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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of B&T Express, Inc. | : | Case Nos. 00-533-TR-CVF, |
| Notice of Apparent Violation and | : | 00-534-TR-CVF, 00-750-TR-CVF, |
| Intent to Assess Forfeiture. | : | 00-1686-TR-CVF |

# REPLY BRIEF
## SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO



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## INTRODUCTION

B&T Express, Inc. (B&T or Company) asks the Public Utilities Commission of Ohio (Commission) to relieve it of its regulatory duty to promote safety on Ohio highways. B&T raised each of its legal arguments practically verbatim in a prior case and the Commission rejected each argument. Ensuring safety for travel on the roads of Ohio is of the utmost importance. As the Commission has already recognized, the carrier is in the best position to prevent violations of the motor carrier safety rules. B&T's attempt to avoid its responsibilities and operate its business absent regulatory accountability is counter-intuitive in an industry that is closely regulated because of the inherent safety concerns. The Commission should uphold its prior decisions and not allow B&T to escape safety regulation.

## PROPOSITION OF LAW I:

### THE COMMISSION'S RULES HAVE BEEN APPROVED ACCORDING TO THE STATUTORY REQUIREMENTS AND ARE THEREFORE VALID AND ENFORCEABLE.

B&T seeks to avoid responsibility for its safety regulation violations by asking this Commission to strike-down the regulations it violated. B&T is arguing that the Commission's adoption of the motor carrier safety rules through Ohio Administrative Code § 4901:2-5-02, was invalid.[1] The Commission has already determined that Ohio Administrative Code § 4901:2-5-02 was properly submitted for review and adopted as a valid rule.[2] The standards originated as Federal Highway Safety Administration

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1 B&T Brief at 2-3.

2 *In the Matter of B&T Express, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture,* Case No. 99-274-TR-CVF, (*"In re B&T"*), (Entry at 6-7)(December 7, 2000).

Regulations, 49 C.F.R. Parts 393 and 395, that apply to interstate transportation through Ohio. The Commission adopted these standards and applied them to all forms of transportation for hire in Ohio.[3] The Commission expressed the standards by referencing the federal regulations rather than reciting the text.[4] The important point is that the Commission filed the full text of the proposed rule with the Joint Committee on Agency Rule Review and the Legislative Service Commission.[5] Thus, there is compliance with the law. The full text of this rule appears in the Ohio Administrative Code.[6] The act used by the Commission to express the rules to be adopted was the most efficient and practical way to provide the federal rules for review without prejudicing the process. In Case number 96-923-TR-ORD, the Commission ordered that the rules contained in § 4901:2-5-02 be filed in accordance with Section 111.15 R.C.[7] The date of original filing was March 26, 1998, with a determination that jurisdiction by the Joint Committee on Agency Rule Review ended May 24, 1998. The effective date was designated as June 25, 1998. The Joint Committee on Agency Rule reviewed the Commission rule and gave no notice pursuant to R.C. § 103.05 that the Commission's rule was not in compliance with the rules of the Legislative Service Commission. The adoption of Ohio Administrative Code § 4901:2-5-02 was valid.

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3 Ohio Admin. Code § 4901:2-5-02 (Baldwin 2001).

4 *Id.*

5 *In the Amendment of the Provisions of Chapter 4901:2-5 Ohio Administrative Code*, Case Number 96-923-TR-ORD, (Finding and Order) (March 25, 1998); Attachment 1.

6 Ohio Admin. Code § 4901:2-5-02 (Baldwin 2001).

7 *In the Amendment of the Provisions of Chapter 4901:2-5 Ohio Administrative Code*, Case Number 96-923-TR-ORD, (Finding and Order) (March 25, 1998); Attachment 1.

B&T further charges that the federal safety rules adopted by reference were never filed in compliance with the requirements set forth in R.C. § 111.15.[8] Respondent cites no authority for that claim.[9] In fact there is no such requirement to file the federal rules when they have been adopted by reference. R.C. § 111.15 (A)(1) states that a ""[r]ule" includes any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing that agency;..." Agency is further defined to mean "any governmental entity of *the state* and includes, but is not limited to, any board, department, division, commission, bureau, society..."[10] It is therefore clear that only rules promulgated by agencies of this state are subject to review. The U.S. Department of Transportation is not a state agency formulated the Federal Motor Carrier Safety regulations. A proposed rule submitted for review pursuant to R.C. § 111.15 which adopts by reference a federal rule without changes, does not warrant legislative review by the State of Ohio.[11] The submission of the unchanged federal rule for review would be a meaningless act.

In response to B&T's allegations, the Staff of the Public Utilities Commission of Ohio (Staff) restates that Ohio Administrative Code § 4901:2-5-02 was submitted for review to the Joint Committee on Agency Rule Review. The Commission received no notice that the rule as filed did not comply with the rules of the Legislative Service Commission as filed. Therefore Ohio Administrative Code § 4901:2-5-02 was effective as filed on June 25, 1998. All vehicle inspections at issue in this proceeding occurred on

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8 B&T Brief at 3.

9 *Id.*

10 Ohio Rev. Code Ann. § 111.15 (A)(2) (Baldwin 2001).

11 *Id.*

or after October 26, 1999, therefore all violations noted during the inspections are valid and enforceable. The Commission must uphold its prior decision and reject B&T's request.

The Commission's rule is valid even if B&T showed filing deficiencies, which it plainly did not show. The General Assembly erased possible deficiencies if any existed with the Commission's adoption of the standards contained in 49 C.F.R. §§ 393 and 395. It ratified whatever rules were not submitted for filing pursuant to O.R.C. §§ 111.15 or 119.03.[12] The General Assembly amended O.R.C. § 111.15 to specifically apply to the Commission and procedurally validated all previously adopted Commission rules.

B&T invites this Court to impose an unwarranted burden of proof on the Commission and all state administrative agencies. B&T would require all agencies to waste hearing time and resources by repeatedly proving their regulations are valid in enforcement cases. Administrative agencies including the Commission are not required to bear such a burden. B&T has provided nothing new for the Commission to review concerning this issue. The Commission must reject B&T's invitation and reaffirm its decision holding the rules are valid.

## PROPOSITION OF LAW II:

### B&T'S LACK OF MANAGEMENT PRACTICES AND CONTROLS REQUIRE OR PERMIT THE VIOLATIONS OF THE MOTOR CARRIER SAFETY RULES.

The Commission has sufficient probative evidence to find B&T's management practices and controls are lacking with regard to driver hiring, training, monitoring of drivers' hours of service, and a policy to prevent violations of the federal motor carrier

12 1997 Ohio Laws H.B. 215 (adopted June 30, 1997).

rules. The Commission recently found this as a factual matter in a prior hearing involving the same management actions at issue in the present proceeding.[13] The Commission found the management and controls of B&T to be so lax that it permitted the violations in that case to occur.[14] B&T offers a number of citations to the testimony of Mr. O'Malley in an attempt to build support for its arguments; most of his testimony was contradicted on cross-examination and by B&T's redirect.[15] The record is full of support for a finding that B&T's lax management policies permit violations of the safety regulations. B&T has no formal policy guiding it's hiring of drivers.[16] B&T has no program to train drivers.[17] Mr. O'Malley stated that he only hires experienced drivers. This means B&T depends solely on a driver's personal knowledge to correctly follow the safety rules. In other words, B&T's calculated management choice is to hope the drivers are experienced enough to understand the rules and are willing to apply them without training from B&T. There is no written policy to discipline drivers.[18] The vehicles used by B&T Express are not equipped with two-way radios making monitoring nearly impossible.[19] There is no system to monitor drivers' hours of service.[20] The only way for the company to monitor the drivers while they are on the

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13 *In re B&T* (Entry at 16) (December 7, 2000).

14 *Id.*

15 B&T Brief at 17-18.

16 B&T (I) Tr. Vol. III at 56.

17 *Id.* at 54.

18 *Id.* at 56, 70.

19 *Id.* at 73.

20 *Id* at 68.

road is to rely on drivers' calls to the terminal.[21] There is no reprimand system to ensure effective discipline.[22] In fact, when asked to provide documentation from the personnel file of one of its drivers, B&T was unable to provide a single document referring to any inspection involving the driver, including the inspection at issue in this proceeding.[23] How can a company monitor problems if it does not even document violations of its own drivers, whom they want to assign liability? It can not. The Company issues no written safety bulletins or letters.[24] In addition, there is the telling admission by B&T's Chairman of the Board that as far as policies go, "most everything we have is informal".[25] If a carrier is truly committed to preventing safety violations it would not organize itself in such a manner as to forego establishment of all formal procedures. The record evidence shows that B&T's lack of management practices and controls permit violations of the motor carrier safety regulations.

The only testimony offered by the company at hearing was from B&T Chairman of the Board, Mr. Howard O'Malley. B&T offered a number of citations to Mr. O'Malley's testimony in an attempt to bolster the perception of the management practices of B&T.[26] B&T failed to call the four drivers to testify concerning the condition of the vehicles or any other matter related to the inspections. B&T failed to call its Safety Director or any of its mechanics. B&T was confident in Mr. O'Malley because

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21 *Id.*

22 *Id.* at 70.

23 Tr. at 105.

24 B&T (I) Tr. Vol. III at 81.

25 *Id.* at 81.

26 B&T Brief at 17-18.

although his title is Chairman, he is involved in the day to day operations of B&T.[27] Mr. O'Malley offered no testimony concerning his personal knowledge of the individual inspections.

In a prior Commission case involving B&T and considering a majority of the same testimony, the Commission found the testimony offered by Mr. O'Malley to be contradictory and insufficient to support the claims of the Company.[28] The Commission should make the same finding in this case. Mr. O'Malley's testimony shows, in detail, how out of touch B&T management is with respect to safety regulations. Mr. O'Malley testified that a pre-trip inspection of each vehicle is required and written in B&T's Rules and Regulations; yet a careful examination of the document reveals that no such rule exists.[29] Equally disturbing is the fact that prior to the hearing, Mr. O'Malley was ignorant as to what constituted a pre-trip inspection.[30] When questioned concerning the proper way to secure cargo on a vehicle Mr. O'Malley testified "there is no way that equipment is tied down properly".[31] The inescapable conclusion is that B&T does not concern itself with the regulatory standards nor does B&T appreciate the importance of properly securing cargo. After testifying that B&T did have a system in place to monitor drivers' hours of service, he was impeached by his own deposition taken only weeks earlier admitting B&T did not have a system to

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27 Tr. at 94.

28 *In re B&T* (Entry at 17) (December 7, 2000).

29 B&T (1) Tr. Vol. III at 54; Counsel Ex. 1 (B&T Rules and Regulations). The exhibit was Staff Exhibit 22 in the prior Commission proceeding.

30 *Id.* at 72. Mr. O'Malley began to testify to his understanding of a pre-trip inspection when he was impeached by a deposition he gave weeks earlier.

31 *Id.* at 66.

monitor the drivers' hours of service.[32] The record reflects that in that same deposition, when asked what would happen if a driver noted on his or her log that a repair was needed, Mr. O'Malley freely admitted he had no idea what would happen with that notation.[33] Mr. O'Malley also testified that a consultant assists his safety director in reviewing the company logs and safety programs.[34] Yet when cross-examined about his consultant, Mr. O'Malley could only testify that he visited a couple times a month to review the company logs.[35]

The testimony given by Mr. O'Malley on the stand in the present hearing was very limited but continued to provide contradictory and evasive statements raising serious doubts about its reliability. For example, during cross-examination it took Mr. O'Malley four pages of transcript to answer whether or not B&T had any responsibility to maintain vehicles leased by the Company.[36] Even after the Attorney Examiner instructed Mr. O'Malley to answer the question, he continued to restate his prior unresponsive answer.[37] Mr. O'Malley also directly contradicted his earlier testimony that B&T does not issue safety notices or letters.[38] Mr. O'Malley testified in the current hearing that B&T issues safety notices to the drivers about once a month and that this is

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32 *Id.* at 67-68.

33 *Id.* at 72.

34 *Id.* at 64.

35 *Id.* at 64-65.

36 Tr. at 107-110.

37 *Id.* at 108.

38 B&T (1) Tr. Vol. III at 81.

a long standing practice.[39] Mr. O'Malley appears to change his story whenever his testimony incriminates his company. The Commission previously discounted the testimony of Mr. O'Malley after such contradictory statements and his lack of knowledge concerning basic company operations in the prior case, and should again find his testimony contradictory and unable to support the arguments of B&T in the present case.

## PROPOSITION OF LAW III:

### THE EVIDENCE OF RECORD SUPPORTS A FINDING THAT THE VIOLATIONS OCCURRED AS CITED.

There is ample support in the record that the violations occurred as cited.[40] Each and every inspection is supported by a valid inspection report detailing the violations of the safety rules. The authoring officers appeared at hearing to support their respective inspection reports.[41] The record also contains exhibits including pictures and company documents incriminating the Company.

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39 Tr. at 118-119, 123.

40 B&T Brief at 3.

41 Officer Price was unable to attend due to a serious illness but the Staff and B&T stipulated to the admission of the inspection report.

## A. 00-750-TR-CVF (Inspection No. OHKH30017)

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| **49 C.F.R. 393.46** | **Brake hose or tubing defective** |
| **49 C.F.R. 396.3(a)(1)** | **Parts and Accessories not in proper operating condition** |

B&T attempts to avoid liability for violation of 49 C.F.R. 393.46 by claiming the rule only requires certain criteria be met in relation to design and construction.[42] What B&T mentions but ignores is brake tubing must be adequate in material and construction to ensure proper continued functioning.[43] The inspection resulted in a finding that the brake hose on the steering axle was worn down to the cords.[44] A hose worn down to the cords is surely not adequate material to insure proper continued functioning. B&T's claim that the regulation only covers construction requirements, and not maintenance, is off base. The rule applies to this situation.

B&T also challenges the applicability of 49 C.F.R. 396.3(a)(1).[45] B&T contends § 396.3(a)(1) covers the requirement of the motor carrier to maintain its motor vehicles' parts and accessories relating to safety of operation, but does not apply to brakes.[46] B&T cites language from the rule requiring "parts and accessories to be in a safe and

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42 B&T Brief at 5.

43 49 C.F.R. 393.46.

44 Staff Ex. 19 (Inspection Report OHKH300171).

45 B&T Brief at 6. B&T also continues to claim that 49 C.F.R. 396.3(A)(1)BL does not exist despite its contention at hearing that it was not challenging notice as a part of this case. Tr. at 86. In light of B&T's attack on the rule as cited the Staff asks the Commission to take administrative notice of the instruction sheet attached to each and every Notice of Apparent Violation and Notice of Intent to Assess forfeiture that explains in procedure four that some codes may have suffixes beyond the C.F.R. citation like the "BL" for internal data collection purposes. See Attachment 2.

46 B&T Brief at 6.

proper operating condition at all times".[47] The rule defines the scope of the section as any parts specified in § 393 and any additional parts that may affect safety of operation. Brakes are clearly a safety mechanism and included throughout § 393. Specifically, § 396.3(a)(1) in fact considers brakes a safety mechanism that should be maintained by the motor carrier.

B&T then argues that there is no proof that the vehicles were unsafe for operation.[48] To support the argument, B&T cites the testimony that the brakes placed out-of-service were still operating in some capacity.[49] The record shows that the violations found were serious enough for the vehicle to be placed out-of-service, hence unable to be driven until repaired. The Officer's actual response to whether the brakes were working was that they "were operating, but they were operating beyond the limits".[50] B&T would have the standard for the violation be a complete lack of working brakes. Under B&T's standard only runaway trucks would be cited under the rule. The safety rules are in existence to promote safety and prevent accidents. If an Officer finds the brakes defective enough to order the truck off the road until they are repaired, it is because the brakes are not in a safe and proper operating condition. The report outlines the out-of-service violation found during the inspection.[51]

The only credible evidence in the record concerning the condition of the vehicles is the evidence supporting the mechanical violations that placed the vehicles out-of-

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47 *Id.*

48 *Id.*

49 *Id.*

50 Tr. at 32.

51 Staff Ex. 19 (Inspection Report OHKH300171).

service. B&T argues that the lease and driver logs provide evidence of the condition of the truck that contradicts the inspection report. In reality those documents serve to prove B&T's culpability. A closer inspection of the lease shows that B&T conducted a full inspection of the vehicle including the brakes and hoses when entering into the lease and certified it as having met all the safety standards.[52] Addendum A to the lease covers the areas certified as checked by the inspector and then certified by B&T safety director Mr. McCullough.[53] An inspection of the driver logs then shows that the truck was operated only one day in between the certification of B&T as meeting all safety requirements and the discovery of the safety violations.[54] B&T asks the Commission to believe the wear and tear violations found by the inspecting officer happened over the course of one day of travel. B&T then depends upon the pre-trip markings of the log showing the driver conducted a walk around inspection of the vehicle that day certifying the condition of the vehicle as safe. It is curious that B&T would depend on this when B&T has admitted to having no formal training for drivers. How can B&T be sure the driver is in any position to certify a vehicle as safe when he or she is not trained by the Company in what to inspect? Even worse is the fact that B&T's mechanics, who according to Mr. O'Malley check for wear and tear conditions,[55] certified the vehicle as meeting all safety regulations.[56] The management practices of B&T do not provide its

52 Counsel Ex. 5 (Gary Wymer Lease).

53 *Id.*

54 Counsel Ex. 8 (Driver logs).

55 Tr. at 117.

56 Counsel Ex. 5 (Gary Wymer Lease).

employees and representatives with the requisite knowledge to prevent safety violations. Thus, B&T permits them to occur.

## B. 00-533-TR-CVF (Inspection No. OHKG300058)

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| **49 C.F.R. 393.205(a)** | **Wheels and rims shall not be cracked or broken** |
| **49 C.F.R. 393.207(a)** | **No axle positioning part shall be cracked, broken, loose or missing. All axles must be in proper alignment.** |

B&T argues it can not be cited for violations under sections of 49 C.F.R. 393 because they do not contain language indicating whether the carrier is liable.[57] B&T cites language from §393.1 that states, "No employer shall operate a commercial motor vehicle, or cause or permit it to be operated, unless it is equipped in accordance with the requirements of Part 393". B&T uses this language to support its position that the carrier must have actual knowledge of the violation when it is dispatched in order to be held liable.[58]

B&T can and should be cited for violations of § 49 C.F.R 393. B&T does not challenge the fact that it could be a party responsible for the violations. B&T alleges it did not cause or permit the violations because it did not have actual knowledge of the problem. The knowing standard claimed by B&T is not the controlling standard. The question is whether B&T required or permitted the violations to occur. The Commission found the same management controls and practices to "permit" violations

57 B&T Brief at 20.

58 *Id.*

in the prior case.[59] The existence of the violations are unchallenged and B&T is responsible due to its lax management controls and its duty to keep parts in a safe working manner.

### C. 00-534-TR-CVF (Inspection No. OHKW300058)

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| **49 C.F.R. 396.3(A)(1)** | **Brake out of adjustment** |
| **49 C.F.R. 393.67** | **Fuel Tank requirement/ leaking** |

B&T asserts 49 C.F.R. 396.3(a)(1) only requires parts and accessories to be in a safe operating condition and that the brakes were never proven unsafe.[60] This is the same debate B&T raised with inspection number OHKH300171.[61] Brakes are covered by the rule and the only evidence of the condition of those brakes is the documentation from the inspection.[62] Regardless of what B&T may argue in theory, the Officer testified the brakes were operating beyond the limits.[63] Given the absence of testimony raising any doubt about the authenticity of the account contained in the inspection, the unrebutted conclusion is the vehicle's parts and accessories were not in a safe and proper operating condition.

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59 *In re B&T* (Entry at 16) (December 7, 2000). Three of the four inspections took place prior to the testimony from the prior case upon which the Commission relied to find the management practices of B&T permitted violations of the motor carrier safety rules. Mr. O'Malley testified on cross-examination that the fourth inspection was also covered by the same management controls. Tr. at 105.

60 B&T Brief at 12.

61 See Prop. of Law III A.

62 Counsel Ex. 12 (Inspection Report OHKW300058).

63 Tr. at 32.

B&T's argues that the Staff did not prove the driver was operating for B&T. [64] This is without merit. When questioned about the inspection Mr. O'Malley testified the driver Mr. Bentley was operating as an employee of B&T.[65] The Officer testified he concluded B&T was the responsible carrier based upon the markings on the vehicle, the B&T logs, B&T permits and B&T paperwork.[66] B&T offered no evidence that the vehicle was stolen. B&T must be held accountable for the condition of its vehicles.

B&T argues 49 C.F.R. 393.67 should not be applied to them because it is a requirement for manufacturers.[67] The rule requires functioning fuel tanks.[68] The officer does not need to run a structured test when he arrives on the scene and there is fuel all over the ground. The general scope of the section found in § 393.65(a) reads:

> The rules in this section apply to systems for containing and supplying fuel for the operation of motor vehicles or for the operation of auxiliary equipment installed on, or used in connection with, motor vehicles.

The scope of the section applies to the maintenance of systems for containing and supplying fuel not just manufacturing the systems. B&T's attempt to avoid responsibility for its leaky fuel tank should not be allowed. The Commission should find the violations occurred as cited.

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64 B&T Brief at 12.

65 Tr. at 101.

66 *Id.* at 28.

67 B&T Brief at 13.

68 49 C.F.R. 393.67.

## D. 00-1686-TR-CVF (Inspection No. OHKG300521)

**49 C.F.R. 393.102 Securement Systems**

B&T claims 49 C.F.R. 393.102 can not be used to enforce an insecure cargo violation.[69] B&T is wrong. B&T argues the rule simply deals with the requirements for a proper chain used in securing devices regardless of the load; simply put, the specifications of the actual chain. In reality the regulation deals with the chains tying down the object and strength or ability of the chains to secure an item.[70] The Officer found the chains securing the object were too weak to secure the vehicle's load. Had more chains been used the requirement for the strength of the chain would have been less. But, since only a few chains were used the load security must be judged by those few chains. The out-of-service criteria published by the Commercial Vehicle Safety Alliance (CVSA) requires citation to this regulation for this type of violation.[71] B&T offered no evidence to contradict the Officer. Thus the Commission should find § 393.102 was violated by B&T.

B&T also claims that since this was an intrastate shipment, Ohio statutory law, specifically Title 45 which covers basic motor vehicle laws, supercedes the safety regulations. *Again, Title 45 concerns do not belong before the Commission.* B&T is regulated by the Commission and is subject to the motor carrier safety rules.[72] B&T's repeated attempts to claim shelter under Title 45 should be dismissed by the Commission.

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69 B&T Brief at 15.

70 49 C.F.R. 393.102.

71 Staff Ex. 18 (Out-of-Service Criteria) at 25.

72 B&T (I) Tr. Vol. III at 72.

B&T's final argument is that the Staff failed to show the Company knew the load was insecure.[73] B&T can not absolve itself from liability for the drivers actions. If B&T fails to have in place proper management controls and practices, the drivers are not properly trained to secure vehicle loads. B&T can not delegate that responsibility by simply providing its drivers with a copy of the federal rules and regulations and sending them on their way hoping they understand and can apply the standards. B&T needs a formal policy to train on the important principles for highway safety. The absence of proper management and training results in the carrier being culpable for its failure to ensure safety regulations are followed. Merely providing copies of rules to drivers is not ensuring compliance; without other efforts it is permitting violations.

## PROPOSITION OF LAW IV:

### B&T'S RELIANCE ON STRICT LIABILITY IS UNWARRANTED.

B&T attempts to excuse its violations by claiming the Commission imposes strict liability upon it; B&T then argues the Commission is not authorized to impose strict liability. The statutory provisions cited do not show the Commission applies strict liability. The standard B&T calls for was used by the Commission in B&T's prior case.[74] Yet, B&T argues the Commission is still applying strict liability. Application of the same standard would again result in B&T being liable for safety violations.

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73 B&T Brief at 16.

74 *In re B&T* (Entry at 16)(December 7, 2000).

## A. THE STANDARD PROPOSED BY B&T RESULTS IN CARRIER CULPABILITY IN THIS CASE.

B&T offers legislative history to declare a specific degree of inaction on the part of the carrier is necessary to find a carrier responsible for violations of the safety regulations.[75] The standard offered by B&T requires either a carrier disregard the rules because they are inconvenient, or the carrier tolerates a pattern of equipment violations or conduct that any responsible business could detect. While the Commission is not required to follow the standard offered by B&T, the Commission did so in the prior case and could easily do so in the present case.

B&T's actions, or lack thereof, meet the standard it raises as the proper means to analyze the assignment of culpability to a motor carrier. B&T encourages the Commission to find a carrier liable only if there is a tolerated pattern of violations and a conscious decision by management to disregard safety issues.[76] B&T made a conscious decision to have no formal procedures to ensure operational safety. It was a conscious decision by B&T to do business informally, disregarding the safety rules. It is curious that B&T included the types of violations typical of these middle range offenders in its argument because it incriminates B&T. B&T cites the language stating these "types of violations include general failure to maintain equipment, control hours of service, or screen drivers' qualifications ...".[77] In this case, B&T faces numerous citations regarding a failure to maintain equipment. Further, since B&T does not provide two-way radios in is vehicles it admitted being unable to monitor its drivers' hours of service. Finally,

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75 B&T Brief at 21.

76 *Id.* at 21-22.

77 *Id.* at 21.

B&T has no formal internal standards for hiring drivers.[78] If the Commission chooses to adopt this standard, B&T has dug its own grave.

B&T erroneously relies on congressional intent underlying 49 U.S.C. § 31135. B&T cites to a superceded version. The current version reads:

> Each employer and employee shall comply with the regulations on commercial motor vehicle safety prescribed by the Secretary of Transportation under this subchapter that apply to employer's or employee's conduct.[79]

This version requires compliance for all regulated actions. It no longer assigns liability only for one's own actions. B&T's reliance on this statute to show the driver's independent responsibility is misplaced. The employer is liable for actions of the employee.

The Commission must determine by a preponderance of the evidence which person is responsible for the violation.[80] This standard only requires the evidence demonstrate more likely than not that the party is responsible.[81]

## B. *RESPONDEAT SUPERIOR* SERVES TO HOLD B&T RESPONSIBLE FOR THE VIOLATIONS.

The principle of *respondeat superior* and Ohio Revised Code § 4905.55 do not require a standard of liability such as strict liability. While the Commission has discussed them in the past, it has not cited them to impose strict liability.[82] The

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78 B&T (I) Tr. 161 Vol. III at 56, 73.

79 49 U.S.C. § 31135.

80 Ohio Rev. Code §§ 4919.99, 4921.99 and 4923.99 (Baldwin 2001).

81 *State of Ohio v. Ali*, 119 Ohio App. 3d 766, 696 N.E. 2d 285 (Ohio App. 8th Dist. 1997); 90 Ohio 2d 127, 698 N.E. 2d (Ohio Ct. fo Claims 1996); Black's Law Dictionary, Sixth Edition, pg. 1182 (West 1990).

82 *In re B&T*, (Entry at 15-17) (December 7, 2000).

Commission cited them to explain the principle that B&T is responsible for the actions of its employees.[83] In response to B&T's past attempt to lay blame solely on its employees, the Commission stated:

> Alternately [sic], respondent argues that the vehicle drivers and not the company should be responsible for any violations and that imposition of civil forfeitures recommended by staff would result in a standard of strict liability being levied against the company, which is beyond the statutory authority of the Commission. With respect to this argument the Commission would first note that, as we stated in *Norris*, the common law doctrine of *respondeat superior* holds an employer responsible for the acts of an employee done within the scope of employment. Further, performing or omitting an act contrary to an employers instructions, as respondent argues its drivers did for several of the violations in question, is not cause for relieving an employer of liability for the acts or omission of the employee. In this case, there is no allegation in the record that the drivers departed from their employment on their own business and in such a way as to sever the employer/employee relationship. Indeed, the facts of this case show that, at the times of the violations, the drivers were operating on the highway on behalf of B&T, the carrier.[84]

The same situation exists in the present case. B&T is responsible for the acts of its representatives.

The Commission previously determined that the statutory language of Title 49, Revised Code, also places responsibility on B&T for the acts and omissions of its agents. O.R.C. § 4905.55 states:

> The act, omission, or failure of any officer, agent or other person, acting for or employed by a public utility or railroad,

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83 *Id.*

84 *Id.*

> while acting within the scope of his employment, is the act or failure of the public utility or railroad.

Based on the basic principle that an employer is liable for the acts of its employees the Commission found B&T liable. B&T confuses that with strict liability.

Despite the claims of B&T, O.R.C. § 4905.55 does apply in this case. In the prior case, the Commission cited this section as additional support for the principle that a corporation, like B&T, is responsible for the acts of its employees.[85] As already discussed, B&T would be responsible for its employees' acts even without this section. But O.R.C. § 4905.55 applies to these types of cases. The Commission properly found it applies, explaining:

> Section 4905.02, Revised Code defines a public utility to include all business associations defined in Section 4905.03, Revised Code. Section 4905.03 (A)(3), states that a motor carrier engaged in the business of carrying or transporting persons or engaged in the business of carrying property, for hire, over any public roadway in this state is a motor transportation company and consequently a public utility as defined in Section 4905.02, Revised Code. B&T Express is a motor transportation company authorized to conduct business in this state as a for hire property carrier and is therefore a public utility. All vehicles at issue in this proceeding were operated by B&T and have the company name on the vehicle. In addition, no evidence was presented that the vehicles and the drivers at issue in this proceeding were operating outside the scope of employment or operating for another motor carrier.[86]

There is credible unrebutted evidence that B&T is a "motor carrier" registered with the Commission in order to do business in Ohio.[87] B&T is culpable for the actions of its representatives.

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85 *Id.*

86 *Id.*

87 Staff Exs. 12,13,14,15,19; B&T (I) Tr. Vol. III at 72.

The case law also supports the presumption of *respondeat superior* when a lease situation is involved. As the Staff pointed out in its initial brief there is a statutory presumption of the doctrine of *respondeat superior* when a lease is in existence and the vehicle carries the lessee's placard.[88] Thus the Commission has the proper basis to determine that B&T is the party responsible for the actions of its drivers.

B&T's discussion of sections from O.R.C. Title 45 do not support its position.[89] Title 45 specifically requires all vehicles under the jurisdiction of the Commission to be inspected according to the Commission rules.[90] Any safety rule or regulation covered by the Commission takes priority over any provision from Title 45 for vehicles subject to Commission jurisdiction. They do not limit the Commission's jurisdiction or decision-making authority. They do not even fall under Commission jurisdiction. As the Commission previously found, Title 45 provisions have no effect on the Commission's motor carrier regulations.[91]

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88 Staff's Post Hearing Brief at 15.

89 B&T Brief at 6-8, 15-16, 23.

90 Ohio Revised Code § 4513.02 (Baldwin 2001).

91 *In re B&T* (Entry on Rehearing at 4) (January 30, 2001).

## PROPOSITION OF LAW V:

### THE COMMISSION PROPERLY ASSESSES THE CIVIL FORFEITURES CONTEMPLATED IN OHIO REVISED CODE §§ 4919.99, 4921.99 AND 4923.99 THROUGH OHIO ADMINISTRATIVE CODE § 4901:2-7-06.

B&T misreads ORC §§ 4919.99, 4921.99 and 4923.99 to require the Commission to adopt rules governing the manner in which forfeitures may be determined.[92] That requirement only exists, in sub-part (B) of those statutes, to provide a method for the parties to agree on a forfeiture prior to an administrative hearing. A procedure to agree on a forfeiture amount before a hearing and the blanket requirement alleged by B&T are very different. B&T also represents that O.R.C. § 4901.13 *requires* the Commission to adopt and publish rules regulating the manner of all valuations, tests, audits, inspections, investigations and hearings.[93] A proper reading of O.R.C. § 4901.13 shows that the "Public Utilities Commission *may* adopt and publish rules". The requirement B&T asserts does not exist. Even though the Commission is not required to adopt such rules and despite the claims of B&T to the contrary, the Commission has adopted Ohio Administrative Code § 4901:2-7-06 to govern this process.

Ohio Revised Code §§ 4919.99, 4921.99, and 4923.99 are the statutes that give the Commission the power to assess civil forfeitures for violations of the motor carrier safety regulations. Each statute is worded identically in relation to the assessment of civil forfeitures. Each statute requires the amount of forfeitures resulting from roadside inspections to be consistent with the recommended fine schedule of the CVSA. The

92 *Id.* at 24.

93 *Id.*

amount of the forfeiture resulting from a compliance review is based on the civil penalty guidelines adopted by the U.S. Department of Transportation's Federal Highway Administration.[94] B&T argues that the civil forfeiture assessment system followed by the Commission has never been subjected to public scrutiny and only imposes civil forfeitures upon those the Commission chooses to punish.[95] Nothing could be further from the truth.

Mr. John Canty, the Assistant Chief of the Civil Forfeiture Section of the Transportation Department of the Commission testified that the civil forfeiture assessment amount is calculated based on the CVSA guidelines as required by statute.[96] Mr. Canty testified that there are four groups of out-of-service violations.[97] The most severe violations are in Group One, *i.e.*, broken brake components, safe loading and steering gearbox violations.[98] Group Four violations deal with more administrative matters, such as operating authority and failing to register, but still require a vehicle to be placed out-of-service until the violation can be remedied.[99] Consistent with the CVSA guidelines, each group is assigned a dollar amount based on the severity of the violation, with Group One violations having the higher dollar amount.[100] Every inspection report is entered into the computer which then objectively issues the civil

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94 Ohio Rev. Code Ann. §§ 4919.99, 4921.99 and 4923.91 (Baldwin 2001).

95 B&T Brief at 25.

96 Staff Ex. 16. (Canty Testimony) at 3.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

forfeiture amount dependant on the group of violations included in the report. This process ensures the assessments are the same for each type of violation.[101]

Once the amount of the forfeiture is determined, the Commission or its Staff apply Ohio Administrative Code § 4901:2-7-06 "Amount of Forfeiture". The administrative code provision allows the Commission to consider seven different factors when determining the amount of any forfeiture:

1. The nature and circumstances of the violation;
2. The extent and gravity of the violation;
3. The degree of the respondent's culpability;
4. The respondent's history of violations, including but not limited to prior "violations" as defined under this chapter and any other available information concerning the respondent's safety of operations;
5. The respondent's ability to pay;
6. The effect on the respondent's ability to continue in business; and
7. Such other matters as justice may require.

If the Commission or its Staff still believe a civil forfeiture is appropriate, the motor carrier is sent a notice of intent to assess forfeiture listing the amount resulting from the full review. B&T provided no evidence that either the statute or the administrative code section were improperly adopted or applied.

B&T has misinterpreted the entire civil forfeiture process causing it to improperly question the validity of the system. The faulty assumptions relied upon lead B&T to erroneously assert the Commission acts in contradiction to legislative directive.[102] The Commission followed O.R.C. §§ 4919.99, 4921.99, and 4923.99, as well as Ohio Administrative Code § 4901:2-7-06. B&T questions the adoption of the statutes and the Administrative Code. Yet, no evidence is offered to call each section's

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101 *Id.* at 4.

102 *Id.*

enactment into question. B&T erred in its analysis of the entire forfeiture system causing it to raise arguments that simply do not apply.

B&T attempts to discredit the forfeiture system by misusing the testimony of Mr. John Canty in hopes of misleading the Commission. B&T cites to a number of statements made by Mr. Canty that are irrelevant to its argument. For example, B&T cites to testimony concerning the absence of compliance review information on the history list.[103] Roadside inspections and compliance reviews are two entirely different types of inspections controlled by different guidelines; the history list is a tool used in conjunction with roadside inspections and has no place determining forfeitures for compliance reviews.[104] More disturbing is where B&T claims Mr. Canty testified that carriers with less than ten inspections in a twelve-month period would never receive a civil forfeiture regardless of the violation.[105] The transcript tells the opposite story. Counsel for B&T cross-examined Mr. Canty on this exact issue.

> Q. Is it true that a carrier that received fewer than 10 inspections during the 12-month period would not be given a civil forfeiture regardless of the violation?
>
> A. No, I do not believe that is true.[106]

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103 B&T Brief at 25.

104 In relation to the difference between compliance reviews and roadside inspections B&T improperly asserts facts not in the record. B&T on page 26 of its initial brief complains that a carrier with 300 violations resulting from a compliance review would be assessed no forfeiture while a carrier with the roadside inspections would receive a forfeiture assessment. The statement is both incorrect and appears nowhere in this record.

105 B&T Brief at 25.

106 Tr. at 82.

It is unclear what B&T is relying upon to contradict this explicit statement. B&T's usage and attack on the testimony of Mr. Canty is both irrelevant and incorrect and does not discredit the civil forfeiture system.

The civil forfeiture and compliance programs are operated in an objective non-discriminatory manner. B&T's claim that the manner in which the Commission applies the penalty provisions of the civil forfeiture program is discriminatory is without merit.[107] B&T claims it is discriminated against since some unnamed entity determines the forfeiture amount using discriminatory factors.[108] As discussed previously, according to statute, the Commission must base forfeiture amounts upon the CVSA guidelines and the procedures outlined in Ohio Administrative Code §4901:2-7-06. B&T provided no evidence that the application of these statutes and administrative code sections result in discrimination. The statistical computer program applied by the Commission Staff is a neutral process that allows for the most objective manner to effectuate the statutes and administrative code section.

B&T's claims of discrimination do not exist. Upon closer review each and every assertion raised by B&T is dismissed. Without any legal or factual support the allegations that the Commission's civil forfeiture program are unsupported and discriminatory must be rejected.

107 B&T Brief at 25.

108 *Id.*

## CONCLUSION

The Staff has provided credible evidence proving violations of the motor carrier safety regulations and B&T's relationship and responsibility for these violations. B&T only provided the discredited testimony of one witness who has no knowledge of the actual facts surrounding the inspections. The Staff recommends that the Commission reject the arguments of B&T and find as a matter of fact that the testimony of Mr. O'Malley was contradictory and failed to support the arguments raised by B&T. The Staff also respectfully recommends that as required by statute, the Commission assess the full four hundred ninety-dollar ($490) civil forfeiture based on the CVSA guidelines.

Respectfully submitted,

**Betty D. Montgomery**
Attorney General

**Duane W. Luckey, Chief**

**Mathew J. Satterwhite**
Assistant Attorney General
Public Utilities Section
180 E. Broad St., 9th Floor
Columbus, OH 43215
614-466-4396
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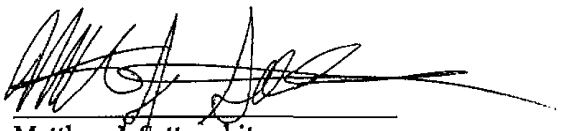
## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 18th day of May, 2001.



**Matthew J. Satterwhite**

Parties of Record:

Boyd B. Ferris
Attorney for B&T Express, Inc.
Carlile Patchen & Murphy LLP
366 E. Broad St.
Columbus, OH 43215

# ATTACHMENT I

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|---|
| In the Matter of the Amendment of the Provisions of Chapter 4901:2-5, Ohio Administrative Code. | ) ) ) | Case No. 96-923-TR-ORD |

FINDING AND ORDER

The Commission finds:

(1) Chapter 4901:2-5, O.A.C., currently adopts the provisions of the Federal Motor Carrier Safety Rules, Title 49, Code of Federal Regulations, Parts 383, 387, 390-397, for transportation into, through or within Ohio.

(2) By Entry dated September 26, 1996, the Commission issued for public notice and comment proposed rules amending Rules 4901:2-5-02, -07, -14, and -15, Ohio Administrative Code (O.A.C.). Comments to the proposed rules were filed by the Ohio Petroleum Marketers Association (OPMA).

(3) With respect to the proposed amendment of Rule 4901:2-5-02, O.A.C., the Federal Highway Administration (FHWA) of the United States Department of Transportation adopted new provisions regarding controlled substance and alcohol testing, contained at 49 C.F.R. Part 382. Although other provisions of the Federal Motor Carrier Safety Rules already adopted by the Commission incorporate these provisions by reference, the Commission believes that it will simplify compliance with these provisions if the Commission directly adopts into Rule 4901:2-5-02, O.A.C., the provisions contained in 49 C.F.R. Part 382. No comments were received regarding the proposed rule.

(4) Proposed Rule 4901:2-5-14, O.A.C., which would authorize the Commission to order intrastate carriers out-of-service and to order cessation of commercial motor vehicle operations, was based upon Recommendation H-94-13 of the National Transportation Safety Board. Proposed Rule 4901:2-5-14 is equivalent in scope, coverage and content to 49 C.F.R. 382.72 which authorizes the Federal Highway Administration to order interstate carriers out-of-service and to order cessation of commercial motor vehicle operations due to violations which pose an imminent hazard to safety.

The OPMA, while generally supporting the proposed rule, commented the Commission should order cessation of operations where the Commission finds "continuous and deliberate" violations of the safety regulations. The OPMA further commented that the Commission should be guided by the triggers contained in the Motor Carrier Safety Act of 1984.

Because proposed Rule 4901:2-5-14, O.A.C. is equivalent in scope, coverage and content to 49 C.F.R. 382.72, which was promulgated pursuant to the Motor Carrier Safety Act of 1984, the Commission intends to be guided by the same factors which would guide the FHWA in considering whether to order the cessation of commercial motor vehicle operations by an interstate carrier.

(5) The Commission proposed to amend Rule 4901:2-5-07, O.A.C., to clarify the circumstances in which a vehicle or driver may be placed out-of-service for violations of the Hazardous Materials Regulations, Title 49, Code of Federal Regulations, Parts 171-180. The OPMA indicated in its comments that it fully supports the proposed rule.

(6) The FHWA mandated in 49 C.F.R. 395.1(l) that the States determine the "planting and harvesting season" within the State. Proposed Rule 4901:2-5-15 would establish the planting and harvesting season, for the purposes of 49 C.F.R. 395.1(l), as March 1 through November 30 of each year. The OPMA commented that it also fully supports this proposed rule.

(7) The attached rules amending Rules 4901:2-5-02, and -07, O.A.C. and creating Rules 4901:2-5-14, and -15, O.A.C., should be adopted by the Commission.

It is, therefore,

ORDERED, That this Finding and Order and the attached rules amending Rules 4901:2-5-02, and -07, O.A.C. and creating Rules 4901:2-5-14, and -15, O.A.C., be filed in accordance with Section 111.15, O.R.C. It is, further,

ORDERED, That amended Rules 4901:2-5-02, and -07, O.A.C. and creating Rules 4901:2-5-14, and -15, O.A.C., be effective on the earliest possible date. It is, further,

ORDERED, That a copy of this Finding and Order, with the attached rules, be served upon the Ohio Trucking Association, the Ohio Manufacturers Association, the Ohio Chemical Council, the Ohio Chamber of Commerce, the Ohio Petroleum Marketers Association, the Ohio Petroleum Council, the Ohio Chemical Recyclers, the Ohio Nursery and Landscape Association and the Ohio Agribusiness Association.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

Jolynn Barry Butler

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

GP:sm

Entered in the Journal
MAR 25 1998
A True Copy
Gary E. Vigorito
Secretary

4901:2-5-02 Adoption of U.S. department of transportation safety standards.

(A) The commission hereby adopts the provisions of the motor carrier safety regulations of the U.S. department of transportation contained in Title 49, CFR Parts 382, 383 and 387 (insofar as that pertains to the transportation of hazardous materials, hazardous substances or hazardous wastes as therein defined) and Parts 390 through 397 including future modifications or additions, unless specifically excluded or modified by a rule of this commission, and those portions of the hazardous materials transportation regulations contained in Title 49, CFR Parts 171 through 180 as are applicable to transportation or offering for transportation by motor vehicle, including future modifications or additions. All motor carriers operating in intrastate commerce within Ohio shall conduct their operations in accordance with those regulations and the provisions of this chapter. With respect to such regulations as applicable to intrastate motor carriers, any notices or requests permitted or required to be made to the U.S. department of transportation or officials thereof under Title 49, CFR Parts 390 through 397 shall instead be made to the director of the commission's transportation department.

(B) All motor carriers engaged in interstate commerce in Ohio shall operate in conformity with all regulations of the U.S. department of transportation, including future modifications or additions, which have been adopted by this commission. Violation of any such federal regulation by any motor carrier engaged in interstate commerce in Ohio shall constitute a violation of this commission's rules.

(C) All offerors shall operate in conformity with all applicable regulations of the U.S. department of transportation, including future modifications or additions, which have been adopted by this commission. Violation of any such federal regulation by any offeror shall constitute a violation of this commission's rules.

(D) Enforcement of those portions of Title 49, CFR Parts 171 through 180 as are applicable to transportation or offering for transportation of hazardous materials by motor vehicle shall be subject to any exemptions granted by the U.S. department of

transportation pursuant to Title 49, CFR Part 107 and shall be consistent with interpretations issued by the research and special programs administration, U.S. department of transportation.

(E) Title 49, CFR Part 395.3, maximum driving time, does not apply to private motor carriers engaged in the intrastate transportation of ready mixed concrete. As to such carriers, the following maximum driving time limitations apply:

(1) No private motor carrier engaged in the intrastate transportation of ready mixed concrete shall permit or require any driver used by it to drive nor shall any such driver drive:

(a) More than twelve hours following eight consecutive hours off duty; or

(b) For any period after having been on duty sixteen hours following eight consecutive hours off duty.

(2) No private motor carrier engaged in the intrastate transportation of ready mixed concrete shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after:

(a) Having been on duty seventy hours in any seven consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(b) Having been on duty eighty hours in any eight consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

Case No. 96-923-TR-ORC

Eff.:

Certification _____
Gary Vigorito, Secretary

_____
Date

Promulgated under R. C. Sec. 111.15
Authorized by R.C. Sec. 4919.79, 4921.03, 4921.04, 4923.03, 4923.20
Rule amplifies R.C. Sec. 4921.03, 4921.04, 4923.03, 4923.20
Prior effective dates: 7/7/97, 4/25/92, 10/28/90, 12/15/88, 12/25/87, 3/19/89, 11/11/78, 9/5/77, 11/23/70, 2/17/67, 6/12/65, 7/1/64, 5/31/64, 4/12/64, 1/23/64, 11/30/63, 10/19/63
Rule review date: 11/30/99

4901:2-5-07 Out of service vehicles and drivers.

(A) Authorized employees of the commission's transportation department, and employees of the state highway patrol designated by the superintendent to conduct commercial vehicle inspections, may declare "out of service":

(1) Any motor vehicle which by reason of its mechanical condition or loading would likely cause an accident or breakdown;

(2) ANY MOTOR VEHICLE WHICH IS BEING OPERATED IN VIOLATION OF TITLE 49 CFR PARTS 171 THROUGH 180, 383 OR 387 TO SUCH AN EXTENT THAT INFORMATION REGARDING THE PRESENCE OF HAZARDOUS MATERIALS IS INADEQUATE FOR USE OF EMERGENCY RESPONDERS IN PROVIDING PROTECTION TO THE PUBLIC; AND

(3) ~~and may declare "out of service" any~~ ANY driver who meets the "out of service" criteria set forth in Title 49 CFR, Part 392.5 or 395.13, or is not properly licensed to operate a motor vehicle as required by section 4507.02 of the Revised Code.

(B) In determining whether a vehicle, ~~by reason or its mechanical condition or loading would likely cause an accident or breakdown, or whether a driver is unqualified to drive a commercial motor vehicle,~~ OR DRIVER SHALL BE PLACED "OUT OF SERVICE," authorized employees of the commission's transportation department and employees of the state highway patrol designated by the superintendent to conduct commercial vehicle inspections shall utilize the "out of service" criteria adopted and disseminated by the federal highway administration.

(C) THE FOLLOWING DRIVERS AND VEHICLES SHALL BE CONSIDERED TO BE OUT OF SERVICE AND UNDER AN OUT OF SERVICE ORDER:

(1) THOSE DECLARED OUT OF SERVICE IN ACCORDANCE WITH PARAGRAPH (A) OF THIS RULE, OR UNDER COMPARABLE LAWS OR REGULATIONS OF ANOTHER

FEDERAL, STATE, CANADIAN, OR MEXICAN JURISDICTION.

(2) THOSE DECLARED "OUT OF SERVICE" BY THE FEDERAL HIGHWAY ADMINISTRATION IN ACCORDANCE WITH PROVISIONS OF TITLE 49 CFR PARTS 386.72; AND

(3) THOSE DECLARED OUT OF SERVICE BY AN "IMMINENT HAZARD" ORDER ISSUED IN ACCORDANCE WITH RULE 4901:2-5-14 OF THE ADMINISTRATIVE CODE.

~~(C)~~ (D) Vehicles declared "out of service" may be marked with an appropriate sticker, which shall not be removed until ~~those violations which resulted in the "out of service" determination have been corrected.~~ THE VEHICLE IS NO LONGER OUT OF SERVICE. Drivers declared "out of service" shall remain out of service ~~in accordance with the provisions of Title 49 CFR Part 392.5 or 395.13, or~~ until such time as they are qualified to drive a commercial motor vehicle ~~in accordance with paragraphs (B) and (C) of rule 4901:2-5-03 of the Administrative Code~~ AND MEET ALL CONDITIONS ESTABLISHED IN THE LAW, RULE, OR OUT OF SERVICE ORDER UPON WHICH THEIR OUT OF SERVICE STATUS WAS BASED.

~~(D)~~ (E) No motor carrier shall operate or permit the operation of a motor vehicle by a driver who ~~has been declared~~ IS "out of service" nor shall any driver operate such a vehicle until the period specified in paragraph (C) of this rule has elapsed. No motor carrier shall operate or permit the operation of a motor vehicle nor shall any driver operate a vehicle which ~~has been declared~~ IS "out of service" ~~until those violations which resulted in the out of service determination have been corrected,~~ except under the following conditions:

(1) The motor vehicle may be towed by an emergency towing vehicle equipped with a crane or hoist;

(2) The motor vehicle may be removed for storage or repair directly to a location approved by authorized employees of the commission's transportation department or employees of

the state highway patrol designated by the superintendent to conduct commercial vehicle inspections; or

(3) If the vehicle is located beside the traveled portion of highway, or contains hazardous materials and is located in an area where parking of hazardous materials is not permitted, it shall be escorted by authorized employees of the commission's transportation department or employees of the state highway patrol designated by the superintendent to conduct commercial vehicle inspections to the nearest safe location unless that employee determines that it would be less safe to move the vehicle.

~~(E)~~ (F) Motor carriers shall comply with any additional measures or conditions as directed by the commission's transportation department for the purpose of enforcing this rule.

~~(F)~~ (G) This rule shall not be interpreted to supersede any more stringent federal requirement adopted by the commission.

Case No. 96-923-TR-ORD

Effective:

Certification _____
Gary Vigorito, Secretary

_____
Date

Promulgated under R. C. Sec. 111.15
Authorized by R.C. Sec. 4919.79, 4921.03, 4921.04, 4923.03, 4923.20
Rule amplifies R.C. Sec. 4921.03, 4921.04, 4923.03, 4923.20
Prior effective dates: 11/18/93, 4/25/92, 10/28/90, 3/19/87, 9/5/77, 2/17/67
Rule review date: 11/30/99

4901:2-5-15 PLANTING AND HARVESTING SEASON.

FOR THE PURPOSES OF TITLE 49 CFR PART 395.1(L), THE "PLANTING AND HARVESTING SEASON" IN THE STATE OF OHIO SHALL BE MARCH 1 THROUGH NOVEMBER 30 OF EACH YEAR.

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Case No. 96-923-TR-ORD
Effective:

Certification _____
Gary Vigorito, Secretary

_____
Date

Promulgated under R. C. Sec. 111.15
Authorized by R.C. Sec. 4919.79, 4921.03, 4921.04, 4923.03, 4923.20
Rule amplifies R.C. Sec. 4921.03, 4921.04, 4923.03, 4923.20
Rule review date: 11/30/99

4901:2-5-14 IMMINENT HAZARD.

(A) WHENEVER IT IS DETERMINED THAT A VIOLATION OF THIS CHAPTER POSES AN IMMINENT HAZARD TO SAFETY, THE COMMISSION MAY ORDER A CARRIER TO CEASE ALL OR PART OF THE CARRIER'S COMMERCIAL MOTOR VEHICLE OPERATIONS IN THIS STATE. IN MAKING ANY SUCH ORDER, NO RESTRICTIONS SHALL BE IMPOSED ON ANY DRIVER OR CARRIER BEYOND THAT REQUIRED TO ABATE THE HAZARD. IN THIS RULE, "IMMINENT HAZARD" MEANS ANY CONDITION OF VEHICLE, DRIVER, OR COMMERCIAL MOTOR VEHICLE OPERATIONS WHICH IS LIKELY TO RESULT IN SERIOUS INJURY OR DEATH IF NOT DISCONTINUED IMMEDIATELY.

(B) UPON THE ISSUANCE OF AN ORDER UNDER THIS RULE, THE CARRIER OR DRIVER SHALL COMPLY IMMEDIATELY WITH SUCH ORDER. AN ORDER TO A CARRIER TO CEASE ALL OR PART OF ITS OPERATIONS SHALL NOT PREVENT VEHICLES IN TRANSIT AT THE TIME THE ORDER IS SERVED FROM PROCEEDING TO THEIR IMMEDIATE DESTINATION, UNLESS ANY SUCH VEHICLE OR DRIVER IS SPECIFICALLY ORDERED OUT OF SERVICE FORTHWITH. HOWEVER, VEHICLES AND DRIVERS PROCEEDING TO THEIR IMMEDIATE DESTINATION SHALL BE SUBJECT TO COMPLIANCE UPON ARRIVAL.

(C) FOR PURPOSES OF THIS RULE, THE TERM "IMMEDIATE DESTINATION" IS THE NEXT SCHEDULED STOP OF THE VEHICLE ALREADY IN MOTION WHERE THE CARGO ON BOARD CAN BE SAFELY SECURED.

(D) THE COMMISSION MAY, PRIOR TO ISSUING AN ORDER UNDER THIS RULE, ORDER A CARRIER TO SHOW CAUSE WHY THE COMMISSION SHOULD NOT ISSUE AN ORDER REQUIRING THAT A CARRIER CEASE ALL OR PART OF THE CARRIER'S COMMERCIAL MOTOR VEHICLE OPERATIONS; OR THE COMMISSION MAY ISSUE AN ORDER UNDER THIS RULE WITHOUT A PRIOR HEARING, PROVIDED THAT THE CARRIER MAY REQUEST A HEARING WITHIN THIRTY DAYS AFTER THE ISSUANCE OF SUCH ORDER. THE COMMISSION SHALL SCHEDULE A HEARING REQUESTED UNDER THIS

RULE NO LESS THAN SEVEN DAYS AND NO MORE THAN FIFTEEN DAYS FOLLOWING THE REQUEST FOR HEARING. A HEARING UNDER THIS RULE MAY CONSIST OF WRITTEN STIPULATIONS, ORAL TESTIMONY, OR SUCH OTHER EVIDENCE WHICH IS ADMITTED. ALL HEARINGS SHALL BE CONDUCTED IN ACCORDANCE WITH CHAPTER 4901:1-11 OF THE ADMINISTRATIVE CODE.

Case No. 96-923-TR-ORD
Eff.

Certification _____
Gary Vigorito, Secretary

_____
Date

Promulgated under R. C. Sec. 111.15
Authorized by R.C. Sec. 4919.79, 4921.03, 4921.04, 4923.03, 4923.20
Rule amplifies R.C. Sec. 4921.03, 4921.04, 4923.03, 4923.20
Rule review date: 11/30/99

SERVICE NOTICE



CASE NUMBER 96-923-TR-ORD

CASE DESCRIPTION AMENDMENT CHAPTER 4901:2-5

DOCUMENT SIGNED ON March 25, 1998

DATE OF SERVICE 3/28/98

PERSONS SERVED

| PARTIES OF RECORD | ATTORNEYS |
|---|---|
| APPLICANT | |
| AMENDMENT OF CHAPTER 4901:2-5<br>OHIO ADMINISTRATIVE CODE | NONE |
| INTERVENOR | |
| OHIO PETROLEUM MARKETERS ASSN.<br>ELIZABETH SOKOL, GENERAL COUNSEL<br>6631 COMMERCE PARKWAY<br>DUBLIN, OH 43017 | KRISTEN MANOS, ESQ.<br>OPMA<br>P.O. BOX 490<br>DUBLIN, OH 43017 |

# ATTACHMENT 2

# INSTRUCTION SHEET

## NOTICE OF APPARENT VIOLATION AND NOTICE OF INTENT TO ASSESS FORFEITURE

You have received a combined "Notice of Apparent Violation" and "Notice of Intent to Assess Forfeiture" as described in Rule 4901:2-7-09, Ohio Administrative Code (O.A.C.). WITHIN 30 DAYS OF RECEIPT OF THIS NOTICE, YOU MUST EITHER: (1) Pay the forfeiture amount indicated in the notice, or (2) Make a written request for conference. If you do not pay the forfeiture or request a conference within 30 days, your case will be referred to the Attorney General for collection.

Both procedures are described below. Please read them carefully.

1. How to Pay the Forfeiture

   You may make payment of the forfeitures indicated in the Notice by company check or money order (no Canadian postal money orders) made payable to: "PUCO Fiscal Division", and must indicate the case number(s) for which payment is being made. Please mail the payment to the following address:

   Public Utilities Commission of Ohio
   Attention: Fiscal Division
   180 East Broad Street
   Columbus, OH 43215-3793

THE CASE NUMBER (OR INSPECTION NUMBER) AND THE COMPANY NAME MUST BE WRITTEN ON THE FACE OF YOUR CHECK OR MONEY ORDER.

2. How to Make a Request for Conference

   If you believe that any of the violations described in the Notice did not occur as alleged, that any of the occurrences described did not constitute a violation of the safety rules, or that you were not responsible for the apparent violations, or if you wish to contest the amount of the forfeiture indicated in the Notice, you should make a "Request for Conference" as described in Rule 4901:2-7-10, O.A.C., in lieu of payment for the forfeiture(s). Your "Request for Conference" must be IN WRITING and must be mailed or otherwise delivered within thirty days of your receipt of the "Notice of Intent to Assess Forfeiture" to the following address:

   Public Utilities Commission of Ohio
   Civil Forfeiture Division
   180 East Broad Street, 5th Floor
   Columbus, OH 43215-3793

(Over please)

Your request for conference must contain the "Case Number" at the top of the notice letter, and the name, address and telephone number of the person to whom further communications regarding this matter should be directed. It should be designated a "Request for Conference", should indicate your preference whether this matter be discussed by telephone, or in person, and may include any additional information you wish to submit at this time.

3. Failure to Make a Request for Conference

If you do not serve a timely "Request for Conference" in the manner described above, you will forfeit your right to contest liability to the State of Ohio for the amount of the forfeitures set forth in the Notice. Moreover, the occurrence of the violations described in the Notice will be conclusively established for purposes of inclusion in your "history of violations". Should the history of violations reveal an ongoing safety problem, the result may be an increase in the amount of any civil forfeiture assessed for future violations.

4. Violation Amounts, Codes and Violation Group

R.C. Section 4919.99, 4921.99 and 4923.99 authorizes the Public Utilities Commission of Ohio to assess a civil forfeiture of up to $1,000 per violation for any violation of the safety rules discovered during a roadside inspection. The amount of any forfeiture depends upon the nature, gravity, circumstances, and extent of the violation, the offender's degree of culpability for the violation, and the offender's history of violations.

"Code" in the Notice identifies the rule which was violated. Numbers in a 300 series refer to specific sections of the Motor Carrier Safety Regulations, Title 49, Code of Federal Regulations. Codes in other formats refer to violations of Ohio rules. Some section numbers may have suffixes beyond those which appear in the C.F.R. These are used for internal data collection purposes.

"Violation Group" and "Total Amount Due" in the Notice identifies the numerical fine Group (1-4) of the code which was violated. The total amount of fine for all violations is listed in the "Total". If the words "with history" is added to the word "Total", than the amount of your total has been doubled, up to $1,000. For additional information on the fine structure, contact the Civil Forfeiture Division.

5. Copies of Inspection Reports

A copy of the inspection report for the violations described in the Notice was given to the driver at the time of inspection. The driver should have given that copy to you. Additional copies of inspection reports must be requested from the PUCO's Investigations and Inspections Division at (614) 466-0429.

Please contact the Civil Forfeiture Division at (614) 466-0351 if you need additional information regarding the civil forfeiture compliance program.