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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF:

:

: Case No. 11-5484-TR-CVF

LARRY J. BISCHOFF TRUCKING, LLC

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BRIEF OF RESPONDENT LARRY J. BISCHOFF TRUCKING, LLC

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PUCO

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This is to certify that the above information is accurate and complete as furnished by the respondent and delivered in the regular course of business.  
Technician AM Date Processed 3/2/12

## I. STATEMENT OF THE CASE

### A. Procedural Posture

On June 15, 2011, an inspection was performed on a truck owned by Respondent Larry J. Bischoff Trucking, LLC. As a result of the inspection, Respondent received violations for operating a commercial vehicle with a flat tire under 49 C.F.R. § 393.75(a) and operating a commercial vehicle with tire tread depth less than 2/32 of an inch under 49 C.F.R. § 393.75(c). (The third violation for gross weight overload was not addressed by the PUCO at hearing and is therefore, not being addressed herein.) A Telephone Conference with the PUCO was held on August 30, 2011. Following that Conference, Respondent requested an Administrative Hearing. The Administrative Hearing was held on January 26, 2012. This Brief is being submitted in accordance with Hearing Examiner Kerry K. Sheets' request.

### B. Statement of Facts

At approximately 2:00 p.m. on June 15, 2011, Respondent's drivers were traveling on State Highway 20A in Fulton County, Ohio when the driver in the first truck Jason A. Schaffner noticed that he had a flat tire. (T. at p. 33.) Mr. Schaffner and the driver of the second truck (Kenneth B. Nye, Jr.) immediately stop along the side of the roadway. (T. at p. 34.) Mr. Schaffner called the owner of the company (Larry J. Bischoff) to advise him of the flat tire and to have a new tire delivered to the spot where they stopped. (T. at p. 34.) The tire that became flat was a single tire (not a dual tandem), which would prohibit Mr. Schaffner from driving on it, as the rim would get ruined. (T. at p. 40.)

After Mr. Schaffner spoke to his boss, Mr. Nye and Mr. Schaffner spoke and Mr. Nye decided to go back down the road to retrieve the tread from the flat tire, which was in the roadway. (T. at p. 34.) It was not until after Mr. Nye was almost back to his truck that Officer

Robert D. Divak pulled behind the two trucks. (T. at p. 34-35.) Officer Divak did not witness the commercial vehicle operating and did not initiate the stop. (T. at p. 35 and 37.) It was four to five minutes after the drivers stopped that Officer Divak pulled in behind them. (T. at p. 37 and 41.) Perhaps this is why Officer Divak kept saying that it was the second truck that had the flat tire when in fact it was the first truck. (T. at p.10 and 25.)

The one 16 to 18 inch grove mark on the road supports the story of Respondent's driver that both drivers immediately pulled over when they noticed the flat tire. (T. at p. 26-27.) Even Officer Divak admitted that there were no other grove marks on State Highway 20A. (T. at p. 31.)

Furthermore, testimony from Respondent's owner Larry Bischoff indicated that the truck at issue did not have exposed tread nor thin tread. (T. at p. 43.) Mr. Bischoff testified that the only tire that needed replaced on the truck was the flat tire. (T. at p. 44.) Upon seeing the picture of the exposed thread, Mr. Bischoff indicated that the picture was of a blown tire. (T. at p. 43.)

## II. ARGUMENT

### A. RESPONDENT'S DRIVER WAS NOT "OPERATING" THE MOTOR VEHICLE WHEN THE OFFICER ARRIVED.

49 C.F.R. § 393.75 provides in part that "[n]o motor vehicle shall be operated on any tire that-(1) Has body ply or belt material exposed through the tread or sidewall; . . .[or] (3) Is flat . . ." Therefore, in order for there to be a violation of 49 C.F.R. § 393.75(a) or 49 C.F.R. § 393.75(c), the Staff must prove that Respondent's driver "operated" the truck on a flat tire and with a tire tread depth of less than 2/32 of an inch.

Testimony from the Respondent showed that Officer Divak never witnessed the motor vehicle operating and that he did not even initiate the stop. (T. at p. 35 and 37.) It was four to

five minutes after Respondent's drivers stopped that Officer Divak pulled in behind them. (T. at p. 37 and 41.) Before Officer Divak even showed-up, Respondent's driver had an opportunity to call Respondent's owner and request that a new tire delivered. (T. at p. 34.) One of Respondent's drivers even had time to go back and picked-up the tire tread before Officer Divak showed-up. (T. at p. 34 and 35.)

Officer Divak recollection is called into question when he is not even able to correctly identify which commercial vehicle had the flat tire. Officer Divak kept saying that it was the second truck that had the flat tire when in fact it was the first truck. (T. at p.10 and 25.)

The physical evidence supports Respondent's position that his driver immediately pulled to the side of the roadway. There was only one 16 to 18 inch grove mark on the roadway (caused by the exposed rim) that was within inches of where Respondent's driver stopped (T. at p. 26-27.) See also Staff Exhibit 4. Officer Divak even admitted on redirect from the Staff that there were no other grove marks on State Highway 20A. (T. at p. 31.)

Furthermore, testimony from Larry Bischoff showed that the truck at issue did not have exposed or thin tread. (T. at p. 43.) Mr. Bischoff testified that the only tire that needed replaced was the flat tire. (T. at p. 44.) Upon seeing the picture of the exposed thread, Mr. Bischoff indicated that the picture was of a blown tire. (T. at p. 43.) The Staff did not have evidence (pictures) showing the location of the tire with the thin tread.

Because the Staff failed to prove that Respondent's driver was "operating" on a flat tire, there is no violation of 49 C.F.R. § 393.75(a). Likewise, the Staff failed to prove there case that Respondent operated a motor vehicle with less than 2/32 of an inch tire depth in violation of 49 C.F.R. § 393.75(c).

B. THE STAFF FAILED TO INTRODUCE INTO EVIDENCE CERTIFICATION OF THE OFFICER'S QUALIFICATIONS TO CONDUCT MOTOR CARRIER INSPECTIONS.

During its case in chief, Staff failed to introduce evidence of Officer Divak's qualifications to perform inspections of Motor Carriers. (T. at p. 6.) On cross-examination, the undersigned questioned Officer Divak about his training and certifications. During this cross-examination, Officer Divak admitted that he did not have certification of his training. (T. at p. 6.)

The court in *State v. Helke* (Oct. 15, 2007), 3d Dist. No. 8-07-04, 2007 Ohio 5483, overturned a conviction by the trial court where the State similarly failed to present a certificate of the officer's qualification to use the radar that he was using. In *Helke*, the court held that "[b]ecause the city did not show Standley's qualifications and experience, any evidence concerning the radar device readout should have been excluded." *Id.* at 6. The court in *Helke* noted that "[w]ithout more, Standley's testimony concerning his qualifications is insufficient to uphold a conviction for speeding based solely on the reading of a K-55 radar device." *Id.* at 6.

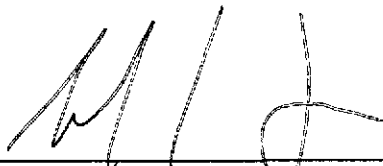
Since the Staff failed to present Officer Divak's Certification evidencing his qualification to perform motor carrier inspections, Respondent is not liable for the violations herein.

CONCLUSION

Because the Staff failed to prove that Respondent's driver was "operating" on a flat tire, there is no violation of 49 C.F.R. § 393.75(a). Likewise, the Staff failed to prove there case that Respondent operated a motor vehicle with less than 2/32 of an inch tire depth in violation of 49 C.F.R. § 393.75(c). Furthermore, the Staff by failing to present the Officer's Certification evidencing his qualifications to perform motor carrier inspections, failed to prove

an element necessary for finding Respondent in violation of the C.F.R. Therefore, Respondent is not in violation of 49 C.F.R. § 393.75(a) or 49 C.F.R. § 393.75(c).

Respectfully submitted,



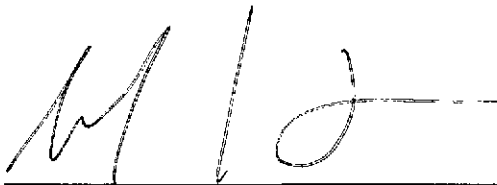
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing was served upon the following:

Steven L. Beeler  
Assistant Attorney General, Public Utilities Section  
Ohio Attorney General Mike DeWine  
180 East Broad Street, 6<sup>th</sup> Floor  
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via U.S. Mail on this 2<sup>nd</sup> day of March 2012.



Michael J. Yemc, Jr. (0065390)