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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of Richard Hess, Notice of : Case No. 06-1141-TR-CVF  
Apparent Violation and Intent to Assess : (OH3274004435D)  
Forfeiture. :

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

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Marc Dann  
Ohio Attorney General



John H. Jones  
Anne L. Hammerstein  
Assistant Attorneys General  
Public Utilities Section  
180 E. Broad St., 9<sup>th</sup> Floor  
Columbus, OH 43215  
(614) 466-4397  
Fax: (614) 644-8764  
[john.jones@puc.state.oh.us](mailto:john.jones@puc.state.oh.us)  
[anne.hammerstein@puc.state.oh.us](mailto:anne.hammerstein@puc.state.oh.us)

Attorneys on behalf of the Staff of  
The Public Utilities Commission of Ohio

Submitted April 6, 2007

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## **TABLE OF CONTENTS**

### **PAGE**

INTRODUCTION.....	1
STATEMENT OF FACTS.....	3
ARGUMENT .....	5
A.    The Commission Staff showed by a preponderance of the evidence that Mr. Hess violated 49 C.F.R. §§ 392.2 and 396.3 as cited in the Inspection Reports, Staff Exhibits A and B, and Joint Exhibits A and B. ....	6
B.    The Commission should assess the civil forfeiture proposed by Staff against Mr. Hess as it is consistent with the Commercial Vehicle Safety Alliance.....	11
CONCLUSION .....	12
PROOF OF SERVICE .....	13

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**INTRODUCTION**

A commercial driver shall not drive a commercial motor vehicle that has been declared "out-of-service" (OOS) and marked with appropriate stickers, as a result of a Federal Motor Carrier Safety Regulations (FMCSR) inspection, until all repairs required by all the OOS violations noticed to the driver in the vehicle examination report (OOS notice) are completed.<sup>1</sup> Commercial motor vehicle OOS violations are serious transportation safety issues that can impact public safety if transportation laws and regulations are not complied with and enforced. It is imperative that all motor vehicle OOS violations be corrected before a motor vehicle is restored to service. The Commercial Vehicle Safety Alliance (CVSA) publishes the North American Standard Vehicle Out-of-Service Criteria, which requires all commercial motor vehicle OOS repairs be done before returning the motor vehicle to service. This is also a requirement of the Ohio

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<sup>1</sup> 49 C.F.R. § 392.2 (2007); Ohio Admin. Code § 4901:2-5-07 (Anderson 2007); Staff Ex. C, D, and G.

Administrative Code and Ohio State Highway Patrol, as outlined in its policy and procedures on out of service vehicles and repairs.<sup>2</sup>

This is a simple case. The facts are clear. The Respondent, Mr. Hess, admitted to driving a commercial motor vehicle to a repair shop after the Officer declared his vehicle OOS and served him an OOS notice. Mr. Hess received both a verbal notice and a written notice from Officer Bell. The written notice was the vehicle examination report and OOS stickers Officer Bell placed on Mr. Hess' tractor and trailer, because both units had been placed OOS until all OOS violations were corrected. The evidence further shows that Mr. Hess violated the OOS notice again, when he left the repair shop and resumed operation of his commercial motor vehicle without the right front brakes being adjusted. This was a violation he was cited and placed OOS for in the first inspection that occurred just hours earlier. This was now his second stop and inspection. Ultimately, Mr. Hess is liable for his non-compliance with the OOS notice for all repairs not being made to all OSS violations, so his blame the mechanic defense does not excuse or exonerate him in this case. It is Mr. Hess' responsibility alone to make sure all OOS repairs were done before returning his motor vehicle to service. The evidence is not contradicted and supports the OOS violations in this case.

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<sup>2</sup>

Ohio Admin. Code Ann. § 4901:2-5-07(D) (Anderson 2007); Staff Ex. D and G.

## STATEMENT OF FACTS

On January 31, 2006, at approximately 11:20 a.m., Officer Bell stopped Richard Hess after noticing an obvious violation for a left clearance light out.<sup>3</sup> Once stopped, Officer Bell conducted a level 1 safety inspection.<sup>4</sup>

Upon completing the inspection, Officer Bell cited Mr. Hess with four brake adjustment or inoperative/defective brake violations and marked all four as “out-of-service” (OOS) violations.<sup>5</sup> Officer Bell incorporated the OOS brake violations into his laptop computer, printed out a vehicle inspection report, and served a copy of the report on Mr. Hess.<sup>6</sup> Officer Bell then explained the inspection report to Mr. Hess and put OOS stickers on the truck and the trailer.<sup>7</sup> Officer Bell placed one OOS sticker on the windshield of the tractor right next to the driver.<sup>8</sup> Officer Bell placed the other OOS sticker on the left front corner of the trailer.<sup>9</sup> Both OOS stickers provide a written notice that the vehicle was placed OOS and that no one was to take off the stickers unless all the OOS items were repaired.<sup>10</sup>

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<sup>3</sup> Tr. at 9.

<sup>4</sup> *Id.* at 9-10, 19; Staff Ex. A.

<sup>5</sup> Staff Ex. A; Tr. at 18.

<sup>6</sup> Tr. at 20-21.

<sup>7</sup> *Id.*; Staff Ex. A.

<sup>8</sup> Tr. at 24.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Officer Bell specifically explained to Mr. Hess that he was OOS there at the rest stop and could not be re-dispatched until all the OOS violations were fixed on both the tractor and trailer.<sup>11</sup> After Officer Bell went over the report with Mr. Hess, both signed the report.<sup>12</sup> Officer Bell then left to patrol and inspect other commercial motor vehicles.<sup>13</sup>

At approximately 3:05 p.m. that same day, Officer Bell observed Mr. Hess driving the same tractor and trailer a half-mile north of the rest area where he was placed OOS.<sup>14</sup> Officer Bell stopped Mr. Hess for a second inspection to see if all the OOS violations had been repaired.<sup>15</sup> Officer Bell checked the front steer brakes and found the right one was still out of adjustment from the first inspection.<sup>16</sup>

Officer Bell issued Mr. Hess a second citation and vehicle examination report for operating the OOS vehicle without fixing all OOS items on the original inspection report.<sup>17</sup> During the second stop, Mr. Hess admitted to Officer Bell that he drove the truck with the OOS stickers on the vehicle to the repair shop to get the defects fixed and

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<sup>11</sup> Staff Ex. A; Tr. at 21-22.

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

<sup>13</sup> *Id.* at 24.

<sup>14</sup> *Id.* at 25-26; Staff Ex. A.

<sup>15</sup> Tr. at 26-27.

<sup>16</sup> *Id.* at 27; Staff Ex. B.

<sup>17</sup> Staff Ex. B; Tr. at 29-32.

that he knew he was not supposed to drive the OOS vehicle to the repair shop to get OOS items fixed.<sup>18</sup>

Mr. Hess was issued a civil forfeiture notice in the amount of \$1,000.00 for operating an OOS vehicle without fixing all OOS items that were documented on the original inspection report.<sup>19</sup> The civil forfeiture assessed Mr. Hess is consistent for this type of violation under the CVSA.<sup>20</sup>

## **ARGUMENT**

Ohio participates in the federal Commercial Motor Carrier Safety Assistance Program, which can be found in the federal regulations at 49 C.F.R. 350. This is a federal grant program that provides financial assistance to Ohio, and other states, to reduce the severity and number of accidents involving drivers like Mr. Hess. Not surprisingly, this federal grant program sets forth conditions that Ohio, and the other participant states, must meet. It requires the states adopt and enforce state laws, rules and standards identical to federal motor carrier safety rules or that have an identical effect.<sup>21</sup> The Commission has adopted the FMCSR, including the regulations involved in this case – 49 C.F.R. §§ 392.2 and 396.3.

The Commission's rules require all drivers operating in Ohio in interstate commerce, such as Mr. Hess, to operate in conformity with all regulations of the U.S.

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<sup>18</sup> Staff Ex. B (Inspection Notes); Tr. at 33-35.

<sup>19</sup> Tr. at 69; Staff Ex. H.

<sup>20</sup> Staff Ex. F; Tr. at 62-65.

<sup>21</sup> Ohio Admin. Code Ann. § 4901:2-5-02 (Anderson 2007).

Department of Transportation, including 49 C.F.R. §§ 392.2 and 396.3. A violation of those regulations is a violation of the Commission's rules. Mr. Hess violated those safety regulations and should pay a \$1,000.00 civil forfeiture for operating his OOS vehicle before restoring his vehicle to safe operating condition.

**A. The Commission Staff showed by a preponderance of the evidence that Mr. Hess violated 49 C.F.R. §§ 392.2 and 396.3 as cited in the Inspection Reports, Staff Exhibits A and B, and Joint Exhibits A and B.**

According to 49 C.F.R. § 392.2, every commercial vehicle must be operated in accordance with the laws and regulations of the jurisdiction in which it is being operated.<sup>22</sup> However, if a regulation of the Federal Motor Safety Administration imposes a higher standard of care than that law or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with.<sup>23</sup> On January 31, 2006, Mr. Hess was stopped, inspected, and had both his tractor and trailer placed OOS by Officer Bell for operating a commercial motor vehicle with brake(s) out of adjustment in violation of 49 C.F.R. § 396.3(a)(1).<sup>24</sup> The location where Mr. Hess had his vehicle placed OOS was a rest area along Highway 271 near Milepost 8 in Richfield, Ohio.<sup>25</sup>

Within a matter of hours, Mr. Hess failed to comply with Officer Bell's OOS notice by driving the OOS vehicle without repairing all the OOS items on the original

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<sup>22</sup> 49 C.F.R. § 396.3 (2007).

<sup>23</sup> *Id.*

<sup>24</sup> Tr. at 20-24.

<sup>25</sup> *Id.* at 25; Joint Ex. A and B.



inspection report, first, when he drove to a repair shop, and then again on Highway 271 at Milepost 9, where he was stopped the second time by Officer Bell.<sup>26</sup> Mr. Hess' noncompliance with the OOS notice constitutes a violation of 49 C.F.R. § 392.2.

In accordance with rule 4901:2-5-07 (A) of the Administrative Code, 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) [a]ny motor vehicle which by reason of its mechanical condition . . . would likely cause an accident or breakdown."<sup>27</sup> In determining whether a vehicle shall be placed "out-of-service," authorized employees shall utilize the North American Standard "Out-Of-Service" Criteria adopted and disseminated by the U.S. Department of Transportation.<sup>28</sup> This standard provides that no person shall "operate any commercial motor vehicle declared and marked 'Out-of-Service' until all repairs required by the 'Out-of-Service notice' have been satisfactorily completed."<sup>29</sup>

In addition, it is the practice and policy of the Ohio State Highway Patrol that vehicles shall not be released from an out-of-service notice until all repairs required by the out-of-service notice have been satisfactorily completed to where a violation no longer exists.<sup>30</sup> Officer Bell testified that he made it clear to Mr. Hess that all repairs had

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<sup>26</sup> Tr. at 25-35.

<sup>27</sup> Ohio Admin. Code § 4901:2-5-07(A)(1) (Anderson 2007).

<sup>28</sup> Ohio Admin. Code § 4901:2-5-07(B) (Anderson 2007).

<sup>29</sup> Staff Ex. C; Tr. at 36-38 (emphasis added).

<sup>30</sup> Staff Ex. D; Tr. at 39-43.

to be made for all the OOS violations before returning his vehicle to service.<sup>31</sup> In accordance with his training and agency procedure, Officer Bell testified that he emphasized that all repairs had to be made to all OOS violations before his vehicle could be operated again.<sup>32</sup>

In his first inspection and vehicle examination report, Officer Bell identified Mr. Hess from his driver's license as the driver who was operating the vehicle with defective brakes.<sup>33</sup> Using Mr. Hess' driver's license, Officer Bell incorporated information into his first vehicle examination report, which included: Mr. Hess' name, license number, date of birth, and home address.<sup>34</sup> The same information was used again by Officer Bell to identify the driver, Mr. Hess, when he operated the OOS vehicle before making all OOS repairs, for his second inspection and vehicle examination report.<sup>35</sup> Mr. Hess subsequently testified and gave the same address that Officer Bell obtained from Mr. Hess' driver's license and listed in his two vehicle examination reports.<sup>36</sup> Mr. Hess did not deny that he was the driver of the vehicle that Officer Bell stopped and inspected twice for vehicle safety violations on January 31, 2006.<sup>37</sup> In fact, Mr. Hess admitted that all of

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<sup>31</sup> Tr. at 22, 39.

<sup>32</sup> *Id.* at 40-44; Staff Ex. G.

<sup>33</sup> Tr. at 10-13, 18-19, 21.

<sup>34</sup> *Id.*; Staff Ex. A; Joint Ex. A.

<sup>35</sup> Tr. at 27-28; Staff Ex. B; Joint Ex. B.

<sup>36</sup> Tr. at 102; Staff Ex. A; Staff Ex. B; Joint Ex. A; Joint Ex. B.

<sup>37</sup> Tr. at 102-104, 108.

his personal information contained in Officer Bell's two vehicle inspection reports is accurate.<sup>38</sup>

After having his vehicle placed OOS, Mr. Hess testified that he called a mechanic to have the defects repaired.<sup>39</sup> A mechanic arrived on the scene a while later and began working on the defects.<sup>40</sup> Mr. Hess testified the mechanic then asked him to drive the OOS vehicle to the mechanic's garage, so the brake repairs could be done.<sup>41</sup> Mr. Hess testified that he drove the OOS vehicle to the mechanic's garage to have the new brake lining put on the vehicle.<sup>42</sup> Mr. Hess admitted that inadequate brake lining was one of the OOS violations he was charged with in the OOS notice.<sup>43</sup> Mr. Hess testified the mechanic did not sign the examination report at the rest area, because the mechanic had not completed all the work.<sup>44</sup> At the garage, the mechanic made repairs for other OOS items listed in Officer Bell's report.<sup>45</sup> The mechanic apparently signed-off on Mr. Hess' copy of Officer Bell's OOS notice, which certified that each mechanical defect for which a violation was listed on the inspection report had been repaired.<sup>46</sup> Mr. Hess testified that

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<sup>38</sup> *Id.* at 112-113; Staff Ex. A; Staff Ex. B; Joint Ex. A; Joint Ex. B.

<sup>39</sup> Tr. at 103.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 104.

<sup>43</sup> Tr. at 111.

<sup>44</sup> *Id.* at 109.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; Joint Ex. A.

he removed the OOS sticker from his tractor at the repair garage, which confirms the fact that he drove his tractor to the garage with the OOS sticker on the windshield.<sup>47</sup> This constitutes a violation of the FMCSR, Ohio Administrative Code, and North American Standard Vehicle Out-Of-Service Criteria.<sup>48</sup>

Afterwards, Mr. Hess testified he went back down the road, saw the officer sitting there, and got pulled over again for a re-inspection.<sup>49</sup> Mr. Hess testified that Officer Bell found that the right front brake was still not operating properly.<sup>50</sup> Mr. Hess testified that he was mad at the mechanic, because the mechanic did not do the work Mr. Hess paid him to do.<sup>51</sup> Rather irritated, Mr. Hess testified he called the mechanic about the situation.<sup>52</sup> In response to the call, the repair shop sent another mechanic to put another slack adjuster on the tractor because the one that was on there was not able to be adjusted.<sup>53</sup> This is why another mechanic's name appeared on the second report for repairs.<sup>54</sup> Mr. Hess testified that the right steer brake had not been repaired at the time of the second inspection.<sup>55</sup>

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<sup>47</sup> Tr. at 110-111.

<sup>48</sup> 49 C.F.R. § 392.2(a)(1) (2007); Ohio Admin. Code § 4901:2-5-07(D) (Anderson 2007); Staff Ex. C.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Tr. at 105.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*; Joint Ex. B.

<sup>54</sup> Tr. at 106; Joint Ex. B.

<sup>55</sup> Tr. at 112.

In *Grosjean v. The Pennsylvania Rd. Co.*, 146 Ohio St. 643, 646, 67 N.E. 2d 623, 624 (1946), the Court held in the syllabus that a *prima facie* case is made by a party where evidence is offered to support that party's claim. To rebut such *prima facie* case it is incumbent on the other party to produce evidence that counterbalances the evidence by which the *prima facie* case was made.<sup>56</sup> In this case, the Transportation Staff satisfied its burden of proof by a preponderance of the evidence that Mr. Hess operated an OOS vehicle that had not been restored to safe operating condition due to a right steer brake being out of adjustment. A *prima facie* case has been made by the Transportation Staff, which has not been rebutted by Mr. Hess. The Commission should find in favor of the Transportation Staff, as to the OOS violation.

**B. The Commission should assess the civil forfeiture proposed by Staff against Mr. Hess as it is consistent with the Commercial Vehicle Safety Alliance.**

The General Assembly has required that the Commission's civil forfeitures be consistent with the recommended fines adopted by the CVSA.<sup>57</sup> The civil forfeiture Staff proposed in this case is consistent with the recommended fines adopted by the CVSA.<sup>58</sup>

First, the information from the inspection is automatically uploaded into the computer system at the Public Utilities Commission of Ohio's Compliance Division.<sup>59</sup> The computer system will then generate a fine based upon the code sections that the inspector

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<sup>56</sup> *Id.*

<sup>57</sup> Ohio Rev. Code Ann. §§ 4919.99 and 4921.99 (Anderson 2007).

<sup>58</sup> Tr. at 62-66.

<sup>59</sup> *Id.* at 59.

indicated were violated on the vehicle examination report using the fine schedule for out of service violations.<sup>60</sup> The fine schedule is organized into four groupings which coordinate with a particular fine amount.<sup>61</sup>

In this case, the violation for operating an OOS vehicle, according to the fine schedule, is a group 1 violation with a \$1000.00 fine.<sup>62</sup> This is the civil forfeiture amount that is applicable to this case, which is consistent with the recommended fines adopted by the CVSA.<sup>63</sup> Therefore, the Commission should adopt and assess this \$1000.00 civil forfeiture to Mr. Hess.

### CONCLUSION

None of the facts comprising Staff's case have been contradicted. Those facts lead only to the conclusion that Mr. Hess violated the Commission's regulations as alleged. Nothing was presented in the hearing that would relieve Mr. Hess from his responsibility for those violations. The Attorney Examiner and the Commission should find that as alleged, Mr. Hess violated the Commission's regulations.

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<sup>60</sup> *Id.* at 62-65.

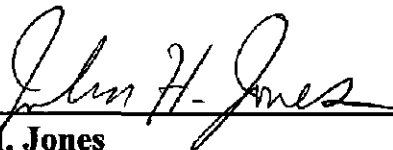
<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 63.

<sup>63</sup> Tr. at 64.

Respectfully submitted,

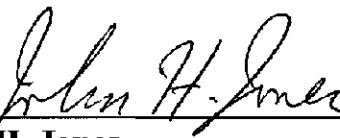
**Marc Dann**  
Ohio Attorney General



**John H. Jones**  
**Anne L. Hammerstein**  
Assistant Attorneys General  
Public Utilities Section  
180 E. Broad St., 9<sup>th</sup> Floor  
Columbus, OH 43215  
(614) 466-4397  
Fax: (614) 644-8764  
[john.jones@puc.state.oh.us](mailto:john.jones@puc.state.oh.us)  
[anne.hammerstein@puc.state.oh.us](mailto:anne.hammerstein@puc.state.oh.us)

### **PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing 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, or via electronic mail, upon Kenneth L. Turowski, Counsel for Respondent, 88 S. Portage Path, Suite 306, Akron, Ohio, 44303, this 6<sup>th</sup> day of April, 2007.



**John H. Jones**  
Assistant Attorney General