.3(a)(1) states, in pertinent part, that: (a) General. Every motor carrier and intermodal equipment provider must systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles and intermodal equipment subject to its control. (1) Parts and accessories shall be in safe and proper operating condition at all times. . . .including, but not limited to, frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems.
- ⁷ Section 393.45(d) states that: Brake tubing and hose connections. All connections for air, vacuum, or hydraulic braking systems shall be installed so as to ensure an attachment free of leaks, constrictions or other conditions which would adversely affect the performance of the brake system.

393.47(e)

Clamp or roto-type brake(s) out-of-adjustment - axle #1 left side, axle #2 left side, axle #2 right side.⁸ (Three separate violations.)

Mr. Shoffner was timely served Notices of Preliminary Determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In these notices, Mr. Shoffner was notified that staff intended to assess a civil monetary forfeiture totaling \$850.00 for violation of the above-noted sections of the C.F.R. A prehearing teleconference was conducted in the cases. The parties, however, failed to reach a settlement agreement during the conference. Subsequently, hearings were held in both cases on July 28, 2009 and December 17, 2009, at which Mr. Shoffner appeared on his own behalf and on behalf of Shoffner Logging. Mr. Shoffner filed a statement of his position in the cases on January 27, 2010, and staff filed its brief on February 12, 2010.

BACKGROUND:

The inspection in this case took place at Mile Post 70 on US 70 in Madison County, Ohio. At the time of the inspection, Mr. Shoffner was driving a truck loaded with machinery from Plain City, Ohio, to Springfield, Ohio.

ISSUE IN THE CASE:

At issue is whether the truck driven by Mr. Shoffner was subject to the Federal Motor Carrier Safety Regulations (FMCSR), and whether Mr. Shoffner was liable for the alleged violations in the cases, or whether he was operating under an exception to the FMCSR that applies to transportation to and from a farm.⁹ Staff contends that, after a roadside inspection of his truck, Mr. Shoffner was properly cited for the violations in these cases by Officer Mark Irmscher, a motor carrier enforcement inspector with the Highway Patrol. Mr. Shoffner, who was hauling machinery for use in his logging operation at the

⁸ Section 393.47(e) states, in pertinent part, that: (e) Clamp and roto-chamber brake actuator readjustment limits. The pushrod travel for clamp and roto-chamber type actuators must be less than 80 percent of the rated strokes listed....or 80 percent of the rated strokes marked on the brake chamber....or the readjustment limit marked on the brake chamber....

⁹ Section 4923.02(A)(6), Revised Code, states, in pertinent part, that: a private motor carrier....does not include any corporation, company....person....or co-partnership engaged in the transportation of farm supplies to the farm or farm products from farm to market.

49 C.F.R. Section 390.5 states, in pertinent part, that: Farmer means any person who operates a farm or is directly involved in the cultivation of land, crops, or livestock....

time of the inspection, maintained that logging is classified as horticulture¹⁰ and that horticulture is synonymous with agriculture. He, therefore, claimed the farm exemption from the FMCSR.

SUMMARY OF THE TESTIMONY:

Officer Irmscher testified that he made the stop of Mr. Shoffner's truck after noticing an obvious violation, a tiedown chain missing from the machinery on the trailer. Officer Irmscher testified that, when he inspected Mr. Shoffner's truck, he clearly was inspecting a commercial motor vehicle, a 1992 Freightliner tractor and a 1994 trailer. He stated that Mr. Shoffner was unable to produce a medical certificate and that there were eight pieces of steel tubing lying unsecured on the deck of the trailer (Tr. at 9-11, 13-14, 20; Staff Exhibit 1 - Driver/Vehicle Examination Report).

Officer Irmscher testified that the machinery being transported by Mr. Shoffner, a large four-wheeled vehicle, articulated or bent in the middle for steering purposes. Officer Irmscher noted that the machinery should have had a tiedown in the center, at the point of articulation, and tiedowns by the rear wheels, but that the tiedowns were missing. He explained that, when a piece of articulating machinery is over 10,000 pounds, tiedowns are required at all four corners, plus one tiedown in the center (Tr. at 16-17, 19-20).

Officer Irmscher testified that he found other violations relevant to this matter during his inspection of Mr. Shoffner's truck. Concerning those violations, Officer Irmscher identified photographs of Mr. Shoffner's truck (Staff Exhibits 2 through 12) and testified that he cited Mr. Shoffner for the following violations: Missing lug nuts on one wheel, an exposed battery on the rear of the tractor that was without a battery cover, a rust hole in a brake chamber, brakes out of adjustment, inoperative brakes, and an air valve on a brake connection that was leaking and would not maintain pressure. Officer Irmscher testified that there were no markings on Mr. Shoffner's truck indicating that the truck was a farm vehicle, nor was any paperwork produced showing a farm use for the load of machinery being hauled. Further, there was nothing on the load that represented supplies for a farm or products from a farm to a market (Tr. at 15-27; Staff Exhibits 2-12).

Mr. John Canty, assistant chief of Commission's Civil Forfeiture Compliance Division, testified that the monetary value of the fines for Mr. Shoffner's violations was determined using a civil forfeiture fine schedule (Staff Exhibit 13) and that the fine schedule divides all violations into four groups, with a different dollar amount assigned to each group. Further, the dollar amounts are added up to obtain a total forfeiture for the

¹⁰ Horticulture is defined as: the art or science of growing flowers, fruits, vegetables, and shrubs especially in gardens or orchards. See Webster's New World Dictionary of the American Language (Second College Edition).

entire inspection. Mr. Canty testified that the dollar amounts of the fines and the procedure used in determining fines in the fine schedule are consistent with the recommended penalties and fines adopted by the Commercial Vehicle Safety Alliance. He noted that the dollar amounts and the procedure used are the same for all motor carriers. Mr. Canty also noted the amount of the forfeiture in each case, and testified that those amounts were accurately determined and properly assessed (Tr. at 35-40; Staff Exhibit 13).

Mr. Canty testified that Notices of Preliminary Determination (Staff Exhibits 14 and 15) were issued to Mr. Shoffner for these cases. He stated that the notices were issued after a conference with respondent was conducted, and staff decided that the civil forfeitures of \$100.00 in Case No. 09-47-TR-CVF and \$750.00 in Case No. 09-48-TR-CVF would stand as assessed. Lastly, Mr. Canty testified that the respondent received all notices of the forfeitures that are required by law (Tr. at 40-42; Staff Exhibits 14 and 15).

Mr. Shoffner testified that the tractor-like machine he was hauling is called a timberjack. He stated that he did not have a chain across the middle of the machine because the machine locks in place when the brake is set, and there is no possible way it can move until the brake is released. Mr. Shoffner testified that he had chains on each axle of the machine in the front and it was tied down in every corner. Mr. Shoffner also indicated that he did not need a physical card because he was performing farm-related hauling. Mr. Shoffner stated that he hauls his own commodities, and he questioned why he cannot haul his equipment from farm to farm (Tr. at 52-55).

Mr. Shoffner testified that, prior to the inspection of his truck, he had started out from a farm that he leases at Plain City, Ohio, and was traveling to another farm that he leases at Springfield, Ohio. With regard to the farm at Plain City, Mr. Shoffner stated that he leases 12 acres of woods and 214 acres of farm field. He testified that he leases the farm field so that he can drive across it to get to the wooded area, in order to harvest the timber. He testified that he does not harvest any crops from the farm field and that he did not plant the trees in the woods. The trees were mature when he entered into a lease with the owner of the property (Tr. at 56-59).

Mr. Shoffner testified that he is a logger, cutting trees, which he characterizes as harvesting, and taking them to a saw mill. He stated that he transports this harvest from the farm to a saw mill that is the market for the timber. Mr. Shoffner testified that, on the day of the inspection, he was not transporting any trees, but was moving his equipment from one job to another. Mr. Shoffner agreed that he was not hauling farm crops, and was not going from or to a market to sell produce. However, he indicated that his hauling on the day of the inspection was related to the transportation of farm supplies. Mr. Shoffner testified that if he cannot get his machinery to the trees, he cannot obtain his supply of timber (Tr. at 59-63).

Mr. Shoffner testified that his destination on the day of the inspection, a farm at Springfield, has the same type of configuration as the farm at his starting point, Plain City. Mr. Shoffner testified that he has a logging operation in a wooded area at Springfield and that he leases a farm field so that he can transport harvested logs across the farm field to a saw mill. Mr. Shoffner testified that he transports logs to a saw mill called Miami Valley Hardwoods, near Belle Center, Ohio, and to several small Amish mills. Further, he noted that there is no sawmill at the Springfield farm (Tr. at 63-65).

ARGUMENT

In its post hearing brief, staff noted that the farm described by the respondent in his testimony was woods and that respondent testified that he harvested timber, not crops. Further, at the time of the inspection, instead of timber, respondent testified that he was hauling a heavy piece of machinery that he uses in his logging business. Staff noted that respondent admitted under cross-examination that he was not hauling farm products that would grow on a farm, nor was he going or returning from a market, and no sawmills were located at either his origination or destination points.

Staff stated that, according to the inspector's testimony, respondent's truck did not have any farm markings or license tags; the truck cab and trailer were tagged only as a "Truck" and "Trailer", respectively. Moreover, staff argued that respondent's timberjack, which moves trees already felled from one location to another on site, does not qualify as supplies for a farm or farm machinery, because respondent is not a wood farmer and his machine is not capable of planting, tilling, or picking trees from the earth. Staff argued that hauling a timberjack from a wooded lot to another wooded lot, as part of a logging operation, does not make respondent a farmer. Staff argued that respondent failed to provide any corroborating evidence to his testimony that he meets the definition of farmer and qualifies for the farm exemption.

In a post-hearing statement, Mr. Shoffner argued that logging is called harvesting, which is why loggers are allowed to buy farm vehicle tags. Mr. Shoffner argued that logging is agricultural in nature and that it is exempt from transportation regulation. He argued that loggers are harvesting their timber (crops) from farm land just the same as corn, wheat, beans, etc., are harvested from farm land. In addition, Mr. Shoffner argued that an attachment to his statement, the cover and pages from a publication entitled Timber Harvesting & Wood Fiber Operations, proves that logging is called harvesting (Respondent's Post-Hearing Statement at 1).

DISCUSSION

The Commission initially notes that Mr. Shoffner disputed only two of the violations listed in the driver/vehicle examination report (Staff Exhibit 1) - 49 C.F.R. Section 392.9(a)(1), failing to secure the middle of the articulating machine that he was hauling, and Section 391.41(a), no medical certificate in his possession. He argued that the machine was locked, i.e., immobile on the trailer, chained at the front wheels, and tied down at every corner and that a chain around the middle of the machine was unnecessary. He further indicated that he did not need a medical certificate because he hauled his own commodities and machinery from farm to farm. Mr. Shoffner, however, did not deny the occurrence of any of the violations in this matter. He argued instead that, under the farming exemption from regulation that is set forth in Ohio statute, the FMCSR are not applicable to him because he is engaged in a horticultural business, harvesting timber from farms.

With regard to the medical certificate and cargo securement violations, we believe that the record in this matter is clear. Officer Irmischer testified that Mr. Shoffner did not have a medical certificate in his possession in violation of Section 391.41(a) (Tr. at 13). He also testified that Mr. Shoffner did not have tiedowns at the center and by the rear wheels of his machine in violation of Section 392.9(a)(1) (Tr. at 16, 20). Mr. Shoffner admitted that he did not have a center tiedown on the machinery (Tr. at 52). He testified that, at the time of the inspection, he told Officer Irmischer that he did not need a medical certificate because he was engaged in farm-related hauling (Tr. at 53). After reviewing the record, we believe that the medical certificate and cargo securement violations did occur. Mr. Shoffner, therefore, was in violation of Sections 391.41(a) and 392.9(a)(1).

With regard to all of the violations listed in the inspection report, including the aforementioned medical certificate and securement violations, the Commission observes that Section 4923.02(A)(6), Revised Code, does provide an exemption from intrastate regulation for the private transportation of farm supplies to a farm or farm products from farm to market. Mr. Shoffner, however, admitted that he was not transporting a farm product from farm to market (Tr. at 62). Also, although he indicated that trees in the wooded areas of his logging operation are his "supply" (Tr. at 62-63), it is evident that he was not transporting any type of supply for a farm. The Commission notes that 49 C.F.R. Section 390.5 defines a farmer as "... any person who operates a farm or is directly involved in the cultivation of land, crops, or livestock which (a) are owned by that person; or (b) are under the direct control of that person." By that definition, Mr. Shoffner is not a farmer. He is, by his own admission, a logger (Tr. at 59). He cuts mature trees that have grown naturally in a wooded area and transports the logs to a saw mill (Tr. at 59). He leases farm ground so that he can travel over that ground to the wooded areas at the sites of his logging operation (Tr. at 58, 64). At the time of the inspection, he was hauling

machinery between logging sites (Tr. at 60). The Commission, therefore, finds that the farm exemption from transportation regulations, set forth in Section 4923.02(A)(6), Revised Code, does not apply to Mr. Shoffner's hauling.

Consequently, in view of Officer Irmischer's testimony that the violations did occur, and the fact that Mr. Shoffner did not deny them, the Commission finds that Mr. Shoffner is liable for the \$850.00 forfeiture assessed for the relevant violations in these cases, 49 C.F.R. Sections 391.41(a), 392.9(a)(1), 392.9(a)(2), 393.48(a), 393.205(c), 396.3(a)(1), 393.45(d), and 393.47(e). We further find that the civil forfeiture is both reasonable and consistent with the fines recommended by the Commercial Vehicle Safety Alliance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On June 26, 2008, the Ohio State Highway Patrol (Highway Patrol) stopped and inspected a motor vehicle, driven by Timothy Shoffner, operating as Shoffner Logging, in the state of Ohio. The Highway Patrol found various violations of Title 49 of the Code of Federal Regulations (C.F.R.), including the following violations that are relevant to these cases:

<u>C.F.R. Section</u>	<u>Violation</u>
391.41(a)	No medical certificate in driver's possession - at time of inspection.
392.9(a)(1)	Failing to secure cargo as specified in 49 CFR 393.100 through 393.142- machine articulating, no tiedown.
392.9(a)(2)	Failing to secure vehicle equipment - 8 pcs. of steel tube unsecured.
393.48(a)	Inoperative Brakes - axle #1 right side.
393.205(c)	Wheel fasteners missing - axle #3 left side 3 of 10.
396.3(a)(1)	Inspection, repair and maintenance of parts & accessories - axle #3 left side rust hole in brake chamber.

393.45(d) Brake connections with leaks or constrictions - air valve left frame rail midway leaking, will not maintain air.

393.47(e) Clamp or roto-type brake(s) out-of-adjustment - axle #1 left side, axle #2 left side, axle #2 right side (Three separate violations).

- (2) Mr. Shoffner was timely served Notices of Preliminary Determination that set forth civil forfeiture assessments totaling \$850.00 for the above-noted violations of the C.F.R. Hearings in this matter were held on July 28, 2009 and December 17, 2009.
- (3) The farm exemption from transportation regulations, set forth in Section 4923.02(A)(6), Revised Code, does not apply to Mr. Shoffner's hauling.
- (4) Officer Irmischer testified that the violations did occur, and Mr. Shoffner did not deny them.
- (5) Staff demonstrated at hearing, by a preponderance of the evidence, that Mr. Shoffner committed violations of 49 C.F.R. Sections 391.41(a), 392.9(a)(1), 392.9(a)(2), 393.48(a), 393.205(c), 396.3(a)(1), 393.45(d), and 393.47(e).
- (6) Mr. Shoffner's arguments at hearing were not sufficient to demonstrate that he should not be held liable for the civil forfeitures assessed for violations of 49 C.F.R. Sections 391.41(a), 392.9(a)(1), 392.9(a)(2), 393.48(a), 393.205(c), 396.3(a)(1), 393.45(d), and 393.47(e).
- (7) Pursuant to Section 4905.83, Revised Code, respondent must pay the state of Ohio the civil forfeiture assessed for violations of 49 C.F.R. Sections 391.41(a), 392.9(a)(1), 392.9(a)(2), 393.48(a), 393.205(c), 396.3(a)(1), 393.45(d), and 393.47(e). Mr. Shoffner shall have 30 days from the date of this order to pay the assessed forfeiture of \$850.00.

It is, therefore,

ORDERED, That Mr. Shoffner pay the assessed amount of \$850.00 for violations of 49 C.F.R. Sections 391.41(a), 392.9(a)(1), 392.9(a)(2), 393.48(a), 393.205(c), 396.3(a)(1), 393.45(d), and 393.47(e), as set forth in Finding (7). Payment should be made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 4th Floor, 180 East Broad Street, Columbus, Ohio 43215-3793. In order to assure proper credit, Mr. Shoffner is directed to write the case numbers (OH3242005057D and OH3242005057C) on the face of the check or money order. 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 each party of record.

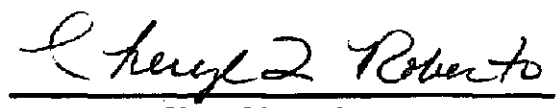
THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Vergus

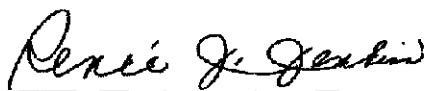

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MAR 31 2018



Renee J. Jenkins
Secretary