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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF HANKO FARMS, INC., Notice of Apparent Violation and Intent to Assess Forfeiture.	CASE NO.: 05-153-TR-CVF ATTORNEY EXAMINER GREGORY A. PRICE **HANKO FARMS, INC.'S POST-HEARING REPLY BRIEF**

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I. INTRODUCTION.

An evidentiary hearing was held in this case on May 10, 2005. The Presiding Officer ordered simultaneous Post-Hearing Briefs submitted by June 9, 2005 and gave the parties the right to file Reply Briefs by June 20, 2005. Respondent's counsel received the Staff's Post-Hearing Brief on June 15, 2005 by U.S. Mail.[1]

Respondent has considered the Staff's Brief and offers the following reply.

II. ARGUMENT.

1. THE STAFF FAILED TO PROVE ANY OF THE THREE PURPORTED SECUREMENT VIOLATIONS BY A PREPONDERANCE OF THE EVIDENCE.

The Staff's burden of proof in this case was the Staff's burden was to prove each of the violations by "a preponderance of the evidence." O.A.C § 4901:2-7-20(A). A "preponderance of the evidence" means "evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it." *Black's Law Dictionary* (6th Ed.1998) 1182; *In re Starks*, Darke App. No. 1646, 2005 WL 939851 2005-Ohio-1912, ¶ 15.

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[1]. Respondent faxed its Post-Hearing Brief to the Staff's counsel on June 9, 2005.

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The Staff noted that Respondent "did not offer a single piece of evidence to prove the violations did not occur; it only introduced the statutes (sic) pertaining to the violations." (Brief at 1).[2] While Respondent offered by affirmative evidence, it did cross-examine Motor Carrier *Inspector* Donn B. Jackson, the only witness the Staff offered to prove the purported violations.[3] It is obvious that Respondent had not affirmative duty to present evidence regarding whether the purported violations occurred. That was the Staff's burden.

The Staff correctly points out that the purported violations relate to O.A.C. § 4901:2-5-02(A) (Brief at 3). However, in that regulation, the Commission adopted *in toto* the applicable sections of the Federal Motor Carrier Safety Regulations ("FMCSR") including 49 C.F.R. 339 and 392 "unless specifically excluded or modified by a rule of this commission." *Id.* We address each of the three regulations supposedly violated by Respondent on June 30, 2004 below.

A. **THE STAFF DID NOT PROVE A VIOLATION OF FCMSR §393.130(c)(1).**

The Staff claims the evidence showed that Respondent, "through improper use of tiedowns, did not restrain its crawler machinery against movement in the lateral, forward, rearward, and vertical direction." (Brief at 4). FMCSR §393.130(c) requires that "**heavy equipment or machinery with crawler tracks . . . must be restrained against movement in the lateral, forward, rearward, and vertical direction using a minimum of four tiedowns.**" Inspector Jackson claimed on direct examination that the regulation requires that such equipment

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[2]. Respondent introduced copies of each of the cited Federal Motor Carrier Safety Regulations, which are not "statutes." See, Respondents Exhibits A, B and C.

[3]. The Staff consistently mischaracterizes Inspector Jackson as an "Officer" of the Ohio State Highway Patrol (Brief at 2-6). Jackson testified he was employed by Ohio Highway Patrol District 2 as a "Motor Carrier [Enforcement] Inspector" (Tr. 5-6).

must be "secure[d] . . . at four independent points." (Tr. 6). However, the regulation clearly does not require such. Rather, it requires that the equipment be restrained against movement in all directions "using a minimum of four tiedowns." *Id.*

Inspector Jackson asserted that "in this case as I recall it . . . they had one chain that went over both tracks . . . and didn't go from track to the corner on each four points." (Tr. 6). Even assuming that this was true – and there is reason to doubt it – this assertion does not establish by a preponderance of the evidence that the tractor was not restrained against movement in the lateral, forward, rearward and vertical directions, or that an insufficient number of tiedowns were used.

Indeed, the purported "violation" of this regulation on Staff Exhibit 1 refers to an insufficient number of tiedowns for the weight of the object. Inspector Jackson testified that such a violation would have "fallen under 393.106(d)."[4] However, he did not cite the Respondent for this "violation" because such would be "stacking" and should would been "overdoing it" (Tr. 7).

On cross-examination, Inspector Jackson was shown FMCSR §393.130(c)(1) and was asked whether he was asserting that less than four tiedowns secured the crawler. He answered: "I [asserted that] by the mere fact that I put [on Staff Exhibit One] 393.130(c) which states . . . very concisely [what is required]." (Tr. 22). He also claimed that the vehicle was not secured in the

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4. That regulation reads as follows: "(d) Minimum *strength* of cargo securement devices and systems. The aggregate working load limit of any securement system used to secure an article or group of articles against movement must be at least one-half times the weight of the article or group of articles. The aggregate working load limit is the sum of: (1) One-half of the working load limit of each associated connector or attachment mechanism used to secure a part of the article of cargo to the vehicle; and (2) One-half of the working load limit for each end section of a tiedown that is attached to an anchor point." (emphasis supplied).

lateral, forward, rearward and vertical directions (Tr. 22). When asked why not, he claimed that FMCSR §393.130(c) required the tiedowns to be "at four opposing points wherever practical." (Tr. 22). When he was shown FMCSR §393.130(c), however, he conceded that the regulation did not require what he claimed it did: "I could say that's correct." (Tr. 23). However, he claimed his "training" and the "interpretation [of the regulation] that was given to us" were different (Tr. 23).

Pressed, Inspector Jackson conceded he "could not recall now" whether four tiedowns were on the crawler on the date of the supposed violation of FMCSR §393.130(c)(1) (Tr. 24; 25). He agreed that four tiedowns were all that was required (Tr. 25). He cited Respondent with violating FMCSR §393.130(c)(1) solely because supposedly enough tiedowns "for the load." (Tr. 25).

Most decidedly, Inspector Jackson never claimed that the tiedowns which were on the crawler were insufficient to restrain it "against movement in the lateral, forward, rearward, and vertical direction using a minimum of four tiedowns." FMCSR §393.130(c)(1).

The Staff claims the evidence showed that "[t]raining, common sense and common practice in the industry instruct investigators to check for securement on all four corners of the truck bed" (Brief at 4, citing Tr. 22-24). In fact, however, the testimony on those pages does not support the Staff's disingenuous position. In fact, the only thing Jackson said was that he received "training" (from whom and when was not stated) and had received an "interpretation" of FMCSR §393.130(c)(1) which varied from what the regulation actually requires. If Jackson was told by someone that the regulation requires something which it does not require, this is hardly justification for finding that the Staff proved by a preponderance of the evidence that Respondent violated what the regulation *actually says*.

Lastly, the Staff contends that FMCSR §393.130(c)(2) "provides further instruction on securement" which "bolsters [Inspector] Jackson's determination that the tiedowns used by [Respondent] were insufficient for the weight of the object" (Brief at 4-5). FMCSR §393.130(c)(2) says nothing about the number of tiedowns required for a particular weight of object (nor does FMCSR §;393.130(c)(1)). Indeed, FMCSR §393.130(c)(2) reads as follows: "Each of the tiedowns must be affixed as close as practicable to the front and rear of the vehicle, or mounting points on the vehicle that have been specifically designed for that purpose."

First, Inspector Jackson did not testify that the tiedowns were not affixed as close as practicable to the front and rear of the vehicle, or to mounting points on the vehicle (or whether they even existed on Respondent's vehicle). Rather, he merely testified that one of the chains "went over both tracks" and "didn't go from track to the corner on each four points." (Tr. 6). He could not testify whether there were four or more tiedowns on the equipment (Tr. 24; 26). Second, Respondent was not charged with violating FMCSR §393.130(c)(2).

Accordingly, the Staff's position that it proved by a preponderance of the evidence a violation by Respondent of FMCSR §393.130(c)(1) is untenable to say the very least. In fact, the Staff completely failed in its proof on that point.

B. THE STAFF DID NOT PROVE A VIOLATION OF FMCSR §393.131(b)(1)

The Staff likewise failed to prove by a preponderance of the evidence that Respondent violation FMCSR §393.130(b)(1) relating to securing the "hydraulic shovel" affixed to the track hoe. The Staff repeatedly refers to "reasonable discretion" by Inspector Jackson in determining whether the violation was proved and the forfeiture should be ordered (Brief at 5). However, whatever "discretion" by Inspector Jackson may have used is irrelevant to whether the Staff

proved by a preponderance of the evidence that, in fact, a violation of this regulation actually occurred on the date charged.

In our opening brief, we pointed out FMCSR §393.130(b)(1) required that "(1) Accessory equipment, such as hydraulic shovels, must be completely lowered and secured to the vehicle." Further, we pointed out that the regulation did not define what was meant by such accessory equipment being "*secured* to the vehicle" (emphasis supplied). Inspector Jackson agreed (Tr. 30).

The Staff, however, says "training, common sense and common practice in the industry instructs investigators to check for securement of hydraulic shovels by use of tiedowns" (Brief at 5). No evidence was offered that "common practice in the industry" either requires inspectors to look for securement of such accessory equipment "by use of tiedowns" or that it is "common practice" for transporters to secure such "accessory equipment" by the "use of tiedowns." *Id.* Rather, the most that can be said from the evidence is that Inspector Jackson testified that "our interpretation of securement" is that such accessory equipment "will be tied down." (Tr. 27).[1] Moreover, the Staff cites to no precedent where this regulation has been interpreted to require that "tie downs" be used to "secure" the accessory equipment "to the vehicle."

What's more, the Staff ignores the fact that Inspector Jackson begrudgingly conceded that the hydraulic shovel at issue in this claim was at least "partially" underneath where the crawler tracks were (Tr. 27, lines 12-13). Furthermore, he never testified that it was "insecure" in any way (other than no being affixed to the crawler with a "tiedown").

Given the foregoing, it is clear the Staff did not prove by a preponderance of the evidence that the accessory equipment (hydraulic shovel) on the tractor hoe was, in fact, not "secured" to

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[1]. It is not clear in this context who "our" refers to.

the vehicle as FMCSR §393.130(b)(1) required. The hydraulic shovel was completely lowered as the regulation required (Tr. 30) and was at least partially underneath where the crawlers are (Tr. 27). The only reasonable conclusion that can and should be drawn from this evidence was that the regulation was not violated, or, at the least, that the Staff did not make its case that a violation had, in fact, occurred, by a preponderance of the evidence.

C. **THE STAFF DID NOT PROVE A VIOLATION OF FMCSR §392.9(a)(2).**

The Staff's argument that FMCSR §392.9(a)(2) was violated by having unsecured lumber laying on the deck of the trailer is likewise without merit. The Staff concedes this regulation requires that 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 . . .(emphasis supplied). *Id.* Without reference to Inspector Jackson's testimony, the Staff claims that the words "other equipment" should be viewed separately from the remainder of the regulation that the few pieces of wood on the deck of the trailer should be considered to violate the regulation (Brief at 6).

The Staff asserts that Inspector Jackson used "reasonable discretion and expertise in determining that the lumber was used in the operation of securing machinery." (Brief at 6). Further, it asserted that "training, common sense and common practice in the industry instruct investigators, for safety purposes, to check for securement of loose equipment such as lumber." *Id.*

There is no evidence in the record that it is the "common practice" of anyone, much less some unspecified "industry," to "check for securement of loose equipment such as lumber" on a trailer "for safety purposes." According to Inspector Jackson, "unsecured lumber is a direct threat

to the motoring public. It can fall off at any time." (Tr. 19). That may, or may not be the case. The record shows that small pieces of either 4X4s or 6X6s were "laying on the deck" and were not secured "by any means whatever." (Tr. 18).

Whether the lumber posed any kind of risk to the "motoring public," however, is not relevant to whether, in fact, the Staff proved that the lumber was required to be secured by FMCSR §392.9(a)(2). In order for that regulation to be applicable, the Staff had to prove that the lumber constituted "other equipment used in [the] operation" of the commercial motor vehicle in question. *Id.* Clearly the Staff did not prove this in this case.

Inspector Jackson testified that the lumber was not part of the crawler itself (Tr. 31). He admitted not knowing why the lumber was on the trailer (Tr. 32). Specifically, he testified as follows:

> Q. You don't have any idea in this particular instance why that wood was there, who put it there, or whether it had anything whatsoever to do with the operation of this commercial motor vehicle?
>
> A. That's correct, sir.

(Tr. 33-34). Further, he admitted that if the lumber was not used in the operation of the commercial motor vehicle, the regulation would not apply (Tr. 35).

Given these admissions, it is hard to fathom the validity of the Staff's bold assertion that the regulation was violated (Brief at 6). The fact that Jackson "believed the wood was used in Respondent's operations" does not trump his own admissions (quoted above) that he did not, in fact, know what the wood was used for and, more specifically, whether the wood was used for the operation of the commercial motor vehicle (Brief at 6, Tr. 33-34).

Further, as noted above, the regulation relates to equipment used in the "operation" of the

commercial motor vehicle. The regulation simply does not pertain to lumber that is not used in its operation. While one or more other regulations may pertain, it is clear that FMCSR §392.9(a)(2) clearly does not. Accordingly, the Staff did not prove this purported violation by a preponderance of the evidence.

III. CONCLUSION

For the reasons set forth in Respondent's opening Brief, as supplemented by this Reply Brief, the Staff clearly failed to prove any of the three violations for which Respondent was cited. Accordingly, the proposed civil forfeitures are not well taken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the Hanko Farms, Inc.'s Post-Hearing Reply Brief was served by first class U.S. Mail, postage prepaid, upon Jim Petro, Attorney General of Ohio, c/o Duane W. Luckey, Esq., Senior Deputy Attorney General, Public Utilities Section and upon Steve Beeler, Esq., Assistant Attorney General, and Thomas G. Lindgren, Assistant Attorneys General, Public Utilities Section 180 East Broad Street, 9th Floor, Columbus, Ohio 43215-3707 and was further served upon them by facsimile to (614) 644-8764 on this 15th day of June 2005.

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