

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Larry J. Bischoff Trucking,)
LLC, Notice of Apparent Violation and) Case No. 11-5484-TR-CVF
Intent to Assess Forfeiture.) (OH3265007432C)

OPINION AND ORDER

The Commission, considering the evidence of record, the arguments of the parties, and the applicable law, and being otherwise duly advised, hereby issues its opinion and order in this matter.

APPEARANCES:

Michael J. Yemc, Jr., 600 South High Street, Suite 200, Columbus, Ohio 43215, on behalf of Larry J. Bischoff Trucking, LLC.

Mike DeWine, Ohio Attorney General, by Steven Beeler, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

NATURE OF THE PROCEEDING:

On June 15, 2011, a motor carrier enforcement inspector with the Ohio Highway Patrol (Highway Patrol) inspected a motor vehicle operated by Larry J. Bischoff Trucking, LLC (Bischoff Trucking, respondent), and driven by Jason A. Schaffner, in the state of Ohio. The Highway Patrol found the following violations of the Code of Federal Regulations (C.F.R.) that are relevant to this case:

49 C.F.R. Section 393.75(a) - Flat tire or fabric exposed 6L, tire blown rim on road.¹

49 C.F.R. Section 393.75(c) - Tire tread depth less than 2/32 of inch, 4R 0/32.²

¹ 49 C.F.R. Section 393.75(a) provides, in part, that:

- (a) No motor vehicle shall be operated on any tire that--
- (1) Has body ply or belt material exposed through the tread or sidewall,
 - (2) Has any tread or sidewall separation,
 - (3) Is flat or has an audible leak, or
 - (4) Has a cut to the extent that the ply or belt material is exposed.

² 49 C.F.R. Section 393.75(c) provides, in part, that:

Bischoff Trucking was notified that staff intended to assess a civil monetary forfeiture totaling \$90.00 for violation of 49 C.F.R. Section 393.75(a) (Section 393.75(a)) and 49 C.F.R. Section 393.75(c) (Section 393.75(c)). On October 18, 2011, Bischoff Trucking filed a request for an administrative hearing, thereby initiating this case. A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement during the conference. A hearing then was convened on January 26, 2012. At the hearing, the parties announced a stipulated agreement as to the forfeiture amounts in the case. Subsequently, the parties filed briefs on March 2, 2012.

Background:

The roadside inspection in this case took place on June 15, 2011. At the time of the inspection, the driver, Mr. Schaffner, was driving respondent's truck from Whiting, Indiana to Woodville, Ohio. That truck, eastbound on SR-20A in Fulton County, Ohio, was loaded with a cargo of coal and coke. Another truck, also operated by Bischoff Trucking, and driven by Kenneth B. Nye, Jr., was traveling in tandem with the truck driven by Mr. Schaffner and was present at the roadside inspection.

Issue in the Case:

Staff maintained that the Highway Patrol observed respondent's truck with one blown tire and one bald tire and, after an inspection of the truck, correctly cited respondent for those violations. Bischoff Trucking denied committing the violations.

DISCUSSION:

During the hearing, Inspector Robert D. Divjak testified for staff. Mr. Nye, the driver of respondent's other truck, and Larry J. Bischoff, the owner of Larry J. Bischoff Trucking, Inc., testified for the respondent. Mr. Schaffner, the driver of the truck that was inspected, did not testify.

Inspector Robert D. Divjak

Inspector Divjak was driving westbound on SR-20A when he observed respondent's trucks moving slowly in the eastbound lane of the highway. The truck driven by Mr. Schaffner was leaning to the left as it moved and, as Inspector Divjak came abreast of that truck, he could see that its left rear tire was blown and the tire rim was running on the road. Inspector Divjak activated the lights on his patrol car and, at that time, both trucks pulled over to the side of the highway. He noted that he observed the

....tires shall have a tread groove pattern depth of at least 2/32 of an inch when measured in a major tread groove. The measurement shall not be made where tie bars, humps, or fillets are located.

truck driven by Mr. Schaffner traveling approximately one quarter of a mile on the blown tire and that the trucks were not already at the side of the road prior to being stopped by him. With reference to Staff Exhibit 8 (a hand-drawn diagram of the inspection site), Inspector Divjak stated that he passed the position of the trucks, turned his patrol car around, and parked behind the second truck at the roadside. After the inspection, Inspector Divjak observed part of the blown tire on the south side of the road and toward the west of the stop, at the beginning of the curve in the roadway. (Tr. at 10-13, 15-16, 17, 19, Staff Exhibit 1 - Driver/Vehicle Examination Report.)

When Inspector Divjak obtained the shipping papers, he saw the weight of Mr. Schaffner's truck listed, and he called for portable scales to be brought to the inspection site. A Highway Patrol trooper and a portable scales van arrived and both trucks were moved to a safer location, a county road about a quarter of a mile away, and Mr. Schaffner's truck was weighed. The weigh-in revealed that the truck was overloaded.³ Inspector Divjak noted that overloading on a truck could contribute to a blown tire. Further, the out-of-service violations for the blown and bald tires were enforced at the weigh-in location. (Tr. at 13-14.)

Inspector Divjak indicated that he took photographs at the inspection and he identified Staff Exhibits 3 and 4 - photographs of the blown tire (tire "6L") on the truck driven by Mr. Schaffner, and Staff Exhibits 5 and 6 - photographs of a tire with worn tread (tire "4R") on that same truck. He testified that the tire depicted in Staff Exhibits 5 and 6 was worn to a depth of less than 2/32nds of an inch, in violation of Section 393.75(c). (Tr. at 18-21, Staff Exhibits 3, 4, 5, and 6.)

On further examination, Inspector Divjak testified that the second of respondent's two trucks, the truck driven by Mr. Schaffner, was the truck with the blown tire. Also with reference to Staff Exhibits 3 and 4, the photographs of the blown tire, Inspector Divjak testified that the photographs show approximately an 18-inch groove in the roadway made by the rim of the wheel. Inspector Divjak noted that the groove in the roadway was intermittent because the remnant of the blown tire would flip over the rim of the wheel. He testified that he did not observe other grooves further back on SR-20A. With reference to Staff Exhibits 5 and 6, the photographs of the tire with the worn tread, Inspector Divjak testified that the photographs show the tire with the tread worn smooth. He noted that those photographs do not show the tread that came from the blown tire. (Tr. at 25-29.)

Kenneth B. Nye, Jr.

While driving behind the truck driven by Mr. Schaffner on SR-20A, Mr. Nye observed that truck blow a tire. Both Mr. Nye and Mr. Schaffner then immediately pulled

³ The driver/vehicle examination report (Staff Exhibit 1) in this matter lists a violation of 49 C.F.R. Section 392.2 for the overweight load and a citation issued for that violation.

their vehicles to the shoulder of the eastbound lane of the highway. Mr. Nye parked his truck behind the truck driven by Mr. Schaffner. Mr. Nye's truck was the second truck parked at the side of the roadway. According to Mr. Nye, the first truck, the one driven by Mr. Schaffner, was the truck with the blown tire. Mr. Schaffner contacted the trucks' owner, Mr. Bischoff, by radio and informed him about the blown tire on his truck. Mr. Nye then walked back along the highway and removed the tread of the blown tire from the eastbound lane of SR-20A. Mr. Nye also stated that he had performed a pre-trip vehicle inspection before getting into his truck and that he had observed Mr. Schaffner walking around his truck. (Tr. at 33-36.)

With reference to Staff Exhibit 8, Mr. Nye testified that, after the tire blew on the truck driven by Mr. Schaffner, and the trucks had pulled over, the rear of Mr. Schaffner's truck was about at the position represented by the officer's car in the diagram. Further, Inspector Divjak arrived at the scene only after Mr. Nye had removed the tire tread from the highway and walked back to his truck. Inspector Divjak did not initiate the stop. Mr. Nye testified that, based on the timing, the four to five minutes that it took him to remove the tire tread from the highway, Inspector Divjak did not see Mr. Schaffner operating his truck with a blown tire. (Tr. at 36-37.)

Larry J. Bischoff

On June 15, 2011, Mr. Bischoff was notified, via a telephone call from Mr. Schaffner, that Mr. Schaffner had just blown a tire on his truck, that a new tire was needed, and that there appeared to be no damage to the tire rim. Mr. Schaffner mentioned in the conversation that Mr. Nye was removing the tire tread from the highway, but he did not mention an officer being present at that time. After Mr. Bischoff called the repair shop, Mr. Schaffner called back and informed him that an officer had arrived at the scene. Subsequently, Mr. Schaffner contacted Mr. Bischoff again and indicated that, after having to move the truck down the road, he noticed there was damage to the tire rim. A new rim had to be ordered. Later that day, Mr. Bischoff saw that the tire rim was ruined. (Tr. at 40-42.)

Mr. Bischoff testified that he inspects his trucks on a weekly basis. He stated that Staff Exhibits 5 and 6, which staff maintains show the worn tread of another tire on the truck driven by Mr. Schaffner, appear to be photographs of the casing of the same blown tire on that truck. Further, the left rear tire and rim were the only replacements needed on that truck. No other tires needed to be replaced. (Tr. 43-44.)

COMMISSION DECISION:

We initially observe that there was disagreement between the parties with regard to the facts in the case, i.e., Inspector Divjak's appearance at the scene of the inspection,

which of respondent's trucks had the blown tire, how far Mr. Schaffner drove his truck on the blown tire, and whether another tire on respondent's truck was worn down or whether that tire was the remaining casing of the tire that had blown. Inspector Divjak testified that he observed respondent's trucks moving slowly and that the truck driven by Mr. Schaffner, which was leaning to the left with a blown left rear tire, traveled for approximately a quarter of a mile. He testified that, when he activated his lights, both of respondent's trucks pulled over to the side of the highway. He then parked behind the truck driven by Mr. Schaffner, which was the second of the two parked trucks. (Tr. at 10-12.) Inspector Divjak also stated that another tire on that truck was worn down, tire "4R" - fourth axle, right side (Tr. at 19-21). Mr. Nye, on the other hand, testified that respondent's trucks were already stopped when Inspector Divjak arrived. Mr. Nye further testified that his truck was the second truck parked along the highway, not Mr. Schaffner's truck. (Tr. at 35-37.) Mr. Bischoff, for his part, testified that, via information he had received in a telephone conversation with Mr. Schaffner, an officer arrived after the trucks were stopped. Mr. Bischoff also gave his opinion that Staff Exhibits 5 and 6 depicted the casing of the tire that had blown, not another tire that was worn down. (Tr. at 41, 43.)

While the testimony of the parties is at odds about what happened at the inspection site, the Commission believes that the record does reveal a violation of Section 393.75(a). Turning to the evidence, we note that the diagram of the roadside inspection shows the tire tread debris lying at the side of highway SR-20A, behind respondent's parked trucks and Inspector Divjak's patrol car. We further note that when asked how far it was from where the tire blew to where respondent's trucks pulled over, Mr. Nye replied, somewhat ambiguously, that the rear of the truck driven by Mr. Schaffner was at the position of the symbol represented by the beginning of Inspector Divjak's patrol car in the diagram (Tr. at 36). He did not dispute the location of the tire tread debris in the diagram - some distance to the rear of the parked vehicles and around the curve in the highway. According to Inspector Divjak's testimony, that distance was within a quarter of a mile (Tr. at 25). Inspector Divjak's testimony on this point is not rebutted in the record. With the tire tread debris laying that far to the rear of the parked vehicles, we believe that it is reasonable to conclude that Mr. Schaffner drove his truck for some distance on the highway.

Further, with regard to respondent's argument on brief that there was only one 16 to 18 inch grove mark caused by the exposed rim on the highway, and that the mark was within inches of where respondent's driver stopped (Respondent's Post-Hearing Brief at 3, Tr. at 26-27), we do not find this argument compelling. Inspector Divjak explained that Staff Exhibit 4, a photograph of the blown tire and exposed wheel rim, shows only one short grove mark in the frame of the picture because the grove in the highway was intermittent, i.e., the remnant of the blown tire would flip over the rim of the wheel and prevent the wheel rim from coming directly into contact with the surface of the highway (Tr. at 27). Moreover, we do not attach any particular significance to Inspector Divjak's statement that he did not observe other groves further back on SR-20A (Tr. at 31).

Inspector Divjak testified that he observed the tire tread debris at the beginning of the curve of the highway and to the west of the parked trucks, as he was pulling away from the inspection site (Tr. at 13). This statement indicates to us that Inspector Divjak's inspection was limited to the violations that he discovered on respondent's truck and that he considered what was behind the trucks – the tire tread debris, which he noted, or the condition the surface of the highway for that matter – to be of lesser importance.

The Commission notes that Section 393.75(a), which states, in part, that no motor vehicle shall be operated on any tire with tread or sidewall separation, does not specifically state any distance that a truck with a defective tire may be driven before it should be pulled over to the side of the road. Section 393.75(a) merely states that "no motor vehicle shall be operated" on a defective tire. We believe that the evidence of record, the location of the tire tread debris by the highway, as depicted in Staff Exhibit 8, and Inspector Divjak's un-rebutted testimony about the distance from that debris to respondent's parked vehicles at the side of the highway, supports Inspector Divjak's version of the events leading up to the inspection of respondent's trucks. More specifically, based on the location of the tire tread debris by the highway and Inspector Divjak's un-rebutted testimony, the record shows that Mr. Schaffner continued to drive his truck along the highway for about a quarter of a mile after the tire blew.

With respect to the violation of Section 393.75(c) violation, operating a truck with a tire that was worn below the allowable tread depth, the Commission finds that the evidence supports a finding that the violation did occur. In this case, the driver/vehicle examination report (Staff Exhibit 1), completed by Inspector Divjak at the scene of the inspection, lists a violation of Section 393.75(c), with the following notation: "Tire tread depth less than 2/32 of inch, 4R 0/32." In addition, as noted previously, Inspector Divjak confirmed at hearing, by identifying photographic exhibits, which tire had a worn tread. After a review of the testimony and evidence submitted in the case, the Commission is of the opinion that Inspector Divjak specifically identified a tire on the truck driven by Mr. Schaffner with a tread that was worn down, tire "4R", and correctly cited respondent for that violation. We do not believe that the bald tire on the right side of the truck could have been mistaken for the casing of the blown tire, tire "6L", which was on the left side of the truck. Further, we do not find Mr. Bischoff's claim credible that the photographs of the tire with the worn tread (Staff Exhibits 5 and 6) actually depict the casing of the blown tire (Staff Exhibits 3 and 4).

Finally, respondent argued on brief that staff failed to introduce evidence of Inspector Divjak's qualifications to perform inspections of motor carriers and, that, during cross-examination, Inspector Divjak admitted that he did not have certification of his training (Tr. at 23). Respondent noted that in *State v. Helke* (Oct. 15, 2007), 3d Dist. No. 8-07-04, 2007 Ohio 5483, the court overturned a conviction by the trial court where the state failed to present a certificate of the officer's qualification to use a radar detector. 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.) Respondent argued that since staff failed to present Inspector Divjak’s certification evidencing his qualification to perform motor carrier inspections, respondent is not liable for the assessed violations. (Respondent’s Post-hearing Brief at 4.)

On this issue, the Commission observes that Inspector Divjak’s visual observation of the blown and bald tires on respondent’s truck does not equate to the questioned radar-operating expertise of the officer in *Helke*. The two events, visually identifying blown and worn tires on a truck and operating a radar detector, are not comparable. Moreover, a plain reading of the hearing record demonstrates that what Inspector Divjak meant on cross-examination was that he did not bring certification of his training to the hearing room., not that he lacked such certification altogether. In our opinion, while it may take a high level of expertise to operate a radar detector reliably, a skill which the court in *Helke* was unwilling to accord the officer in that case without a certificate of qualification, Inspector Divjak’s 26 years of service as a Highway Patrol motor carrier inspector (Tr. at 6) qualified him to make the truck inspection in this case. We also take notice that Inspector Divjak has appeared in a past civil forfeiture hearing before the Commission. He presented credible testimony and evidence as a qualified Highway Patrol inspector in *Rye Gentry Trucking, Notice Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-1280-TR-CVF (Opinion and Order dated January 21, 2009). We thus find that Inspector Divjak is a qualified Highway Patrol inspector in this matter and that his testimony and evidence were credible with regard to the violations in this case.

CONCLUSION:

Pursuant to Rule 4901:2-7-20, Ohio Administrative Code, staff demonstrated at hearing, by a preponderance of the evidence, that Bischoff Trucking violated Section 393.75(a) and Section 393.75(c). The Commission, therefore, finds that Bischoff Trucking was in violation of Section 393.75(a) and Section 393.75(c) by operating a truck with a blown tire and a tire that was worn below the allowable tread depth.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On June 15, 2011, the Ohio Highway Patrol (Highway Patrol) stopped and inspected a motor vehicle operated by Bischoff Trucking and driven by Jason A. Schaffner in the state of Ohio. The Highway Patrol found the following violations of the Code of Federal Regulations (C.F.R.): 49 C.F.R. Section 393.75(a) - Flat tire or fabric exposed 6L, tire blown rim on road, and 49 C.F.R. Section 393.75(c) - Tire tread depth less than 2/32 of inch, 4R 0/32.

- (2) Bischoff Trucking was notified that staff intended to assess civil monetary forfeiture of \$90.00 for violation of 49 C.F.R. Section 393.75(a), and 49 C.F.R. Section 393.75(c). On October 18, 2011, Bischoff Trucking filed a request for an administrative hearing, thereby initiating this case.
- (3) A hearing in this matter was convened on January 26, 2012.
- (4) Staff demonstrated at hearing, by a preponderance of the evidence, that Bischoff Trucking violated 49 C.F.R. Section 393.75(a) and 49 C.F.R. Section 393.75(c).
- (5) Bischoff Trucking's arguments at hearing were not sufficient to demonstrate that the company should not be held liable for the civil forfeiture assessed for violation of 49 C.F.R. Section 393.75(a) and 49 C.F.R. Section 393.75(c).
- (6) Pursuant to Section 4905.83, Revised Code, respondent must pay the State of Ohio the civil forfeiture assessed for violation of 49 C.F.R. Section 393.75(c). Bischoff Trucking shall have 30 days from the date of this entry to pay the assessed forfeiture of \$90.00.

It is, therefore,

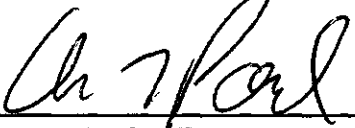
ORDERED, That Bischoff Trucking pay the assessed amount of \$90.00 for violation of 49 C.F.R. Section 393.75(a) and 49 C.F.R. Section 393.75(c), as set forth in Finding (6). Payment should be made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. In order to assure proper credit, Bischoff Trucking is directed to write the case number (OH3265007432C) on the face of the check or money order. It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,


ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman

Paul A. Centolella


Andre T. Porter

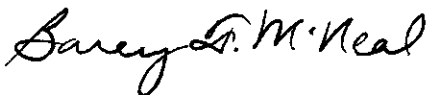
Steven D. Lesser


Cheryl L. Roberto

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Entered in the Journal

MAR 21 2012



Barcy F. McNeal
Secretary