

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Jim Schnoll, Notice of) Case No. 13-1408-TR-CVF
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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I. INTRODUCTION

This proceeding arises out of an inspection of a vehicle operated by Jim Schnoll dba JJEBCO (“JJEBCO” or “Respondent”). As a result of the inspection performed by an officer of the Ohio State Highway Patrol, the Staff of the Public Utilities Commission of Ohio (“Staff”) assessed a civil forfeiture for violations of the Federal Motor Carrier Safety Regulations (“FMSCRs”). Specifically, the inspection revealed that Respondent was operating a motor vehicle with an unsecured load. At the evidentiary hearing, Staff offered the testimony of a highly qualified and credible safety inspector to support the violations at issue. In its defense, Respondent failed to rebut Staff’s evidence of the improperly secured load. Despite Respondent’s misplaced belief, JJEBCO, as a motor carrier, is responsible for the actions of its employees or agents. Basic principles of agency law and Commission precedent place the responsibility of securement with the carrier. Therefore, based on the evidence of record, the Commission must find that the

Respondent violated Section 392.9(a)(1) of the FMSCRs and must hold Respondent liable for the civil forfeiture of \$100.00 as recommended by the Staff.

II. STATEMENT OF FACTS

A. Procedural History

Staff sent a Notice of Preliminary Determination to Respondent on May 28, 2013, as required and described in Section 4901:2-7-12 of the Ohio Administrative Code (“O.A.C”). The Notice of Preliminary Determination cited a violation of 49 C.F.R. § 392.9(a)(1) for failing to secure the load. Respondent filed a request for an administrative hearing in this matter on June 17, 2013. The hearing was conducted on August 26, 2013.

B. Factual Background.

On February 28, 2013, Ohio State Highway Patrol Trooper Rodney D. Ramps (“Trooper Ramps”) conducted a roadside walk-around inspection of a commercial motor vehicle operated by JJEBCO and driven by Mr. Russell R. Heberer (“Mr. Heberer”) on State Route 5 (westbound) in Trumbull County, Ohio.¹ The cargo was a tow truck that was being picked up in Mercer, Pennsylvania and driven to West Bend, Wisconsin.² The driver, Mr. Heberer, was hired by JJEBCO to transport the tow truck.³ Mr. Heberer

¹ Staff Ex. 1 (Driver/Vehicle Examination Report).

² *Id.*

³ Tr. at 55.

drove his Pontiac Vibe to retrieve the truck in Mercer, PA, improperly loaded his Pontiac Vibe onto the flatbed, marked the tow truck with JJEBCO company markings (*See* Staff Ex. 2; Tr. at 15-16), and began his trip back to Wisconsin.⁴ Trooper Ramps, while following Mr. Heberer westbound on SR 5, observed that the Pontiac was not properly secured as all four chains attempting to secure the Pontiac were noticeably and excessively loose.⁵ The left front, right front, and right rear chain were all lying flat against the deck of the bed. The left rear chain had a noticeable sag.⁶ The steel rope at the middle front, attached to a hydraulic mechanism, also had a noticeable sag and was excessively loose.⁷

As a result of the obvious violation he observed, Trooper Ramps pulled the vehicle over and conducted a walk-around inspection.⁸ Following the inspection, Trooper Ramps prepared a report describing his findings. The report was introduced at the hearing as Staff Exhibit 1. As stated in his report, Trooper Ramps found three violations of the FMSCRs: (1) 49 C.F.R. § 395.8(a), no drivers record duty of status (no log book); (2) 49 C.F.R. § 390.19(a)(1), motor carrier failed to file required biennial update as required; and (3) 49 C.F.R. § 392.9(a), failing to secure load.⁹ As a result of these violations,

⁴ *See* Staff Ex. 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; Tr. at 10.

⁹ Staff Ex. 1.

Trooper Ramps placed the vehicle out of service.¹⁰ The violation for failing to secure the load (49 C.F.R. § 393.9(a)) is the only issue in this proceeding and is the violation for which JJEBCO was assessed a \$100.00 civil forfeiture.¹¹

III. LAW AND ARGUMENT

A. Motor carriers must comply with the motor carrier safety regulations.

The Commission, as the lead agency tasked with administering the Motor Carrier Safety Assistance Program (“MCSAP”) in Ohio, regulates the operation of commercial motor vehicles. In furtherance of this obligation, the Commission has adopted an extensive body of rules to govern the conduct of motor carriers engaged in commerce. The Commission has adopted safety rules for motor carriers pursuant to authority delegated by the Ohio General Assembly. These rules, which are found under O.A.C. 4901:2-5-02, largely adopt the U.S. Department of Transportation (“USDOT”) motor carrier safety regulations. The State of Ohio strives to implement programs to ensure the safety of the motoring public and to reduce accidents involving commercial motor vehicles. Compliance with the regulations is mandatory.

¹⁰ Staff Ex. 1.

¹¹ Staff Ex. 16.

B. Respondent did not comply with the regulations as they relate to securement.

Respondent did not comply with 49 C.F.R. §§ 392.9(a)(1), which deals with securement of cargo. Trooper Ramps has been a Motor Carrier Enforcement Inspector employed by the Ohio Highway Patrol for nearly 14 years and has had continual training in the applicable regulations.¹² Trooper Ramps used his sound judgment and expertise when citing Respondent for the violations at issue in this case. Trooper Ramps prepared his report contemporaneously with the stop to document the event as it occurred that day.¹³

1. Respondent operated a motor vehicle with an unsecured load in violation of 49 C.F.R. § 392.9(a)(1).

Trooper Ramps testified that he observed JJEBCO operating a motor vehicle with an unsecured load.¹⁴ He testified that the Pontiac Vibe on the flatbed was not properly secured as all four chains and the steel rope attempting to secure the Pontiac were noticeably and excessively loose.¹⁵

49 C.F.R. § 392.9(a)(1) states 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 —

¹² Tr. at 7-8.

¹³ Tr. at 8-9.

¹⁴ Tr. at 12-14.

¹⁵ Staff Ex. 1; Tr. at 12-14.

(1) The commercial motor vehicle's cargo is properly distributed and adequately secured as specified in §§393.100 through 393.136 of this subchapter. (Emphasis added).

49 C.F.R. § 393.128(b)(1) states that:

Automobiles, light trucks, and vans must be restrained at both the front and rear to prevent lateral, forward, rearward, and vertical movement using a minimum of two tiedowns.

Respondent's vehicle did not have a single adequate tiedown to prevent forward, rearward, vertical, or lateral movement of the Pontiac.¹⁶ Therefore, Respondent, by operating a motor vehicle with an unsecured load, violated 49 C.F.R § 392.9(a)(1).

Trooper Ramps, in his inspection of Respondent's vehicle, used reasonable discretion in determining that JJEBCO was in violation of 49 C.F.R § 392.9(a)(1).¹⁷ Trooper Ramps, as part of a routine inspection, used his extensive training and experience to properly cite JJEBCO for operating a motor vehicle with an unsecured load in violation of 49 C.F.R. § 392.9(a)(1). A plethora of record evidence demonstrates that JJEBCO violated the regulation. Most notably, Trooper Ramps testified that:

- He observed the motor vehicle operating with an unsecured load;¹⁸
- He pulled the vehicle over for an obvious violation;¹⁹

¹⁶ Staff Ex. 1; Tr. at 13.

¹⁷ Staff Ex. 1.

¹⁸ Staff Ex. 1; Tr. at 12-14.

¹⁹ Staff Ex. 1; Tr. at 12.

- As supported by a photograph, he observed that the motor vehicle was properly marked with duct tape and marker as JJEBCO, the carrier subject to the inspection;²⁰
- As supported by photographs, he observed that the right-rear chain was excessively loose and he could move the chain with his hand;²¹
- As supported by photographs, he observed that the left-rear chain was excessively loose and he could move the chain with his hand;²²
- As supported by photographs, he observed that the right-front chain was excessively loose and he could move the chain with his hand;²³
- As supported by photographs, he observed that the left-front chain was excessively loose and he could move the chain with his hand;²⁴
- As supported by photographs, he observed that the front-middle steel rope was excessively loose and he could move the rope with his hand;²⁵ and
- The motor vehicle was placed out of service.²⁶

Trooper Ramps also took photographs of the shipping papers to show the pick-up and delivery locations.²⁷ Trooper Ramps prepared his report contemporaneously with the

²⁰ Staff Ex. 2; Tr. at 14-16.

²¹ Staff Exs. 1, 3, 4 and 7; Tr. at 16-17 and 19.

²² Staff Exs. 1, 3, 5 and 6; Tr. at 16 and 17-19.

²³ Staff Exs. 1, 9 and 10; Tr. at 20-22.

²⁴ Staff Exs. 1, 9 and 11; Tr. at 20 and 22-23.

²⁵ Staff Exs. 1, 9 and 12; Tr. at 20 and 23.

²⁶ Staff Ex. 1.

²⁷ Staff Exs. 13 and 15.

stop to document the inspection.²⁸ The above evidence supports Trooper Ramps' determination that JJEBCO was operating a commercial motor vehicle with an unsecure load in violation of the regulation. As a result, the Commission must find that Respondent violated 49 C.F.R. § 392.9(a)(1).

C. Respondent failed to defend and rebut the Staff's evidence.

It is the Staff's burden to prove its case by a preponderance of the evidence. The Staff has met that burden by providing record evidence through oral testimony of an experienced Motor Carrier Enforcement Inspector employed by the Ohio Highway Patrol for nearly 14 years, the authenticated Driver/Vehicle examination report (Staff Ex. 1), and numerous authenticated photographs.²⁹ In contesting the underlying facts of the violations, Respondent, who was not present at the time of the inspection, offered only his own oral testimony.³⁰ It should be noted that Respondent did not offer the testimony of the driver who drove the truck subject to the inspection. Moreover, Respondent produced no documentation to support its defenses.

Respondent argues that the vehicle was secure from lateral, forward, rearward, and vertical movement because the regulation only called for two chains.³¹ Respondent's statements are misleading and fail to rebut Staff evidence. Trooper Ramps testified that

²⁸ Tr. at 9.

²⁹ Staff Exs. 2-15.

³⁰ Tr. at 52-54.

³¹ Tr. at 53-54.

he observed the Pontiac Vibe on the flatbed without proper securement as all four chains and the steel rope attempting to secure the Pontiac were noticeably and excessively loose.³² Respondent's vehicle did not have a single adequate tiedown to prevent forward, rearward, vertical, or lateral movement of the Pontiac.³³ As mentioned above, Staff produced a number of authenticated photographs that demonstrate the failure to secure the vehicle.³⁴ Respondent asked Trooper Ramps on cross-examination if Trooper Ramps checked for movement of the Pontiac by "pushing it, moving it, shoving, it...." Respondent is misguided in his assertion that physically moving the vehicle was necessary. Physically pushing and pulling the Pontiac to determine lateral, forward, rearward, and vertical movement would create an unsafe situation and is improper here. Trooper Ramps used his professional experience, training, and judgment to properly inspect and evaluate this securement violation; his testimony, investigation report, and photographs support his conclusion.

Again, JJEBCO did not offer testimony of the driver of the vehicle; JJEBCO relied on the testimony of a JJEBCO "group leader" who was not present at the inspection; and JJEBCO produced no documentation to support its defenses. Respondent failed to defend and rebut the Staff's evidence. Thus, the Commission should find that Staff proved the occurrence of the violation of 49 C.F.R § 392.9(a)(1) by a preponderance of the evidence.

³² Staff Ex. 1; Tr. at 13.

³³ Staff Ex. 1; Tr. at 13.

³⁴ Staff Exs. 2-15.

D. As the motor carrier, Respondent, not the driver, is responsible for securement violations.

JJEBCO, as the motor carrier, is responsible for the actions of its agents, contractors, and drivers and Mr. Schnoll admits that Jim Schnoll d.b.a. JJEBCO was the carrier in this case.³⁵ Under the FMCSRs, Commission precedent, and Ohio law, securement violations are carrier violations. JJEBCO argues that, because it was not aware the driver was driving his own vehicle, JJEBCO did not permit or require the driver to improperly secure the load.³⁶ Respondent states that, according to a verbal agreement with the driver, the driver was told to “fly” to the destination to pick up the vehicle.³⁷ Regardless of any verbal agreement between JJEBCO and its driver, JJEBCO is still responsible for the securement violation. The Commission has stated in the past:

* * *that a carrier's actual knowledge is not relevant to a violation. Carriers are responsible for the acts of their drivers on company business, and neither a carrier's intent, nor its knowledge of a violation, is necessary for liability on the part of the carrier. This is because carriers, with the incentives of fewer accidents, fewer employee injuries and fines, and lower insurance rates, are in the best position to ensure compliance

³⁵ Tr. at 56-57.

³⁶ Tr. at 52-54.

³⁷ Tr. at 52.

with motor carrier safety regulations. In short, a basic principle of regulatory control is that a carrier must answer for the actions of its drivers.³⁸

Staff witness Turek also noted the carrier's responsibility in his testimony when he stated that:

* * *since there was talk about whether securement is a carrier or driver violation, I would note that we see securement violations all the time and they are always assessed to the carrier. The Commission has ruled in previous cases and has held -- and has held that carriers are responsible for securement.³⁹

Trooper Ramps reaffirmed the carrier's responsibility and stated:

[t]o the best of my understanding, because the driver is an agent of the carrier, the carrier is the one who bears the brunt of that blow for lack of a better way of putting it.⁴⁰

JJEBCO attempts to improperly transfer the responsibility for compliance to its driver. This is unwarranted. The driver, Mr. Heberer, was working within the scope of his employment and furthering the business of JJEBCO. Mr. Heberer displayed JJEBCO markings on the tow truck and was acting on behalf of JJEBCO.⁴¹ It is also a reasonable

³⁸ See, *In the Matter of Grammer Industries, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 07-25-TR-CVF (Opinion and Order at 5) (Apr. 16, 2008) citing, *In re R. Norris Co., Inc.*, Case No. 99-745-TR-CVF (Finding and Order) (Nov. 18, 1999); *In the Matter of Carrol Ball Transport, Inc.*, Case No. R7-94-131, (Final Order) (U.S. Highway Administration, 1996) Ap. at 1; *Truckers United for Safety v. Federal Highway Administration*, 139 F.3d 934, 329 U.S. App. D.C. 241 (D.C. Cir. 1998) (Truckers United); *In re Arctic Express, Inc.*, Case No. 03-238-TR-CVF (Opinion and Order) (Mar. 17, 2004); and *In re Arctic Express, Inc.*, Case No. 06-881-TR-CVF (Opinion and Order) (Feb. 14, 2007).

³⁹ Tr. at 44.

⁴⁰ Tr. at 35.

⁴¹ Staff Ex. 2; Tr. at 14-16.

expectation, since the driver was picking up a tow truck large enough to hold a vehicle, that the Driver could drive his own vehicle and load it on the tow-truck bed. Mr. Schnoll testified that he was aware that the tow truck being picked up was large enough to hold a vehicle.⁴² Therefore, JJEBCO, as the carrier, is responsible and liable for the securement violation.

The FMCSRs also provide definitions and guidance relevant to this case. Under § 49 C.F.R. 390.5, a motor carrier is defined as a:

* * *for-hire motor carrier or a private motor carrier. *The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories.* * * * (Emphasis added.)

Furthermore, 49 C.F.R. § 390.5 defines employee as:

* * *any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (*including an independent contractor while in the course of operating a commercial motor vehicle*), a mechanic, and a freight handler. * * * (Emphasis added.)

Similarly, under 49 C.F.R. § 390.5, employer is defined as:

* * *any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, *or assigns employees to operate it*, * * * (Emphasis added.)

⁴²

Tr. at 55-56.

Furthermore, the USDOT also provides interpretive guidance material for the FMCSRs. These interpretations are generally applicable to motor carrier operations on a national basis.⁴³ The interpretation on the issue of agency responsibility of carriers and owner operators is as follows:

Question 17: May a motor carrier that employs owner-operators who have their own operating authority issued by the ICC or the Surface Transportation Board transfer the responsibility for compliance with the FMCSRs to the owner-operators?

Guidance: No. The term “employee,” as defined in §390.5, specifically includes an independent contractor employed by a motor carrier. The existence of operating authority has no bearing upon the issue. The motor carrier is, therefore, responsible for compliance with the FMCSRs by its driver employees, including those who are owner-operators.

The above definitions and guidance describe the employer-employee agency relationship, which includes independent contractors. Respondent admitted that JJEBCO had an agreement with the driver.⁴⁴ Therefore, the driver was an agent of JJEBCO and securement violations, with or without the carrier’s knowledge, are the carrier’s responsibility.

Similarly, under tort law in Ohio, employers are responsible for the acts of their employees under the doctrine of *respondeat superior*. In order for an employer to be liable under *respondeat superior*, the tort of the employee must be committed within the

⁴³ 62 Fed. Reg. 16,370 (1997).

⁴⁴ Tr. at 55.

scope of employment with the employer.⁴⁵ Here, the driver was working within the scope of his employment.

Finally, 49 C.F.R. § 392.9(a)(1) is silent as to who a civil forfeiture may be assessed for violations of the regulation. As mentioned above, under the FMSCRs, Commission precedent and Ohio law, securement violations are carrier violations. As a basic regulatory principle, carriers are responsible for the acts of their drivers on company business. Therefore, JJEBCO is responsible for this securement violation.

E. 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.⁴⁶ Pursuant to this authority, the Commission has adopted rules to govern the proceedings to assess civil forfeitures.⁴⁷

Mr. Joseph Turek, Staff Attorney and Compliance Division Supervisor in the Transportation Department of the Commission, testified that the Staff recommends a forfeiture in the amount of \$100.00 for this case.⁴⁸ Mr. Turek also testified that the proposed forfeiture was calculated in accordance with the Commission's standard methodology and that the forfeiture amount is consistent with the recommended fine or penalty

⁴⁵ *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991).

⁴⁶ R.C. 4921.99, and 4923.99.

⁴⁷ Ohio Adm. Code 4901:2-7-01 through 4901:2-7-22.

⁴⁸ Tr. at 43.

schedule and recommended civil penalty procedure adopted by the commercial motor vehicle alliance.⁴⁹

As such, if Respondent is found to have violated 49 C.F.R. § 392.9(a)(1), Respondent should be assessed the full \$100.00 forfeiture.

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)(1) of the Federal Motor Carrier Safety Regulations and that the Commission hold Respondent liable for the civil forfeiture of \$100.00 as recommended by the Staff.

Respectfully submitted,

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⁴⁹

Tr. at 43.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **Post Hearing Brief** submitted on Behalf of the Staff of the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, hand-delivered, and/or electronic service upon the following parties of record this 15th day of October, 2013.

/s/ Steven L. Beeler

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