Sunshine Act Meetings

Federal Register
Vol. 55, No. 208
Friday, October 26, 1990

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL MARITIME COMMISSION

TIME AND DATE: 10:00 a.m., October 31, 1990.

PLACE: Hearing Room One, 1100 L Street, N.W., Washington, D.C. 20573-0001.

STATUS:

A portion of the meeting will be open to the public.

A portion of the meeting will be closed to the public.

MATTER(S) TO BE CONSIDERED:

Portion Open to the Public

Docket No. 90-06 *Notice of Inquiry—Marine Terminal Operator Regulations*—Consideration of Comments.

Portion Closed to the Public

1. Maritime Restrictions in Foreign Trades—Korea.
2. Trans-Atlantic Enforcement Initiative.
3. Trans-Pacific Malpractice Program.

CONTACT PERSON FOR MORE INFORMATION: Joseph C. Polking, Secretary, (202) 523-5725.

Joseph C. Polking,

Secretary.

[FR Doc. 90-25565 Filed 10-24-90; 3:35 pm]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 10:00 a.m., Wednesday, October 31, 1990.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Summary Agenda

Because of their routine nature, no substantive discussion of the following items is anticipated. These matters will be voted on without discussion unless a member of the Board requests that an item be moved to the discussion agenda.

1. Proposed 1991 Private Sector Adjustment Factor for Federal Reserve priced services.
2. Proposed national Automated Clearing House (ACH) net settlement service.

Discussion Agenda

3. Publication for comment of a proposed amendment to Regulation Y (Bank Holding Companies and Change in Bank Control) regarding appraisal standards for Federally related transactions.
4. Proposals regarding the Federal Reserve System's seasonal credit program.
5. Proposed 1991 Fee Schedules for Federal Reserve priced services.
6. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452-3684 or by writing to:

Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Dated: October 24, 1990.

William W. Wiles,

Secretary of the Board.

[FR Doc. 90-25503 Filed 10-24-90; 12:04 pm]

BILLING CODE 6210-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: Approximately 11:30 a.m., Wednesday, October 31, 1990, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approxiamtely 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: October 24, 1990.

William W. Wiles,

Secretary of the Board.

[FR Doc. 90-25504 Filed 10-24-90; 12:04 pm]

BILLING CODE 6210-01-M

POSTAL SERVICE BOARD OF GOVERNORS

Notice of a Meeting

The Board of Governors of the United States Postal Service, pursuant to its Bylaws (39 C.F.R. Section 7.5) and the Government in the Sunshine Act (5 U.S.C. Section 552b), hereby gives notice that it intends to hold a meeting at 1:00 p.m. on Monday, November 5, 1990, and at 8:30 a.m. on Tuesday, November 6, 1990, in Washington, DC. The November 5 meeting, at which the Board will discuss possible strategies in collective bargaining negotiations, is closed to the public (See 55 F.R. 40994, October 5, 1990). The November 6 meeting is open to the public and will be held on the Benjamin Franklin Room at Postal Service Headquarters, 475 L'Enfant Plaza, SW. The Board expects to discuss the matters stated in the agenda which is set forth below. Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268-4800.

AGENDA

Monday Session

November 5-1:00 p.m. (Closed)

1. Status Report on Collective Bargaining Negotiations. (David H. Charters, Senior Assistant Postmaster General, Human Resources Group, and Joseph J. Mahon, Jr., Assistant Postmaster General, Labor Relations Department)

Tuesday Session

November 6-8:30 a.m. (Open)

1. Minutes of the Previous Meeting, October 1-2, 1990.
2. Remarks of the Postmaster General. (Anthony M. Frank)
3. Report on Technology Resource Department. (Karen T. Uemoto, Assistant Postmaster General,Technology Resource Department)
4. Capital Investments:
   a. Boston, Massachusetts, Northwest Center Mail Processing Facility. (Stanley W. Smith, Assistant Postmaster General, Facilities Department; and Thomas K. Ranft, Boston Field Division General Manager/Postmaster)
   b. Washington, D.C., National Postal History and Philatelic Museum. (Mr. Smith and Gordon C. Morison, Assistant

Postmaster General, Philatelic and Retail Services Department)

5. Quarterly Report on Service Performance. (Ann McK. Robinson, Consumer Advocate)

6. Tentative Agenda for December 3–4, 1990, meeting in New Orleans, Louisiana.

David F. Harris,

Secretary.

[FR Doc. 90–25486 Filed 10–24–90; 10:27 am]

BILLING CODE 7710–12–M

Corrections

Federal Register
Vol. 55, No. 208
Friday, October 26, 1990

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Gulf of Mexico Fishery Management Council; Public Meeting

Correction

In notice document 90-24257 appearing on page 41740 in the issue of Monday, October 15, 1990, make the following correction:

On page 41740, in the second column, in the file line at the end of the document, the FR document number should read "90-24257".

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP90-122-004, RP88-191-024, and RP85-178-071]

Tennessee Gas Pipeline Co.; Tariff Filing

Correction

In notice document 90-24538 beginning on page 42256 in the issue of Thursday, October 18, 1990, make the following correction:

On page 42256, in the third column, the docket numbers should read as set forth above.

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 90N-0165]

RIN 0905-AD08

Food Labeling; Serving Sizes; Correction

Correction

In proposed rule document 90-23742 beginning on page 41106 in the issue of Tuesday, October 9, 1990, make the following corrections:

On page 41106, in the third column, in the paragragh numbered 1, the last three lines should have appeared in larger print; and in the third line from the bottom of that paragraph, the symbol "$>$" should read "$\geq$".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 90P-0271]

Eggnog Deviating From Identity Standard; Temporary Permit for Market Testing

Correction

In notice document 90-24411 appearing on page 42071 in the issue of Wednesday, October 17, 1990, make the following correction:

On page 42071, in the third column, in the first full paragraph, in the third line "1946" should read "946".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Advisory Committees; Meetings

Correction

In notice document 90-24560 beginning on page 42071 in the issue of Wednesday, October 17, 1990, make the following corrections:

1. On page 42073, in the first column, in the fifth paragraph, in the second line "Council" should read "Counsel".

2. On the same page, in the second column, in the first full paragraph, in the fourth line "FDCA" should read "FACA".

BILLING CODE 1505-01-D

INTERSTATE COMMERCE COMMISSION

Intent to Engage in Compensated Intercorporate Hauling Operations

Correction

In notice document 90-24100 appearing on page 41608 in the issue of Friday, October 12, 1990, make the following correction:

On page 41608, in the first column, in the third paragraph, in the second line insert "operations, and State of operations:" after "the" and before "P.C".

BILLING CODE 1505-01-D

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 7, 18, 57, and 75

RIN 1219-AA57

Electric Cables, Signaling Cables and Cable Splice Kits

Correction

In proposed rule document 90-23108 beginning on page 40124 in the issue of Monday, October 1, 1990, make the following corrections:

1. On page 40124, in the second column, in the third full paragraph, in the second line, "and" should read "any".

2. On page 40126, in the 3rd column, in the first full paragraph, in the 13th line, "Assembly" should read "assembly".

3. On page 40127, in the second column, in the first full paragraph, in the eighth line, "instruction" should read "instrument".

4. On page 40130, in the third column, in the table, under the heading "New section", in the fifth entry, "*" should be deleted.

§ 7.406 [Corrected]

5. On page 40132, in the second column, in § 7.406, in paragraph (a), in the second line, "measuring" was misspelled.

§ 7.407 [Corrected]

6. On the same page, in the third column, in § 7.407, in paragraph, (a)(2), in the third line, "7010" should read "70±10".

BILLING CODE 1505-01-D

DEPARTMENT OF VETERANS AFFAIRS

Summary of Legal Interpretation of the General Counsel-Precedent Opinion 8-90, VA Disposition of Residential Real Property Owned by Other Federal Agencies or Related Entities

Correction

In notice document 90-15129 beginning on page 26809 in the issue of Friday, June 29, 1990, in the second column, in the subject heading, the opinion number should have read as set forth above.

BILLING CODE 1505-01-D

federal register

Friday
October 26, 1990

Part II

Department of Transportation

Federal Highway Administration

Final Orders in Motor Carrier Safety Enforcement Cases; Notice

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Final Orders in Motor Carrier Safety Enforcement Cases

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of final orders.

SUMMARY: This document gives notice of the Final Orders served from March 26, 1990, through the present time concerning motor carrier and hazardous materials proceedings conducted pursuant to 49 CFR part 386. The Orders include both those issued by the Associate Administrator and those issued by Administrative Law Judges and adopted by the Associate Administrator.

FOR FURTHER INFORMATION CONTACT: Mr. David C. Oliver, Motor Carrier and Highway Safety Law Division (202) 366–1356; or Mr. Michael J. Laska, Legislation and Regulations Division (202) 366–1383, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 pm., e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION: The following Final Orders are being published:

Name	Docket No.
Texas Highway Transport, Inc.	R6–90–37
Autotrans, Inc.	R1–90–10
Propane Transportation Corp.	R1–90–09
RAJ Chemicals, Inc., of Virginia	R3–90–055
Browning Services, Inc.	R3–90–08
Woodbury Horse Transportation, Inc. (Administrative Law Judge Order).	R1–88–1
Yankee Trails, Inc. (Administrative Law Judge Order).	R1–89–07
Ronald William Dreyer	R5–89–137
Alamo Distributing Service, Inc.	R6–89–63
R. Brown & Sons, Inc.	R1–90–06
David Salinas	R6–90–20
Wisconsin Protein Carriers, Inc.	R5–90–07
Edgar J. Anderson	R6–90–225
Kenworth of Tennessee, Inc.	89–TN–031–5A
Tonawanda Tank Transport Service, Inc.	R1–88–130
Corey Brothers, Inc.	R3–90–05
Drotzmann, Inc. (Administrative Law Judge Order).	R10–89–11
Schaffner Mfg. & Sales Corp.	R1–90–083
D & N Bus Service, Inc.	R3–90–107
Johnny D. Secrest 89–03D	
A. Weinfeld & Sons, Inc.	R3–90–032
D & D Transportation Co., Inc.	R1–89–276
Abbey Metal Corp.	R1–90–014
Rig Runner Express, Inc.	R6–89–11
Alamo Distributing Service, Inc.	R6–89–63
Uncle Bo's Equipment Co.	R6–89–15
James David Caver dba, J.D. Caver & Co.	R6–89–32
Aaron McGruder Trucking, Inc.	R6–89–56
Chaparral Van Lines	R6–89–55
Plating Products Co., Inc.	R1–90–008
Drotzmann, Inc.	R10–89–11
Service Bus Co., Inc.	R1–89–052
Bower Tiling Service, Inc.	R5–90–03
Charles M. Cephas, Inc.	R3–88–099
Warehouse Imports, trading as Continental Imports, Inc.	R3–89–031
Arthur Shelley Inc.	R3–89–034
Chemical Commodities, Inc.	R7–90–02
A. Weinfeld & Sons, Inc.	R3–90–032
Arizona Freight Systems, Inc.	R9–89–052
J. L. McCoy, Inc.	R3–88–029
Wilmington Tank Lines, Inc.	R3–89–196
Carter's Bus Service, Inc.	R3–89–156
Trinity Transportation, Inc.	R9–90–001
Horizon Transportation, Inc.	R3–89–114
John T. Lesnak	R3–88–023
A. T. Pinto, Inc.	R3–90–006
American Bulk Transport Co., Inc.	R7–89–08
Channel Solvents and Chemicals, Inc.	R6–88–41
Williams Bus Excursions	R3–88–015
Medi-Call Ambulance Services, Inc.	R3–89–202
Vend-Rite Service Corp.	R3–90–050
M & T Trucking Services, Inc., V.I. Gas, Inc., Challenger's Trucking, Inc.	Consolidated Docket No. 89–41
White's Bus Rental, Inc.	R3–90–039
Stenger Gas Corp.	R3–89–185
Stanford & Inge, Inc.	R3–89–211
Industrial Nuclear Co. United States Testing Co., Inc.	R9–90–002
Strong Trucking (Ashbell & Mary Strong, d/b/a).	R3–88–061
Krug Trucking Co. (Michael Krug, d/b/a).	R3–89–125
Action Metal Co., Inc.	R1–89–244
J. R. Christoni	R1–89–2223
Calgon Corportation	R3–89–171
Wonder Chemical Company	R3–88–073
Leroy Randolph	R3–88–090
John Steven Johnson	R3–89–058
Williams Bus Excursions	R3–88–015
Hunter Oil Co., Inc.	R3–88–089
E. L. Lawson Trucking, Inc.	R1–89–015
A. T. Pinto	R3–90–006
Rent-A-Stretch	89–196
C & W Enterprises	R3–88–064
Onnie O. Harlow	R6–89–36
Service Bus Co., Inc. (Administrative Law Judge Order).	R1–89–05

Issued on: October 15, 1990.

T.D. Larson,

Administrator.

In the Matter of Autotrans, Inc.

[Docket No. R1–90–10 (Formerly R1–90–150)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for an administrative hearing to contest the alleged violations charged in a Notice of Claim dated June 26, 1990. The Notice alleged 25 violations of 49 CFR 395.8, failing to retain supporting documents with records of duty status for a period of 6 months, and 6 violations of 49 CFR 396.3, failing to keep minimum records of inspection and maintenance. The Regional Director, Office of Motor Carrier Safety, Region 1, does not raise any objection to the request.

Respondent contends that with respect to the 25 violations of § 395.8, the records have been retained, were made available to the inspectors and remain available. With respect to the 6 violations of § 396.3 respondent contends that records are retained, were made available and remain available.

Therefore, it is hereby ordered, That Respondent's request for a hearing is granted. In accordance with 49 CFR 386.54(a), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: September 1, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Propane Transportation Corp.

[Docket No. R1–90–09 (Formerly R1–90–143)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for an administrative hearing and a denial of alleged violations of the Hazardous Materials Transportation Act and regulations issued thereunder.

The Regional Director, Office of Motor Carrier Safety, Region 1, does not oppose the request for a hearing. The Regional Director, by Notice of Claim letter dated June 18, 1990 alleged 20 violations of the regulations, specifically requiring or permitting a driver to make false entries upon a record of duty status while transporting a hazardous material.

For the most part, Respondent's denial is in broad general terms. It is difficult to determine the precise nature of the denial without a full record before me. However, it has been settled, and accepted by this Agency that responsibility cannot be escaped if it can be shown that Respondent had the means to detect the alleged violation, see *Riss & Co.* v. *U.S.*, 262 F.2d 245, 250 (8th Cir., 1958) and *U.S.* v. *Time-DC*, Inc., 381 F. Supp. 730, 739 (W.D. Va., 1974).

I will appoint an Administrative Law Judge to ascertain (1) whether there are false entries upon the records of duty status, as alleged, and (2) whether Respondent had the means to detect and eliminate such violations.

Therefore, it is ordered, That Respondent's request for a hearing is granted. In accordance with 49 CFR 386.54(a), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of

Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: September 11, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the matter of RAJ Chemicals, Inc. of Virginia

[Docket. No. R3-90-055]

Final Order

This matter comes before me upon request of the Respondent for a hearing and Motion in opposition thereto and Motion for a Final Order filed by the Regional Director, Office of Motor Carrier Safety, Region 3. On December 14, 1989, the Regional Director sent the Respondent a Notice of Claim alleging 6 violations of the Hazardous Materials Regulations. The specific violation involved the offer of a shipment of hazardous materials for transportation in commerce that was not properly classed, described, packaged, marked, labeled and in condition for shipment, in violation of 49 CFR 171.2(a), (49 CFR 173.22(a).

Respondent denies the alleged violations and contends that its agent, an independent contractor, was the shipper and had sole and total control over the shipments in question. Respondent also questions the validity of the complaint and contends that it did not "knowingly" violate any regulation.

The Regional Director correctly points out that all three of Respondent's arguments are legal, not factual in nature. Respondent offers a Terminal Throughput Agreement to support its contentions. The terms of the Agreement facially support the Regional Director. Any dispute as to the applicability of its provisions is a matter to be resolved between RAJ and First Energy Corporation, not by an Administrative Law Judge in an administrative forum.

Likewise, Respondent's second and third supporting arguments for a hearing are not factual. In fact, argument number 2 is misplaced and not relevant to this proceeding. Argument number 3 appears to invoke a layman's understanding of the term "knowingly". Substantial case law exists on which basis this contention could be disposed, even were it properly before me.

Therefore, it is ordered, That Respondent's request for a hearing is denied as it fails to properly raise material factual issues in dispute. The Regional Director's Motion for a Final Order is supported by the record before me and it is granted. Respondent shall pay to the Regional Director the sum of $9,000 within 30 days of the date of this Order.

Dated: September 11, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the matter of Browning Services, Inc.

[Docket. No. R3-90-08 (Formerly R3-90-212)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of Respondent for an administrative hearing and opposition thereto filed by the Regional Director, Office of Motor Carrier Safety, Region 3 (hereafter referred to as Petitioner).

On July 16, 1990, Respondent was sent a Notice of Claim and Notice of Abatement. Therein it was alleged that Respondent was in violation of the Financial Responsibility portions of the Federal Motor Carrier Safety Regulations (FMCSRs) by virtue of its operation in interstate commerce without the requisite levels of insurance.

Respondent operates tow trucks. On occasion, Respondent admittedly tows vehicles across state lines. Respondent contends that the act of towing is legally distinguishable from transporting in interstate commerce subject to the provisions of the FMCSRs.

Petitioner contends that the act of providing towing services for remuneration is covered by the regulations when interstate travel is involved.

Petitioner argues that Respondent's contentions are legal and that there are no material factual issues involved. Therefore, Petitioner contends the request for a hearing must be denied. Respondent apparently concedes that its objections are primarily legal. Nevertheless, Respondent requests a hearing and attempts to differentiate between the acts of towing for remuneration and transportation for hire.

Ordinarily, such arguments are law school balderdash. The government of the United States has no time to enter into semantic metaphysics, particularly where the lives and well-being of its citizens are placed in limbo. The government does acknowledge, on the other hand, that all its citizens are important to it. Much is written and spoken today about the onerous requirements of government regulations on individuals, small businesses and even large entities. We all feel aggrieved at one time or another.

It must be understood that Congress enacts laws. The Executive Branch implements those laws. At times there is wide discretion in implementing the law, at times there is no discretion. The financial responsibility requirements are laid out in statute. It is not for us to say that $500,000 is enough coverage; it is not for Respondent to say $500,000 is enough coverage. Congress has spoken.

It does not advance the cause of safety for Respondent and Petitioner to carry on in petulant disagreement over the applicability of the law. Respondent should note that the maximum penalty for this alleged violation is $10,000 per violation. Respondent cannot operate for very long in the face of such fines.

At the same time, Petitioner has been admonished in the past about the need to exercise discretion in fostering compliance with this requirement and others when dealing with small operations, some of which have little familiarity with these regulations.

Respondent seeks a definitive interpretation of his inclusion under these regulations. If Respondent chooses to argue his point in a Court of law, he may withdraw his request for a hearing and I will grant a Final Order upon which he may proceed with a legal action. I feel strongly this will only delay the inevitable.

I am therefore assigning an Administrative Law Judge to hear Respondent's arguments on the differentiation between towing for remuneration and transportation for hire. I am doing so in the face of longstanding interpretations which efface any distinction in the hope that a decision by an Administrative Law Judge will constitute sufficient authority for Respondent to comply. Normally, I would even consider a reduction of the penalty in such a case where a positive attitude towards compliance is evident. In this matter, Respondent's shows absolutely no willingness to comply without formal edict. Accordingly, the Judge appointed is to consider the factual nature of Respondent's argument only. I will entertain no recommendation for reduction of this penalty in the event that the Judge finds Respondent is covered by the regulation.

Therefore, it is ordered, That Respondent's request for a hearing is granted and Petitioner's request for a Final Order is denied. In accordance with 49 CFR 386.54(a), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b). The Judge may make factual determinations or recommend conclusions of law,

however, the amount of the penalty is beyond the scope of this proceeding.

Date: September 6, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Woodbury Horse Transportation, Inc.

[FHWA Docket No. R1–88–1 (Motor Carrier Safety)]

Order of Administrative Law Judge Served September 4, 1990; Errata

Served September 5, 1990

		Reads	Should read
Page 5.....	Line 23	1990	1989
Page 30.....	Line 20	October 28	October 29

Dated: September 5, 1990.

Ronnie A. Yoder,

Administrative Law Judge.

In the Matter of Woodbury Horse Transportation, Inc.

[FHWA Docket No. R1–88–1 (Motor Carrier Safety)]

Order of Administrative Law Judge

This proceeding arises from a Notice of Claim dated April 7, 1988, alleging violations of the Federal Motor Carrier Safety Regulations (49 CFR parts 350–399) and Woodbury Horse Transportation's request for hearing. The undersigned administrative law judge was assigned to the proceeding by Notice dated December 6, 1988, pursuant to the order of the Associate Administrator for Motor Carriers dated December 1, 1988, and the request of the Assistant Chief Counsel for Motor Carrier and Highway Safety Law dated December 5, 1988.

On May 16, 1989, the Regional Director moved for summary judgment on the ground that Respondent failed to respond to a request for admissions served February 17, 1989, that pursuant to 49 CFR 386.44(a)(2) those requests were thereby deemed admitted, that Respondent failed to comply with the Regional Director's request for interrogatories and production of documents or the Judge's order dated April 26, 1989, directing the filing of such answers and documents, and that the answers filed were not attested as required by the FHWA Rules (49 CFR 386.42(b)) and the Federal Rules of Civil Procedure.

Respondent filed no answer to the Regional Director's motion within the seven-day period permitted by the Rules.[1] Respondent did belatedly on May 8, 1989, file answers to interrogatories and to the request for admissions. That filing did not attempt to provide good cause for Respondent's failure to file an answer to the request for admissions within the time prescribed by the Rules.

Those Rules provide that each request for admission is deemed admitted unless a written answer is filed within 15 days after service (49 CFR 386.44(a)(2)) and that "any matter admitted is conclusively established" unless the judge permits withdrawal or amendment (49 CFR 386.44(b)). Respondent made no effort to justify the failure to make a timely response or to seek relief from that failure. Accordingly, as indicated by the Rules the admissions requested encompassing the allegations of violation were deemed to be conclusively established.[2]

On the basis of Respondent's admissions and failure to comply with the discovery requests and the Judge's Order and to answer the subject motion, we concluded that' summary judgment should be entered against Respondent.

The Notice of Claim dated April 7, 1988, alleged six violations of 49 CFR 395.3(a), which involved requiring or permitting drivers to drive more than 10 hours, and four violations of 49 CFR 395.3(b), which involved requiring or permitting drivers to drive after having been on duty more than 70 hours in eight consecutive days. The facts established by the request for admissions, which are deemed admitted and conclusively established under the FHWA Rules, substantially established the violations and Respondent's liability. Admissions one (1) through twenty-three (23) show that Respondent's drivers exceeded the hours of service requirements as set forth in the Notice of Claim and thus violated 49 CFR 395.3(a) and 49 CFR 395.3(b).

Respondent also ignored the initial request for production of documents including current drivers' daily logs. The documents were sought by Regional Counsel to establish a continuous and current pattern of noncompliance and show that any disciplinary program of the Respondent, if one exists, is mere "lip service." Respondent's failure to submit the documents raises an inference that violations would be established if the requested documents were produced.

Respondent's answer dated August 18, 1988, p. 3, asserted affirmatively that the violations do not warrant a fine of $1,000 per violation (*i.e.* a total of $10,000 as requested in the complaint) in view of Respondent's "past history, which does not, in any way, indicate a pattern of serious safety violations, and its financial status, which can be described as hardship, at best." Respondent, however, waived its opportunity to present those defenses by its failure to comply with the Regional Counsel's production requests and the Judge's Order directed to those issues.

Accordingly, we concluded that summary judgment in favor of the Regional Director could and should be entered,[3] and summary judgment was entered against Respondent Woodbury Horse in the amount of $10,000.

Upon review by the Associate Administrator for Motor Carriers this proceeding was remanded to the Judge (Order dated September 25, 1989) to

> review the facts and arguments surrounding the decision to find that the Respondent did not comply procedurally with the rules on the request for Admissions and Interrogatories, and more importantly to provide a complete review over the circumstances surrounding the failure to respond to the Motion for the Summary Judgment.

That remand order further stated that

> Should the Judge determine that his original findings are correct and that Respondent did, in fact, receive and have ample opportunity to reply to the Motion for Summary Judgment, I would welcome his recommendation on possible disciplinary action.

Thereafter, by Order dated October 23, 1989, the Judge scheduled a prehearing conference for December 5, 1989, and directed each party to file a statement by November 9, 1989, setting forth in separately numbered paragraphing each fact and conclusion of law alleged by each party and directed each party to answer by

[1] 49 CFR 386.35(c). By letter dated June 1, 1989, a secretary in the law firm representing Respondent asked for a copy of the summary judgment motion and a ten-day period in which to answer that motion. That letter indicated that the attorneys for Respondent had been aware of the motion since at least May 24, 1989. They nevertheless filed no answer, no request for a copy of the motion, and no motion for extension of time. The secretary's letter did not state that the motion was not served or received, did not purport to show good cause for the extension, for failure to file an answer or comply with the Judge's prior Order, or to emanate from the attorneys or be authorized or directed by them. Moreover, even if authorized by or submitted on behalf of the attorneys, we do not consider such a letter from an attorney's secretary to the Judge received after the time to answer had expired and at least twelve days after the motion for summary judgment was known to be pending to be an appropriate or timely request for an extension of time, to be an appropriate pleading in appropriate form, or to show good cause for relief.

[2] See Order dated June 13, 1989, pp. 2–4.

[3] See Order dated June 13, 1989, pp. 6–8.

November 24, 1989, admitting or denying or otherwise pleading with respect to each alleged fact and proposed conclusion of law. Both parties filed the statements required by November 9, 1989, and the Regional Director filed a timely answer. Respondent failed to file a timely answer by November 24, 1989, as directed by the Judge's order.

On November 30, 1989, at 3:21 p.m., Kenneth Piken sent to the Judge and the Regional Director a telefax copy of an "Answer" bearing a November 24, 1989, date and an affidavit of service dated as of November 24, 1989, enclosed in an envelope which was meter stamped November 24, 1989, but bore a cancellation stamp dated November 30, 1989. That document was received by telefax on November 30, 1990, after the Judge was notified by Mr. Piken's office at 10:10 a.m. on that date that no such answer was in their file (PHC Tr. 12). Since a filing is not complete until received,[4] even under the most generous reading of that document and the circumstances surrounding its filing, it was not filed on time.[5] Moreover, the circumstances of its filing raise serious questions concerning the accuracy of the affidavit of service. By letter dated November 29, 1989, the Regional Director requested that sanctions be imposed against Respondent for its failure to file a timely answer and that the Regional Director's allegations of fact and conclusions of law be deemed admitted. No response to that request was ever filed.

The substance of Respondent's belated "Answer" contained numerous inaccurate and improper pleadings as acknowledged at the prehearing conference on December 5, 1989. See *infra* and PHC Tr. 20, 26, 27 (denial of para. 2 changed to "Admits") 28, 29, 30 (denial of paras. 4 and 5 changed to "Admits"), 32 (denial of para. 9 changed to "Admits"), 36 (denial of para. 11 changed to "Admits"). Mr. Piken did not appear at that prehearing conference, raising serious difficulties in attempting to obtain explanations for the positions taken by the Piken firm on behalf of Woodbury Horse or itself (PHC Tr. 21–23).

Woodbury Horse and the Piken firm were represented at the prehearing conference by Robert B. Walker of Sims, Walker & Steinfeld. At that time Mr. Walker was cautioned about the risk of criminal prosecution for false statements and perjury (PHC Tr. 7–8, 56), references to the bar for disciplinary action (PHC Tr. 56), and conflict of interest (PHC Tr. 35, 55, 57) inherent in these proceedings.

At the prehearing conference the issues on remand were established, and the fact issues framed by the parties' previous pleadings were substantially narrowed by admissions of counsel for Woodbury Horse that pleadings previously served by Piken & Piken were incorrect. Each of the following allegations of the Regional Director was admitted in Respondent's response or at the prehearing conference:

1. Regional Counsel filed interrogatories, requests for admissions, and requests for production of documents on February 17, 1989.[6]

2. Respondent failed to respond to the request for admissions within 15 days of service.

3. On March 20, 1989 a notice of deemed admissions was filed and served by Regional Counsel.[7]

4. Respondent failed to reply to the interrogatories within 30 days of service thereof.

5. Respondent failed to respond to the Notice to Produce within 30 days of service thereof.

6. Regional Counsel filed and served a motion to compel a response to the request for production of documents and to the interrogatories on March 29, 1989.[8]

7. The Respondent failed to reply to the motion to compel.

8. On April 26, 1989, the Judge issued an order compelling a response within 15 days to the interrogatories and request for production of documents only. The Judge further determined that the requests for admissions were deemed admitted pursuant to 49 CFR 386.44.

9. On May 11, 1989, Respondent filed and served a response to the interrogatories which was neither sworn nor signed by the person answering.

10. 49 CFR 386.42(b) requires responses to interrogatories to be signed and sworn to by the person answering.

11. Respondent failed to respond to the Notice to Produce in direct violation of the Judge's order of April 26, 1989.[9]

12. Respondent submitted a response to the request for admissions in violation of the Judge's order of April 26.[10]

13. The Piken firm has offered no explanation as to its failure to respond to the request for admissions within the prescribed time period, despite many opportunities to do so.

14. The Piken firm has offered no explanation for its total failure to respond to the notice to produce despite many opportunities to do so.

15. Regional Counsel filed a motion for summary judgment on May 16 which was served on respondent by certified mail.[11]

18. An employee of the Piken firm conveyed a letter dated June 1, 1989, to the Judge requesting an additional 10-day period to respond to the motion and requesting a copy of the motion.

19. The June 1 letter was not served in accordance with the Rules of Practice, 49 CFR part 386.

20. In a letter dated June 30, 1989, Attorney Kenneth Piken asserted that the letter was not authorized and therefore the secretary, acting without authority, was not bound by the canons of ethics.

21. In Respondent's petition for review dated July 20, 1989, the Piken firm asserted that the letter of June 30 was expressly authorized by Kenneth Piken.

Respondent denied allegations 16, 17 and 22:

16. A certified mail receipt shows receipt (of Regional Counsel's motion for summary judgment) by an agent of the Piken law firm on May 19 (Sandra F).

17. The signature of Sandra F matches her signature on other documents.

22. The assertions by the Piken firm as to the authorization of the June 30 letter are in

[4] 49 CFR 386.2. Five days are added to the due date when documents are mailed, so filing was required by November 29, 1989. No request to late file was ever made, and no effort was made to show good cause for the failure to file.

[5] The filing was due on November 29, 1989, and a fax copy was received by the Docket on November 30, 1989. A hard copy of the filing was not received until December 4, 1989.

[6] Respondent confirmed at the prehearing conference that its initial assertion of lack of knowledge and information related only to the date of filing, which does not present a triable issue of material fact. The docket shows that the document was served on February 17 and filed on February 22, 1989.

[7] Respondent confirmed at the prehearing conference that its initial assertion of lack of knowledge and information related only to the date of filing, which does not present a triable issue of material fact. The docket shows that the document was served on March 20, 1989, and filed between March 20 and March 31, 1989. (The actual filing date is not stamped on the document.)

[8] Respondent confirmed at the prehearing conference that its initial assertion of lack of knowledge and information related only to the date of filing, which does not present a triable issue of material fact. The docket shows that the document was served on March 29 and filed on March 31, 1989.

[9] Respondent confirmed at the prehearing conference that he would accept the Regional Director's assertion that no production occurred. PHC Tr. 34.

[10] Respondent confirmed at the prehearing conference that it only questioned whether its filing of the response violated the Judge's Order of April 26 deeming the requests admitted. PHC Tr. 36–37.

[11] Respondent confirmed at the prehearing conference that its initial assertion of lack of knowledge and information related only to the date of filing, which does not present a triable issue of material fact. The docket shows that the document was served on May 16 and filed on May 22, 1989.

direct contradiction and represent a falsehood presented to the Judge and Associate Administrator.[12]

Thus the primary fact issue to be determined on remand related to the certified mail receipt allegedly signed by an agent of the Piken firm, Sandra F. A further issue was identified at the prehearing conference relating to the circumstances of the service and filing of Respondent's answer dated November 24, 1989.

Respondent never filed any explanation of its failure to timely file its answer to the filing of the Regional Director and never sought relief from its failure to timely file. Under normal circumstances a single failure to timely file might not warrant the entry of default. In this case, however, where there is a history of failure to comply with the Rules of the FHWA and orders of the Judge, where the case is before the Judge on remand to consider the entry of summary judgment for such past failures and to consider sanctions against counsel, where the belated filing shows a lack of professional responsibility and care in the substance of its submission, and the circumstances of its transmittal raise serious questions about the truthfulness of the accompanying affidavit of service, where Respondent's counsel failed to appear at the prehearing conference scheduled, *inter alia*, to discuss these questions, and where Respondent made no effort to show good cause for the late filing or to request that it be received, we conclude that the filing should not be received, that the pleadings on the Regional Director's Proposed Statements of Fact and Conclusions of Law as amended at the prehearing conference should be taken as admitted, and that summary judgment should be entered against Woodbury Horse on the pleadings.

If Respondent's answer were accepted for filing we would nonetheless enter summary judgment against Respondent because of its failure to file complete or verified answers to the Regional Director's Interrogatories on Remand served January 5, 1990, and its subsequent failure to file a timely answer to the Regional Director's motion for summary judgment on remand served February 22, 1990.

At the prehearing conference when the question of conflict of interest between Respondent and its counsel was raised, the Judge directed that "counsel for Woodbury Horse, specifically Mr. Walker and Mr. Piken" provide the Judge a communication "with respect to the representation of Woodbury Horse and/or Mr. Piken in this proceeding," on or before January 19, 1990. Thereafter, Mr. Walker, by letter to the Judge dated December 22, 1989, stated that:

> Woodbury Horse Transportation, Inc. is seeking new counsel to represent it in any further proceedings. At the present time, Piken & Piken will represent itself. A decision has not been made as to whether Piken and Piken will seek representation by other counsel, but if a decision to do so is made, that fact will promptly be communicated to Your Honor.

No further communication on this subject was received prior to January 19, 1990, the date specified in the Judge's order, and Piken & Piken in fact continued thereafter to represent Respondent.

On January 23, 1990, Piken & Piken served "Respondent's Proposed Procedural Schedule on Remand" as "Attorneys for Respondent;" and on January 30, 1990, Piken & Piken served "Response to Regional Director's First Set of Interrogatories and Notice to Produce upon Demand," which had been served January 5, 1990. That response was timely filed by Piken & Piken as "Attorneys for Respondent" but was not verified as required by the FHWA rules, despite the fact that the verification requirement had been set forth in the January 5 interrogatories and had been specifically addressed at the prehearing conference as a defect in its filing prior to the earlier summary judgment and remand.[13] That defect in Respondent's response was subsequently pointed out in the Regional Director's motion for summary Judgment on remand, but Respondent never sought to explain, excuse, or correct that deficiency. Since those interrogatories related to the central factual issues in dispute and Respondent failed to file responses under oath as required by the rules, that failure likewise warrants the entry of summary Judgment against Respondent on those issues. Moreover, the response, apart from being unsworn, was largely unresponsive, or established admissions against interest contrary to prior submissions in this proceeding.

At the prehearing conference counsel for Respondent stated that Respondent was not asserting that counsel for the Regional Director had created a fraudulent postal receipt. Moreover, in response to the Regional Director's interrogatories, Respondent through Piken & Piken stated that it did not know whether the signature on the postal receipt was that of Sandra Ferrarotti or whose signature it was (Interrogatory No. 6), did not know whether the receipt was fraudulent, and had no evidence or proof that the document was falsified (Interrogatory No. 7).

Absent such a contention or proof that the postal receipt was false or incorrect, the presumption of validity of such a receipt would establish service of the summary Judgment motion,[14] particularly where the signature of Sandra F. was apparently the same as that of Sandra Ferrarotti,[15] an employee of Piken & Piken; where her affidavit failed to deny receipt of the motion or to deny that the signature was hers; where Piken & Piken acknowledged on remand that no records of such deliveries were kept—contrary to its prior submission in the proceeding; and where that firm has in this proceeding established a record of failing to meet procedural dates. Accordingly, Respondent's submissions create no substantial issue for trial on the issue of service of the original summary judgment motion.[16]

The affidavit of Sandra Ferrarotti dated August 7, 1989, submitted by Kenneth Piken with his own affirmation dated August 3, 1989, in support of its petition for review stated that "all legal correspondence entering this office is duly recorded and office records show no certified mailing from Mr. Dymond was received on May 19, 1989." [17]

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[12] The Respondent also asserted in its statement of issues that sanctions should be imposed against counsel for the Regional Director, but Respondent has furnished no substantive support for that suggestion.

[13] The earlier summary Judgment order did not rely on the verification requirement, because it was not cited in the Regional Director's motion; but the requirement was cited by the Regional Director in his brief in opposition to Respondent's petition for review (p. 2, n. 2), was discussed at the prehearing conference (PHC Tr. 30–32), and was specifically cited in the interrogatories which noted that "pursuant to 49 CFR 386.42 you are hereby required to answer the following interrogatories in writing and under oath within thirty (30) days from service hereof."

[14] See *Schultz* v. *Jordan*, 141 U.S. 213 (1981); *Beck* v. *Somerset Technologies*, 882 F.2d 993, 996 (5th Cir. 1989); *Hollis* v. *Bowen*, 832 F.2d 865 (5th Cir. 1987).

[15] Respondent at the prehearing conference admitted that the signature "bears a resemblance to the signature of Sandra Ferrarotti." PHC Tr. 44.

[16] Respondent asserted in its statement of issues that an affidavit of Jose Sprauve, Branch Supervisor, U.S. Postal Service, Rego Park, New York, showed that that office had no record of the certified letter in question being received by that office and that all certified mail deliveries to Piken & Piken are delivered by that office. That affidavit does not rebut or impugn the presumptive validity of the postal receipt, since the affidavit does not state that the letter was not received or delivered by the Postal Service or by that branch office, but only that the branch office had no record of such receipt or delivery.

[17] That affirmation, which states that Mr. Piken was duly sworn but is not notarized, was sent by letter dated August 3, 1989, with an unsigned

Continued

Moreover, the Respondent's statement of allegations and contentions dated November 3, 1989, stated that "meticulous office records" showed no receipt of the motion:

6. Sandra Ferrarotti, the secretary who allegedly accepted the certified mailing, has sworn that she is often not yet at work when the mail is delivered, she consistently signs her full name to mailings received and that meticulous office records do not show any mailing received from Regional Counsel on the day in question.[18]

Nevertheless, the response to interrogatories served January 30, 1990, stated that no such system for recording mail, and no such records, existed. Interrogatory No. 2 said: "State the procedure used by the Piken firm in recording the receipt of incoming correspondence and other types of mail." Piken & Piken replied:

No system is utilized for recording the receipt of incoming correspondence other than whoever happens to be present when the mail arrives by postal carrier, receives the mail, signs for any certification, the mail is then transmitted to a partner of the firm, who opens all mail, date stamps the receipt of same and distributes.

Interrogatory No. 9 asked:

State which office records respondent is referring to when it cites "meticulous office records" in paragraph 6, Part II Motion for Summary Judgment, in respondent's Statements of Fact and Conclusions of Law, dated November 3, 1989.

Piken & Piken responded: "All office records."

Notice to Produce No. 1 asked for "Logs for the receipt of certified mail and first class mail for May 19, 1989 for the firm of Piken & Piken," and that firm responded:

No logs for receipt of certified or first class mail are kept by the law firm, however, periodic checks, when the need arises, are made with the United States Postal Service.

These submissions appear to directly conflict with the previous affidavit of Sandra Ferrarotti submitted by Piken & Piken in support of their petition for review.

On February 22, 1990, the Regional Director moved for an order granting summary judgment on remand pursuant to 49 CFR 386.35, reaffirming the previous grant of summary judgment, finding that Respondent's counsel has acted in violation of standards of conduct for attorneys in FHWA proceedings, and imposing sanctions or issuing an order to show cause with respect to such imposition after a hearing on such sanctions. As grounds for that motion the Regional Director asserted a "pattern of neglect and contemptuous conduct," (p. 1) including:

1. Failure to respond to the request for admissions within the period specified by the rules of practice.
2. Failure to respond to interrogatories and a notice to produce.
3. Filing a response to request for admissions without a request for leave to late file, or a showing of good cause for failure to timely file, and after an order of the Judge recognizing the requests were deemed admitted pursuant to the FHWA's rules.
4. Failure to respond to the Judge's order to produce.
5. Failure to submit sworn answers to interrogatories as required by the FHWA's rules.
6. Failure to answer the motion for summary judgment.
7. Causing an *ex parte* communication to the Judge, requesting a copy of that motion and requesting an extension of time to answer the motion.
8. Submitting conflicting and disingenuous representations to the Judge, first that the *ex parte* submission was authorized and subsequently that it was not.
9. Failing to file a timely answer to the issues on remand as required by the Judge's order.
10. Filing and serving an untruthful affidavit of service with respect to that pleading.
11. Failing to file sworn responses to interrogatories on remand.
12. Filing responses which reflected a lack of candor and outright deceit, and which were intended to delay these proceedings.

In addition, the Regional Director asserted that Respondent had proffered no contention or evidence to rebut the presumption of service arising from the signed receipt and that sanctions against Piken & Piken and Kenneth Piken are within the power of the FHWA and within the scope of this proceeding following a hearing, which that motion suggested should be held prior to the imposition of sanctions. As noted above, we agree with the Regional Director's contention concerning the presumption of service, and accordingly we conclude that that summary judgment should be entered on that basis.

No answer to that motion was filed by March 6, 1990, the due date under FHWA rules. By letter dated March 7, 1990, Piken & Piken, sought to obtain an extension of time for "their client" Woodbury Horse, while at the same time asserting that they no longer represented Woodbury Horse. Thereafter, Robert A. O'Rourke, an attorney with the firm of Piken & Piken filed an affidavit dated March 23, 1990, seeking similar relief. By Order dated March 28, 1990, the Judge denied the request of Piken & Piken noting that while they were still counsel of record for Woodbury Horse, they asserted a conflict with their client, and that respondent should have an opportunity to make one further submission to address the status of its representation, its failure to answer the motion for summary judgment, and any appropriate response to that motion:

Woodbury Horse apparently had notice of the motion for summary judgment no later than February 26, 1990. Piken & Piken immediately told Woodbury Horse; and contrary to counsel's assertions they still are counsel of record for Woodbury. They have not filed a motion to withdraw or to substitute counsel. Indeed on January 30, 1990, Piken & Piken filed on behalf of Woodbury Horse a "Response to Regional Director's First Set of Interrogatories and Notice to Produce Upon Remand." Moreover, Piken & Piken's letter states that if an extension to April 30 was not granted, Piken & Piken will file a response on behalf of Woodbury Horse by March 23, 1990. By affidavit dated March 23, 1990, that date is amended to April 6, 1990.

None of these requests are appropriate. Piken & Piken is still counsel of record for Woodbury Horse. Counsel did not respond to the motion for summary judgment or seek an extension within the time prescribed by the rules, *i.e. 7 days (49 CFR 386.35(c)), plus 5 days for service by mail (49 CFR 386.32(c)(3)), to wit March 6, 1990. Moreover, such a request for extension must be in the form of a motion (49 CFR 386.35(a)), not a letter or affidavit as in counsel's submission dated March 23, 1990. Counsel notes that the firm has a conflict with its client, that it no longer represents the client, but nevertheless repeatedly refers to Woodbury Horse as its client, seeks an extension of its behalf, and proposes to file an answer to the motion for summary judgment on its clients' behalf if the extension to April 30 is not granted.*

We will not grant the requested extensions. Counsel has not officially withdrawn its representation of Woodbury Horse; but it has stated that it no longer represents Woodbury Horse in this proceeding and has acknowledged that it had a conflict with Woodbury Horse. Given these submissions by Piken & Piken we cannot treat that firm as appropriate counsel of record for Woodbury

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certificate of service attesting to service on August 3, 1989, and enclosed Ms. Ferrarotti's affidavit notarized four days later on August 7, 1989.

[18] Her affidavit stated that "I have no recollection of signing for or receiving the correspondence from Mr. Kenneth Dymond, known as a Motion for Summary Judgment," "that I often am not present when the mail is delivered," and that "when I do sign for certified mail, I consistently sign my full name to the receipt," as well as the assertion quoted above that "all legal correspondence entering this office is duly recorded and office records show no certified mailing from Mr. Dymond was received on May 19, 1989." Affidavit dated August 7, 1989, paras. 2, 3, 4, 5. The affidavit did not mention "meticulous office records."

Horse or authorize its filing of a response on Woodbury Horse's behalf. Woodbury Horse has had at least three months to obtain other counsel and has not done so. Woodbury Horse had notice of the procedural posture of the case and the need for new counsel and has failed to obtain counsel, to file a response to the summary judgment motion, or to file a timely or appropriate request for extension of time. Nevertheless, we will afford Woodbury Horse an opportunity to make one further submission in this matter on or before April 30, 1990. That submission should address the status of its representation, its failure to answer the motion for summary judgment, and any appropriate response to that motion.

By letter dated April 24, 1990, Arthur Piken wrote the Judge on behalf of Piken & Piken stating "please deem this letter to be formal advice that this office will not represent the interests of any former client," Woodbury Horse, and that:

A motion will be filed by express mail on Friday, April 27th, for formal request to be relieved. The reason for the letter is that the litigation partner in this firm, Kenneth Piken, is currently engaged in a trial in the United States District Court [and] the motion for being relieved as counsel of record will be made when Kenneth Piken, the attorney of record in this proceeding concludes his trial.

No such motion was ever filed.

The Piken letter also stated that he had advised his client of the April 30 deadline in a letter which could not be provided to the Judge because of the attorney-client privilege. That letter also stated that Sims, Walker & Steinfeld would not be retained by Woodbury Horse.

By letter dated April 24, 1990, Ronald G. Vercesi, President of Woodbury Horse, stated that he had relied on his attorney to ensure that this matter was "properly handled." That letter did not otherwise attempt to explain the failure to file a response to the motion for summary judgment or address the substance of that motion. Rather he stated that he had incurred legal fees of $8,000, that his attorneys had advised that they could no longer represent him, that he was sorry for the violations, that they would not recur, that a $10,000 fine would "immensely hurt" the company, and that he asked for "mercy" and "leniency" to "give our company a chance to continue to exist." Accordingly, summary judgment can and should be entered on the basis of Respondent's failure to answer the motion for summary judgment on remand, and the amount of that judgment should be amended to reflect the agreement of the parties in the proffered settlement.

Mr. Vercesi's letter enclosed a letter from Arthur Piken to Mr. Vercesi, dated April 5, 1990, which stated that that firm could not continue to represent Woodbury Horse, recommended other counsel, and stated *inter alia* that:

1. The appeal was successful and the appeal level remanded the case back to the same Judge, unfortunately.

2. At this point, it is now apparent that the Judge is very much against our firm, inasmuch as his mind has been poisoned by the Regional Counsel.

3. This [prehearing] conference turned out to be a total "snow-job" and turned into a session whereby Bob Walker of Sims, Walker & Steinfeld spent virtually an entire day [the conference was held between 10:00 a.m. and 12:05 p.m.] listening [to] Regional Counsel agreeing with the Judge, and the Judge agreeing with Regional Counsel why their firm should not be "sanctioned."

4. The Regional Director/Counsel filed a new Motion for Summary Judgment [February 26, 1990]. We immediately wrote to the Regional Director for an extension so that you could obtain suitable replacement counsel * * *. [As noted above, Piken & Piken wrote a letter to the Judge dated March 7, 1990, after the time to reply had expired.]

5. We immediately filed a motion for extension of time [no motion was filed], and we currently have until *April 30, 1990* in which to answer this latest motion for Summary Judgment. [No extension was granted, though Woodbury Horse, not Piken & Piken, was granted leave to make one additional submission.] [Emphasis in original.]

6. I enclose the latest Order of the Administrative Law Judge. As you can readily see, this is a complete and utter set-up.

Since these letters were not filed or served, the Judge sent a copy of each to each party and the docket; and since the Piken & Piken letter seriously misrepresented the events and status of the proceeding, the Judge sent a copy of each order in the proceeding and the prehearing conference transcript to Mr. Vercesi on May 3, 1990.

By letter dated March 12, 1990, the Regional Director requested that Piken & Piken be made a party to this proceeding. By order dated March 28, 1990, we declined to make Piken & Piken a party to the proceeding at that time, since that firm continued as counsel of record, and it had not responded to the Regional Director's request, which was not filed as a motion under the rules. That Order noted that we would reconsider that question if it were resubmitted in an appropriate form following April 30, 1990.

By motion dated May 3, 1990, the Regional Director asked to add Kenneth and Arthur Piken as parties to the proceeding. As grounds for that motion, the Regional Director incorporated the grounds for sanctions stated in the motion for summary judgment on remand and noted the authority of the Judge "to take any action and make all needful rules and regulations to govern the conduct of the proceedings (49 CFR 386.54) and the terms of Associate Administrator's remand order that:

Should the Judge determine that his original findings are correct and that Respondent did, in fact, receive and have ample opportunity to reply to the Motion for Summary Judgment, I would welcome his recommendation on possible disciplinary action.

Kenneth and Arthur Piken filed an answer dated May 23, 1990,[19] asserting that the remand order "clearly indicated that Administrative Law Judge, the Honorable Ronnie Yoder, is free to explore this possibility" ["specific relief against Kenneth and Arthur Piken as to why sanctions should not be imposed"] "at such time as is ascertained by the Judge presiding in this matter that the original motion for summary judgment was, in fact, served upon this office in a proper and timely fashion." Since no such determination had been made at that time, the Pikens suggested that all matters should be "held in abeyance as it relates to this firm." The Pikens also asserted that their presence as parties in the case would pressure Woodbury Horse to settle the proceeding and that one of the cases cited by the Regional Director, *Zola* v. *ICC*, 889 F2d 508 (3d Cir. 1989), did not support sanctions against an attorney. No objection was made to the pendency of the sanction question or the FHWA's jurisdiction in that regard, or to the power of the Judge to add the Pikens as parties under 49 CFR 386.54 and the remand order. Moreover, in view of the conclusion reached above that service is presumptively established by the postal receipt and the lack of any rebuttal of that presumption, and the entry of summary judgment on that issue, we conclude that the Pikens have asserted no valid or timely objection to their addition as parties to this proceeding concurrently with the entry of summary judgment against, and effectuation of the settlement with, Respondent.

By letter dated May 23, 1990, the Regional Director stated that settlement discussions were being initiated directly with Mr. Vercesi. That letter also noted that the Piken letter "seriously misrepresents the facts and fails to detail the allegations against him pertaining to neglect of the matter and submitting false documents," and renewed the request that the Pikens be

[19] That answer was served 20 days after the motion, *i.e.* eight days after the answer was due under FHWA rules, without a request for leave to late file and without any attempt to show good cause for such late filing. 49 CFR 386.35(c), 386.32(c)(3).

added as parties to this proceeding and that sanctions be imposed.

By letter dated July 23, 1990, the Regional Director forwarded an Order and Stipulation of Compromise and Settlement purporting to "settle and compromise this action . . . upon the terms stated herein," including the payment of a $7,000 fine, an undertaking to take remedial measures to avoid the conditions that led to the Administrator's claim, including an adequate safety training course for drivers, use of those drivers to transport cargo, and close monitoring of drivers' logs to insure compliance with federal safety regulations. That letter purported to moot the prior motion for summary judgment with respect to Respondent and to continue that motion with respect to the Pikens. The letter submitted an order for the Judge dismissing the claim against Respondent "in accordance with the terms of the settlement agreement" and retaining jurisdiction over the matter and the parties to resolve the issue of disciplinary action against the Pikens.

While we will effectuate the intent of the settlement we cannot approve that settlement and order in the form submitted, insofar as they reflect no adjudication of the questions presented in the FHWA claim. Such a resolution following the lengthy proceedings to date would be an unconscionable waste of governmental resources.[20]

Nor can the parties enter such a settlement without the Judge's concurrence. A party may withdraw his/her pleading only on approval of the administrative law judge or Associate Administrator. 49 CFR 386.52. Moreover, it is clear that settlement must be approved by the judge, unless a settlement and consent order are submitted directly to the Associate Administrator under 49 CFR 386.21—which was not done here and should not be done where an administrative law judge has been assigned to the proceeding.[21]

While the Pikens have questioned the applicability of the *Zola* case to this proceeding, they have never denied the jurisdiction of the FHWA to impose disciplinary sanctions or the judge to consider such sanctions. Moreover, we tentatively conclude that the imposition of such sanctions is within the authority of the FHWA [22] and that consideration of such sanctions is within the mandate of the Judge in this proceeding.[23]

The record in this proceeding raises the question of multiple violations of the ABA Standards of Professional Responsibility, including the New York Code of Professional Responsibility, which is the jurisdiction in which counsel are admitted to practice. Including to the items specified in the Regional Director's motion for summary judgment on remand, *supra*, pp. 15–16, at least the following derelictions of the indicated disciplinary rules ("DR") of the Model Code of Professional Responsibility (see appendix B) are raised by the record in this proceeding:

1. Failure to respond to the request for admission within the period specified by the rules of practice. DR 1–102(A)(1)(5)(6), DR 6–101(A)(2)(3), DR 7–106(A)(C).

2. Failure to respond to interrogatories and a notice to produce. DR 1–102(A)(1)(5)(6), DR 7–106(A)(C).

3. Filing a response to request for admissions without a request for leave to late file, or a showing of good cause for failure to timely file, and after an order of the Judge recognizing the requests were deemed admitted pursuant to the FHWA's rules. DR 1–102(A)(1)(5)(6), DR 6–101(A)(2)(3), DR 7–106(A)(C).

4. Failure to respond to the Judge's order to produce. DR l–102(A)(1)(5)(6), DR 6–101(A)(2)(3), DR 7–106(A)(C).

5. Failure to submit sworn answers to interrogatories as required by the FHWA's rules. DR 1–102(A)(1)(5)(6), DR 6–101(A)(2)(3), DR 7–106(A)(C).

6. Failure to answer the motion for summary judgment resulting in entry of default judgment. DR 1–102(A)(1)(5)(6), DR 6–101(A)(2)(3), DR 7–106(A)(C).

7. Causing an *ex parte* communication to the Judge, requesting a copy of that motion and requesting an extension of time to answer the motion causing a nonlawyer to act as a lawyer in seeking an extension of time in an administrative proceeding. DR 3–101(A), DR 7–110(B).

8. Submitting conflicting and disingenuous representations to the Judge, first that the *ex parte* submission was authorized and subsequently that it was not. DR 1–102(A)(1)(5)(6), DR 6–101(A)(2)(3), DR 7–106(C).

9. Submitting a false affidavit concerning the maintenance of office records at Piken & Piken with respect to the receipt of legal correspondence including certified mail. DR 1–102(A)(4), DR 7–102(A)(2)–(6).

10. Submitting a false, unsigned affidavit of service together with that affidavit. DR 1–102(A)(4), DR 7–102(A)(2)–(6).

11. Failure to file a timely answer to the issues on remand as required by the Judge's order resulting in a default judgment. DR 1–102(A)(1)(5)(6), DR 6–101(A)(2)(3), DR 7–106(A)(C).

12. Filing and serving an untruthful affidavit of service with respect to that pleading. DR 1–102(A) (4), DR 7 102(A)(2)–(6).

13. Failure to file sworn responses to interrogatories on remand. DR 1–102(A)(1)(5)(6), DR 6–101(A)(2)(3), DR 7–106(A)(C).

14. Filing responses which reflected a lack of candor or deceit, and which were intended to delay these proceedings. DR 1–102(A)(1)(5)(6), DR 6–101(A)(2)(3), DR 7–106(C).

15. Failure to answer the motion for summary judgment in remand resulting in a second summary judgment. DR 1–

[20] See *Tourist Enterprises Corporation* "ORBIS", Docket 27914, Notice to All Parties dated July 19, 1977, Recommended Decision dated September 23, 1977, pp. 6–9, 11–12, *aff'd*, Order 78–5–11; *Dominion Intercontinental Airlines Fitness Investigation*, Docket 41035, Supplemental Recommended Decision dated September 13, 1985, pp. 6–9, *aff'd*, Order 86–1–75.

[21] See *Bower Tiling Service*, FHWA Docket No. R5–90–03, Order dated June 18, 1990; *Rodgers Johnson/J and J Bus Service*, Docket R3–89–02, Order dated May 4, 1989.

[22] See, e.g. *Touche Ross & Co.* v. *SEC*, 609 F.2d 570 (2nd Cir. 1979); *Theodore Polydoroff and Timothy C. Miller*, 133 M.C.C. 364 (1984); *John M. Nader*, 364 I.C.C. 83 (1980); *United Air Lines, Inc.* v. *C.A.B.*, 281 F.2d 53 (D.C. Cir. 1960).

[23] On December 8, 1988, the Administrator of the Federal Aviation Administration issued a decision in *Western Airlines* (FAA Docket 85–108), *et al.*, which stated, *inter alia*, that under the Administrative Procedure Act "ALJs lack the authority to modify or add to the procedures provided in published agency regulations, even if the modifications or additions do not actually conflict with specific provisions of the agency's rules." (p. 6.) The decision cites no precedent or other authority for that statement, and the uniform precedent at the Civil Aeronautics Board and theretofore at the Department of Transportation had been that the Judge can adopt any procedures for the conduct of the proceeding consistent with statute, the rules, and considerations of due process and agency policy and precedent. Decisions of the FAA Administrator are not binding in non-FAA proceedings, and the decision of the Administrator in *Western, et al.*, should be limited to its facts and should not be applied in this proceeding. See *Continental Airlines*, FAA Dockets CP89SO0016, *et al.*, Order dated May 4, 1989, p. 4, n. 6; *Robert O. Nay*, DOT Docket 45663, Orders dated February 15 and March 8, 1989. Moreover, as noted above, the FHWA rules specifically permit the Judge to "take any action and to make all needful rules and regulations to govern the conduct of the proceedings to ensure a fair and impartial hearing, and to avoid delay in the disposition of the proceedings." Finally, the ABA Model Code of Judicial Conduct and Model Code of Judicial Conduct for Federal Administrative Law Judges (ABA 1989) also recognize the obligation of the judge to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Canon 3B(3). Previous decisions have recognized the possible applicability of that Code to administrative law judges at DOT. See *In re Chacallo*, 2 M.S.P.B. 20, Supp. Opinion, p. 53 (1980); ABA Informal Opinion 86–1522, dated December 24, 1986; *Competitive Marketing Investigation*, C.A.B. Docket 36595, Order 36595–418, dated June 29, 1981, p. 2, n. 5; *N.L. Industries Inc.*, FAA Docket 84–29 (HM), Order dated February 13, 1986, pp. 8–9, n. 12, *rev'd on other grounds*, Order of FAA Administrator dated December 8, 1988.

102(A)(1)(5)(6), DR 6-101(A)(2)(3), DR 7-106(A)(C).

16. Continuing to represent Woodbury Horse after the summary judgment was entered when an apparent conflict existed and was pointed out on the record at the PHC. DR 2-110(A), DR 2-110(B) (2), DR 5-101(A), DR 5-102(A), DR 7-101(A)(3).

17. Misrepresenting the facts of the proceeding in a letter to Woodbury Horse. DR 1-102(A)(4), DR 6-102(A).

18. Publishing scurrilous and unfounded accusations against the Judge in that letter. DR 7-106(C), DR 8-102(B).

Those derelictions present possible violations of at least the indicated 25 Disciplinary Rules of the Model Code of Professional Responsibility, which are set forth in Appendix B. In order to ensure a complete and appropriate statement of the violations at issue and assure the availability of any appropriate defense and process to the Pikens before recommending sanctions in accordance with the direction of the remand order, we will direct the Regional Director to file a statement of such charges and a proposed procedural schedule, with an appropriate response by the Pikens.[24]

Accordingly, *it is ordered* 2That:

1. Kenneth Piken, Arthur Piken and the law firm Piken & Piken, P.C. are hereby made parties to this proceeding.

2. Piken & Piken is granted leave to withdraw as attorney for Woodbury Horse Transportation, Inc.

3. The Judge's Order dated June 13, 1989 (appendix A), is reaffirmed with the modification that summary judgment is entered against Woodbury Horse Transportation, Inc. in the amount of $7,000 in accordance with the settlement amount agreed by the parties.

4. By September 28, 1990, the Regional Director shall serve and file a specification of charges against Piken & Piken, P.C., Kenneth Piken, and Arthur Piken detailing each charge with respect to possible sanctions against those parties, including without limitation those specifications set forth herein, together with a proposed procedural schedule.

5. By October 28, 1990, Kenneth Piken, Arthur Piken and Piken & Piken, P.C., shall file an answer to each such charge and a response to the proposed procedural schedule and shall otherwise show cause why an order should not be entered:

a. Finding that the violations set forth therein occurred.

b. Barring them from further practice before the FHWA and the DOT.

c. Referring their actions in this proceeding to the New York State Bar and the Interstate Commerce Commission for disciplinary action.

d. Referring their submissions in this proceeding to the Department of Justice for prosecution.

So Ordered.

Dated: September 4, 1990.

Ronnie A. Yoder,

Administrative Law Judge.

In the Matter of Woodbury Horse Transportation, Inc.

[FHWA Docket No. R1-88-1 (Motor Carrier Safety)]

Order of Administrative Law Judge

Served June 13, 1989.

By motion dated May 16, 1989, the Regional Director moves for summary judgment. As grounds for that motion the Regional Director asserts that Respondent failed to respond to the request for admissions served February 17, 1989, that pursuant to 49 CFR 386.44(a)(2) those requests were thereby deemed admitted, that Respondent has failed to comply with the Regional Director's request for interrogatories and production of documents, or the Judge's order dated April 26, 1989 directing the filing of such answers and documents, and that the answers filed were not attested as required by the FHWA Rules and the Federal Rules of Civil Procedures.[1]

Respondent has filed no answer to the Regional Director's motion within the seven-day period permitted by the Rules.[2] Respondent did belatedly on May 8, 1989, file answers to interrogatories and to the request for admissions. That filing did not attempt to provide good cause for Respondent's failure to file an answer to the Request for Admissions within the time prescribed by the Rules.

Those Rules provide that each request for admission is deemed admitted unless a written answer is filed within 15 days after service (49 CFR 386.44(a)(2)) and that "any matter admitted is conclusively established" unless the judge permits withdrawal or amendment (49 CFR 386.44(b)). Respondent has made no effort to justify the failure to make a timely response. Accordingly, as indicated by the Rules the admissions requested are deemed to be conclusively established.

On the basis of those admissions we find and conclude that:

1. Exhibit 1 attached to Regional Counsel' s request for admissions is a true and accurate copy of the driver's daily logs for September 15 and 16, 1987 for driver Shawn Mertens.

2. Exhibit 2 is a true and accurate copy of driver's daily logs for September 22 and 23, 1987 for driver Wayne Oke.

3. Exhibit 3 is a true and accurate copy of driver's daily logs for driver Kevin Keilly for October 8 and 9, 1987.

4. Exhibit 4 is a true and accurate copy of driver's daily logs for driver Kevin Keilly for October 15 and 16, 1987.

5. Exhibit 5 is a true and accurate copy of driver's daily logs for driver Craig Coffin for October 21 and 22, 1987.

6. Exhibit 6 is a true and accurate copy of driver's daily logs for driver Craig Coffin for December 1 and 2, 1987.

7. Exhibit 7 is a true and accurate copy of driver's daily logs for driver Kevin Keilly for September 16 through 23, 1987.

8. Exhibit 8 is a true and accurate copy of driver's daily logs for driver Keith Craig for October 2 through 9, 1987.

9. Exhibit 9 is a true and accurate copy of driver's daily logs for driver Kevin Keilly for October 3 through 10, 1987.

10. Exhibit 10 is a true and accurate copy of driver's daily logs for driver Craig Coffin for November 8 through 15, 1987.

11. On September 16, 1987, Shawn Mertens drove 14 ½ hours without having 8 consecutive hours off-duty.

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[24] Previous decisions have noted that those Rules are appropriate standards for evaluating ethical conduct of practitioners before the Department. *New York-San Francisco Nonstop Service, Reopened*, 35 C.A.B. 423, 494-95 (1962); *Ephrata/Moses Lake Deletion Case*, 74 C.A.B. 831, 850, n. 45 (1977); *Northeast Imperial Airlines, Fitness Investigation*, 106 C.A.B. 32, 37 (1984); *N.L. Industries* FAA Docket 84-29 (HM), Order dated February 13, 1986, p. 9, n. 12, *rev'd on other grounds*, Order of FAA Administrator dated December 8, 1988.

[1] The Regional Director cites no support for this assertion, and the Rules do not require such attestation or incorporate such a requirement from the Federal Rules. 49 CFR 386.44. Cf. 49 CFR 386.43(c)(4), 386.56(c). Accordingly, we give no weight to Regional Counsel's assertion in this regard.

[2] 49 CFR 386.35(c). By letter dated June 1, 1989, a secretary in the law firm representing Respondent asked for a copy of the summary judgment motion and a ten-day period in which to answer that motion. That letter indicated that the attorneys for Respondent have been aware of the motion since at least May 24, 1989. They have nevertheless filed no answer, no request for a copy of the motion, and no motion for extension of time. The secretary's letter does not state that the motion was not served or received, does not purport to show good cause for the extension, for failure to file an answer or comply with the Judge's prior Order, or to emanate from the attorneys or be authorized or directed by them. Moreover, even if authorized by or submitted on behalf of the attorneys, we do not consider such a letter from an attorney's secretary to the Judge received twelve days after a motion for summary judgment is known to be pending to be an appropriate or timely request for an extension of time, to be an appropriate pleading in appropriate form, or to show good cause for relief.

12. On September 23, 1987, Wayne Oke drove 20 hours without having 8 consecutive hours off-duty.

13. On October 9, 1987, Kevin Keilly drove 12½ hours without having 8 consecutive hours off-duty.

14. On October 16, 1987 Kevin Keilly drove 16½ hours without having 8 consecutive hours off-duty.

15. On October 21 and 22, 1987, Craig Coffin drove 12½ hours without having 8 consecutive hours off-duty.

16. On December 2, 1987, Craig Coffin drove 13 hours without having 8 consecutive hours off-duty.

17. From September 16, 1987, to September 23, 1987, Kevin Keilly drove 39 hours after being on duty 70 hours in 8 consecutive days.

18. From October 2, 1987, to October 9, 1987, Keith Craig drove 11½ hours after being on duty 70 hours in 8 consecutive days.

19. From October 3, 1987, to October 10, 1987, Kevin Keilly drove 28 hours after being on duty 70 hours in 8 consecutive days.

20. From November 8, 1987, to November 15, 1987, Craig Coffin drove 17 hours after being on duty 70 hours in 8 consecutive days.

21. Drivers Shawn Mertens, Wayne Oke, Kevin Keilly, Craig Coffin and Keith Craig are employees and drive for Woodbury Horse Transportation, Inc.

22. The trips shown in exhibits 1 through 10 (drivers daily logs) involve travel in interstate commerce.

23. Woodbury Horse Transportation, Inc. is subject to the Federal Motor Carrier Safety Regulations, 49 CFR part 383 *et seq.*

On the basis of Respondent's admissions and failure to comply with the discovery requests and the Judge's Order and to answer the subject motion, we conclude that summary judgment may appropriately be entered against Respondent.

The Notice of Claim dated April 7, 1988, alleged violations of 49 CFR 395.3(a), which involved requiring or permitting drivers to drive more than 10 hours, and four violations of 49 CFR 395.3(b), which involved requiring or permitting drivers to drive after having been on duty more than 70 hours in eight consecutive days. The facts established by the request for admissions, which are deemed admitted and conclusively established under the FHWA Rules, substantially establish the violations and Respondent's liability. Admissions one (1) through twenty-three (23) show that Respondent's drivers exceeded the hours of service requirements as set forth in the Notice of Claim and thus violated 49 CFR 395.3(a) and 49 CFR 395.3(b).

Respondent also ignored the initial request for production of documents including current drivers' daily logs. The documents were sought by Regional Counsel to establish a continuous and current pattern of noncompliance and show that any disciplinary program of the Respondent, if one exists, is mere "lip service." Respondent's failure to submit the documents raises an inference that violations would be established if the requested documents were produced.

Respondent's answer dated August 18, 1988, p. 3, asserts affirmatively that the violations do not warrant a fine of $1000 in view of Respondent's "past history, which does not, in any way, indicate a pattern of serious safety violations, and its financial status, which can be described as hardship, at best." Respondent has, however, waived its opportunity to present those defenses by its failure to comply with the Regional counsel's production requests and the Judge's Order directed to those issues.

Regional Counsel submits and we agree that the Judge's authority under the Administrative Procedure Act and the Federal Highway Administration's Rules enables the entry of summary judgment. Section 7(b) of the Administrative Procedure Act, 5 U.S.C. 556(c), provides:

> Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.[3]

The FHWA Rules provide:

(b) Power and duties. Except as provided in paragraph (c) of this section,[4] *the administrative law judge has power to take any action and to make all needful rules and regulations to govern the conduct of the proceedings to ensure a fair and impartial hearing, and to avoid delay in the disposition of the proceedings.* His/her powers include the following:

* * * *

(6) To consider and rule upon all procedural and other motions, except motions which, under this part, are made directly to the Associate Administrator.

* * * * *

(8) To make and file decisions; and

(9) To take any other action authorized by these rules and permitted by law." 49 CFR 386.54 (emphasis added).

The Administrative Procedure Act and the FHWA Rules give the Judge broad authority to control the hearing, nothing in the Rules proscribes the entry of such an order, and the Judge is empowered to enter orders not inconsistent with those rules.[5]

We conclude that summary judgment in favor of the Regional Director can and should be entered. Accordingly, IT IS ORDERED THAT:

1. The Regional Director's motin is granted.

2. Summary judgments entered against respondent Woodbury Horse Transportation, Inc., in the findings and conclusions herein.

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[3] The Attorney General's Manual on the Administrative Procedure Act (1947), p. 74, points out that the "quoted language automatically vests in hearing officers [now administrative law judges] the enumerated powers" and that "an agency is without power to withhold such powers from its hearing officers." Accord *Tourist Enterprises Corp. "ORBIS,"* CAB Docket 27914, Recommended Decision, dated September 23, 1977, p. 11, n.9, *adopted*, Order 78-5-17, p. 2. See also Attorney General's Opinion dated January 18, 1977, p. 7.

[4] There is no paragraph (c) in section 386.54.

[5] Compare *Rodgers Johnson/J and J Bus Service*, FHWA Docket No. R3-89-02, Order dated May 4, 1989. On December 8, 1988, the Administrator of the Federal Aviation Administration issued a decision in *Western Airlines* (FAA Docket 85-108), *et al.*, which stated, *inter alia*, that under the Administrative Procedure Act "ALJs lack the authority to modify or add to the procedures provided in published agency regulations, even if the modifications or additions do not actually conflict with specific provisions of the agency's rules." (p. 6.) The decision cites no precedent or other authority for that statement, and the uniform precedent at the Civil Aeronautics Board and theretofore at the Department of Transportation had been that the Judge can adopt any procedures for the conduct of the proceeding consistent with statute, the rules, and considerations of due process and agency policy and precedent. Decisions of the FAA administrator are not binding in non-FAA proceedings, and the decision of the Administrator in *Western, et al.*, should be limited to its facts and should not be applied in this proceeding. See *Continental Airlines*, FAA Dockets CP89SO0016, *et al.*, Order dated May 4, 1989, p. 4, n. 6; *Robert O. Noy*, DOT Docket 45863, Orders dated February 15 and March 8, 1989. Moreover, as noted above, the FHWA rules specifically permit the Judge to "take any action and to make all needful rules and regulations to govern the conduct of the proceedings to ensure a fair and impartial hearing, and to avoid delay in the disposition of the proceedings."

Dated: June 13, 1989.

Ronnie A. Yoder,

Administrative Law Judge.

Appendix B

Model Code of Professional Responsibility (ABA 1986)

DR 1–102(A)—A lawyer shall not:

(1) Violate a Disciplinary Rule.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 2–110(A)—In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

DR 2–110(B)—A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

* * * * *

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

DR 3–101(A)—A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

DR 5–101(A)—Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5–102(A)—If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5–101(B) (1) through (4).

DR 6–101(A)—A lawyer shall not:

* * * * *

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

DR 6–102(A)—A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

DR 7–101(A)—A lawyer shall not intentionally:

* * * * *

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7–102(B).

DR 7–102(A)—In his representation of a client, a lawyer shall not:

* * * * *

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

DR 7–106(A)—A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

DR 7–106(C)—In appearing in his professional capacity before a tribunal, a lawyer shall not:

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7–110(B)—In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

DR 8–102(B)—A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

Yankee Trails Inc.

[Docket No. RI89–07 (Motor Carrier Safety—FHWA)]

Order of Chief Administrative Law Judge John J. Mathias

Appearances:

Edwin J. Tobin, Esq., Gentak, Brown & Tobin, 111 Pine Street, Albany, New York 12207, for Yankee Trails, Inc.

Kenneth Dymond, Esq., Counsel for the Regional Director, Federal Highway Administration, Leo W. O'Brien Federal Building, Albany, New York 12207

Pursuant to the Order Appointing Administrative Law Judge herein, dated May 11, 1989, and the Notice of Claim in this matter, dated March 9, 1989, this is the Administrative Law Judge's decision under Rule 386.61 of the Federal Highway Adminisration's rules of practice and procedure, 49 CFR 386.61.

The Notice of Claim in this matter charges respondent, Yankee Trails, Inc. with the following violations: (1) Two instances in which it failed. to report accidents, in violation of 49 CFR 394.9; and (2) Fifteen instances in which it required or permitted a driver to make false entries upon a record of duty status, in violation of 49 CFR 395.8. After careful consideration of all the evidence of record, I find the violations as charged and assess a civil penalty of $1,800.00.

This decision is based upon the entire record of this proceeding, including: The evidentiary record compiled at the hearing; the proposed findings of fact and reply findings submitted by the parties, and the briefs and reply briefs filed by the parties. I have also taken into account my observation of the witnesses who appeared before me and their demeanor. Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters.

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.

* * * * *

The following abbreviations are used in this Decision:

Tr.—Page of the hearing transcript, usually preceded by the name of the witness.
CX—Exhibit of Assistant Regional Counsel, also referred to as Complaint Counsel.
RX—Exhibit of Respondent.
CBr.—Complaint counsel's brief.
CRBr.—Complaint counsel's reply brief.
RBr.—Respondent's brief.
RRBr.—Respondent's reply brief.
CPF—Complaint counsel's proposed finding of fact.
RPF—Respondent's proposed finding of fact.

Findings of Fact

A. The Violations Charged

1. Respondent Yankee Trails, Inc., is a corporation having its principal office located at 3rd Avenue Extension, Rensselaer, New York 12144. (Notice of Claim; Tobin, Tr. 192–193, 196–197, 209).

2. Respondent Yankee Trails, Inc., is a carrier of passengers operating in interstate commerce and subject to the Federal Motor Carriers Safety Regulations. (Admitted, see response to CPF 1).

3. A safety compliance review was conducted of respondent in January 1989 by Safety Investigator Christopher Rotondo. (CX 15; Admitted, response to CPF 14).

4. The safety review revealed that reportable injury accidents occurring on August 4, 1988 and September 14, 1988, involving vehicles owned by respondent, were not reported to the Federal Highway Administration within 30 days of occurrence, as required by 49 CFR 394.9. (CX 5, 6; Tobin, Tr. 208–209; Barbour, Tr. 226).

5. The report of the January 1989 safety compliance review, filed by Investigator Rotondo, also indicated that he discovered 20 instances of drivers being required or permitted to make false entries upon a record of duty status in violation of 49 CFR 395.8. The report also noted that Mr. Rotondo had checked 51 records of duty status in making this finding. (CX 5).

6. The Notice of Claim in this matter cites 15 of such instances as violations by respondent of 49 CFR 395.8. (Notice of Claim, Exhibit B).

7. CX 12, 13, and 15–25 reveal fourteen instances of drivers for respondent who were on charter runs omitting the reporting of commuter runs made on the same day. (Stipulation, Tr. 31–32).

8. CX 14 reveals that a driver for respondent did not record a charter trip on his log. (Rotondo, Tr. 33–34).

9. Respondent does not now contest the fact that the omissions noted in findings 4, 7 and 8 above were violations of the Federal Motor Carriers Safety Regulations. Instead, it urges that mitigating circumstances render unfair the penalty proposed by the Federal Highway Administration. (Respondent's Brief and Reply Brief; Opening Statement, Tr. 10–14).

B. Prior Safety Compliance Review

10. Respondent was the subject of safety audits in 1979, 1980, 1982 and 1984. (CX 1, 2, 3 and 4).

11. The 1979 audit did not reveal any instances of failure to report reportable accidents to the Federal Highway Administration. (CX 1).

12. Counsel for the Federal Highway Administration ("Complaint Counsel") have stipulated that there is little or no evidence of false logs in the 1979 audit. (Tr. 93).

13. A second safety audit was conducted in January 1980, by Investigator Nicholas Walsh. (Exhibit 2).

14. The 1980 audit revealed 3 instances of failing to report accidents. (Exhibit 2, Entry C).

15. The 1980 audit also revealed 5 instances of drivers being required or permitted to make false entries on a daily log. (Exhibit 2, Entry I).

16. Mr. Walsh examined 900 logs during his 1980 audit and found only the 5 instances of drivers being required or permitted to make false entries on a daily log. (CX 2, Entry I; Walsh, Tr. 98).

17. There is no reliable evidence to show that Investigator Walsh found any instances of failure to log commuter runs during his 1980 audit. (Walsh, Tr. 97–98).

18. One case of false entry showed the driver off duty when he was taking a charter to Portland. (Walsh, Tr. 98; CX 26, at p. 2).

19. A third safety audit of respondent was conducted in November 1982, by Safety Inspector Ian Smith. (CX 3).

20. The audit report for the 1982 inspection revealed 4 instances of failure to report an accident (CX 3, Entry D).

21. The audit report for the 1982 audit also shows 3 instances, out of 635 logs examined, of drivers being required or permitted to make false entries upon a daily log. (CX 3, Entry H).

22. A fourth safety audit of respondent was conducted by Safety Inspector Ian Smith in November 1984. (CX 4).

23. The audit report for the 1984 inspection revealed 2 instances of failure to report an accident. (CX 4, Entry J).

24. The audit report for the 1984 audit also shows 2 instances, out of 100 logs checked, of drivers being required or permitted to make false entries upon a daily log. (CX 4, Entry M).

25. Inspector Smith did not find any instance of a driver failing to log a commuter run. If a driver took a commuter and charter run on the same day and didn't log the commuter run he would have cited it. He had all the records available to him and found no such instance. (Smith, Tr. 114).

26. Inspector Smith found that the false logs listed in his audits did not warrant further action at the time. (Smith, Tr. 113).

27. In connection with the four prior safety audits of 1979, 1980, 1982 and 1984, there is no evidence of a finding of instances of drivers failing to log a commuter run when required to do so. (Findings 12, 17, 25, *supra*).

C. Other Factors Considered

28. In his experience, Inspector Smith found occasional errors arising from the application of the 100 mile exemption. (Smith, Tr. 121).

29. In each of the 14 instances of failure to log commuter runs found in the 1989 audit, the drivers would not have been in violation of the hours of service regulation if they had recorded commuter runs. (Gruin, Tr. 136).

30. Mr. Gruin, the federal program manager who assessed the claims in this matter, admitted that there was no proof of failure to log commuter runs in each of the audits prior to the 1989 audit. (Gruin, Tr. 125, 127, 136, 147).

31. One of the things an assessing officer should consider is whether prior violations were similar or dissimilar. (Gruin, Tr. 145).

32. Mr. Gruin considered past compliance to Part 395, which included hours of service violations shown on the logs, in assessing the penalty against respondent. (Gruin, Tr. 188).

33. Mr. Gruin admitted that hours of service violations were dissimilar to the false logs charged in the present case. (Gruin, Tr. 188).

34. Mr. Tobin, president of respondent, testified that he was never advised in the past that drivers who were operating charters and commuter runs were deleting the commuter runs from their logs. (Tobin, Tr. 204).

35. Mr. Gruin admitted that there was some confusion in the industry concerning the application of the 100 mile exemption. (Gruin, Tr. 166–167).

36. Mr. Barry Rubinstein, who assisted Inspector Rotondo in the 1989 audit of

respondent, admitted that there could be some confusion in the industry regarding the application of the 100 mile exemption. (RX 2, at 3, 5).

37. Mr. Rotondo's interviews of two of respondent's drivers and respondent's dispatcher indicates that they were not aware that the commuter runs needed to be recorded in the logs. (CX 6).

38. Despite the fact that respondent had been cited in three prior audits for requiring or permitting drivers to make false entries upon a daily log (see, Findings 15, 21, and 24), respondent did not have any employee reviewing logs for falsifications at the time of the 1989 audit. (CX 6, statement of Margaret Barbour).

39. Respondent has now hired a full time employee to check the logs. (Tobin, Tr. 210; Barbour, Tr. 234).

40. No proof of remedying this problem was offered to the Federal Highway officials at the settlement conference. (Gruin, Tr. 178).

OPINION

Respondent has admitted to the violations charged in this case. (Finding 9). The position of the respondent at the hearing and on brief is that mitigating circumstances render unfair the penalty proposed by the Federal Highway Administration. (Finding 9). I find that there are mitigating factors with regard to the failure to log commuter runs, but can find no mitigating factors in connection with the failure to report accidents or the failure to log a charter run.

In three prior audits, in 1980, 1982 and 1984, the inspector found instances of failure to report accidents. (Findings 14, 20 and 23). Certainly by the time of the 1989 audit, respondent should have been well aware of its responsibility under 49 CFR 394.9. The arguments of respondent as to inadvertent failure to file, and that the accidents were promptly reported to the insurance company and state authorities (RBr., at 8) have no bearing on the separate requirement to file accident reports with the Federal Highway Administration. The further argument that these failures were mere record-keeping violations is already implicitly taken into account by the amount of the maximum penalty which can be applied in such cases. (RX 2).

Accordingly, I find that in view of the repeated violations by respondent of 49 CFR 394.9, through the failure to file reports concerning reportable accidents, that the maximum penalty for the two violations of the type found herein should be applied. Thus, I assess a penalty of $1,000.00 for these two violations--$500.00 for each offense.

In connection with the 15 instances with which respondent was charged concerning the falsification of logs in violation of 49 CFR 395.8 (Findings 6–8), I find mitigating circumstances in connection with the 14 instances involving failure of drivers to log commuter runs. However, there have been no mitigating circumstances shown with respect to the one failure to record a charter run in the driver's log. (Finding 8). Therefore, the maximum penalty of $500.00 should be assessed for the latter violation, in view of respondent's prior record of log falsifications. (Findings 15, 18, 21, and 24).

Insofar as the failure to log commuter runs is concerned, the evidence revealed there was some confusion in the industry, and within respondent, concerning the application of the 100 mile exemption. (Findings 28, 34–37). There is also no evidence that this same type violation had been found of respondent in four prior audits. (Finding 30). The log falsification violations found in prior audits were not shown to be similar to the failure to record commuter run violations found in the 1989 audit. (Findings 30, 32 33). Also, in each of the fourteen instances in which the driver failed to log commuter runs, the drivers would not have been in violation of the hours of service regulation if they had recorded their commuter runs. (Finding 29). Thus, respondent had no reason to falsify the logs.

On the other hand, respondent had been charged with requiring or permitting drivers to make false entries upon their logs in each of three prior audits. (Findings 15, 21, and 24). The 1989 audit also found 20 logs out of 51 logs checked to have been falsified. (Finding 5). Moreover, despite the past history of some violations in this regard, respondent had no employee checking the driver's logs to ensure they were prepared in accordance with the federal highway regulations. (Finding 38).

Even considering the fact that the failure to log commuter runs may be dissimilar to prior log falsification charges, and the other mitigating factors above, the large percentage of log falsifications out of the total logs checked in the 1989 audit (20 out of 51—see Finding 5), coupled with respondent's failure to institute any checks of the logs following the three prior audits where log falsifications were found, indicated the need for at least a minimum penalty for these fourteen violations.[1] I find, therefore, that the fourteen instances of failing to log commuter runs should be lumped together as one violation and the minimum penalty of $300.00 should be assessed therefor.

Accordingly, I find that a total penalty of $1,800.00 should be assessed against respondent—$1,000.00 for the failures to report reportable accidents, $500.00 for the failure to log a charter run, and $300.00 for the failure to log commuter runs.

John J. Mathias,
Chief Administrative Law Judge.

In the Matter of Ronald William Dreyer

[Docket No. R5–89–137]

Order Appointing an Administrative Law Judge

This matter comes before me upon Petition to Review Driver Qualification Proceedings Pursuant to 49 CFR § 386.13 (1989) filed by Mr. Ronald William Dreyer, hereinafter referred to as Petitioner. In his petition Mr. Dreyer also requests an oral hearing pursuant to 49 CFR 386.13(a) (1989) to determine whether or not he was on duty time, as defined in § 395.2(a), at the time of the alleged disqualifying offense.

The Regional Director alleged in a Notice of Disqualification dated August 28, 1989, that in the course of an inspection dated July 1, 1989, it was discovered that Petitioner was not qualified to drive in interstate commerce under 49 CFR 391.15(c)(2)(i) because of a conviction of operating a motor vehicle under the influence of alcohol. Said conviction resulted from Petitioner's plea of guilty on July 28, 1989, to the charge of "DRIVING WHILE UNDER THE INFLUENCE OF AN ALCOHOLIC BEVERAGE". The Regional Director included with his notice copy of all documentary evidence supporting his decision, and gave notice to the Petitioner of his right to petition for review of the disqualification and formal hearing.

Mr. Dreyer's petition for review and hearing is supported by an affidavit, in which he makes allegations concerning the facts surrounding his conviction for the above described charge. Petitioner alleges that at the time he committed the offense he was moving his semi-tractor four blocks from his residence to a truck parking lot, and was not at the time engaged in interstate commerce. He alleges he was not waiting to be dispatched to any other facility or terminal, or inspecting, servicing or conditioning his vehicle.

[1] The institution of a review procedure following the receipt of the Notice of Claim does not indicate that degree of good faith which would warrant total relief from any penalty for these violations.

By Notice dated January 5, 1990, the Regional Director amended his notice of disqualification to state that Petitioner was "not qualified to drive in interstate commerce under 49 CFR 391.15(c)(2)(i) and 49 CFR 383.51(b)(2)(i)". In a letter to Petitioner's attorney dated January 5, 1990, the Regional Director's Counsel encloses copy of the amended notice and alleges that "49 CFR 383.51(b)(2)(i) does not depend upon a showing that a driver was 'on duty' during the commission of the disqualifying offense as does 49 CFR 391.15(c)(2)(i)."

Having reviewed the record and pleadings, I find that there is a substantial issue of fact in dispute in this case. The circumstances surrounding the Petitioner's disqualifying offense are not clear. In view of the above and in fairness to the parties in this case, I have determined that the material factual issue in dispute be submitted to an Administrative Law Judge for additional proceedings. The Judge appointed shall, in addition to the authority cited below, specifically address the matters discussed above and should review the record, oral arguments and briefs prior to making recommendations. Petitioner should be aware that the burden of proof in this proceeding will rest upon him, 49 CFR 386.58(b) and 391.47(e) (1989).

Therefore, it is ordered, That Petitioner's request for a hearing is granted. I hereby appoint an Administrative Law Judge in accordance with 49 CFR 386.54(a) (1989) to be designated by the Chief Administrative Law Judge of the Department of Transportation as the Presiding Judge. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1989).

In Washington, District of Columbia, this 27th day of July, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Alamo Distributing Service, Inc.

[Docket No. R6–89–63]

Order in Response to Motion for Reconsideration

On April 30, 1990, I issued a Final Order in this matter finding the facts to be as alleged and Ordering Respondent to pay an assessed penalty of $11,000. At that time, there was no answer or request from Respondent on the questions of violation or penalty.

On May 25, 1990, I received a letter from Respondent explaining that his business was not such that it could absorb a penalty in this amount. That letter, which I will treat as a Motion for Reconsideration, did not deny the violations but set forth the statement that the company has taken all actions necessary to comply with the regulations.

The violations alleged and proven are not casual violations. Those concerning excess driving hours are serious. Records of duty status and failure to keep adequate driver files are also serious. Nevertheless, although complete forgiveness of the penalty is unwarranted, I am willing to consider the Respondent's current status.

The Regional Director should contact Respondent and schedule an audit within the next thirty (30) days. If the Respondent is in compliance with the regulations, the penalty will be reduced to $5,000. If continuing violations are found, the penalty will remain as assessed in the Order of April 30.

The original Order was partly granted because of an absence of response on the part of the Respondent to the Regional Director's Motion. Likewise, this present Order is granted in part because of an absence of response on the part of the Regional Director to Respondent's letter.

Therefore, it is ordered, That the Order of April 30 is stayed for 30 days from the date of this Order pending a reaudit of Respondent. Should that audit find that Respondent is now in compliance, the penalty assessed shall be reduced to $5,000. Should that audit find continuing violations, the penalty assessed will remain at $11,000.

Dated: July 23, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of R. Brown & Sons, Inc.

[Docket No. R1–90–06 (Formerly R1–90–101)]

Order Appointing an Administrative Law Judge

This matter comes before me upon request for a hearing filed by Respondent. The Petitioner, Regional Director, Office of Motor Carrier Safety, agrees that Respondent has identified material factual issues in dispute.

Petitioner alleged in a Notice of Claim dated May 7, 1990, that Respondent violated several sections of the Federal Motor Carrier Safety Regulations (FMCSRs), 49 CFR 391.51, 395.8 and 396.11.

Respondent contests each of these allegations. Respondent questions whether it was required to maintain a complete driver qualification file, whether it was exempt or whether the failure, if any, to maintain a file was attributable to it. Respondent also denies that it ever required any driver to make a false entry upon a record of duty status and also denies that any necessary repairs to its vehicles were not made. Respondent asserts that it kept such records or certified that no repairs were necessary.

Therefore, it is ordered, That the Respondent's request for a hearing is granted. In accordance with 49 CFR 386.54(a), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: July 19, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of David Salinas

[Docket No. R6–90–20]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, Office of Motor Carrier Safety for a Final Order finding the facts to be as alleged in a Notice of Claim dated March 8, 1990, and assessing a penalty of $500 (not $1,500 as requested incorrectly in the motion).

Respondent has not requested a hearing and settlement negotiations were unsuccessful. Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That the Motion for a Final Order is granted and the Respondent is directed to pay $500 the amount of assessed penalty to the Regional Director within 30 days of the date of this Order.

Dated: July 13, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers

In the Matter of Wisconsin Protein Carriers, Inc.

[Docket No. R5–90–07 (Formerly R5–89–140)]

Final, Order, in Part and Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent for a hearing. This request originates in a Notice of Claim dated October 31, 1989. The Regional Director, Office of Motor Carrier Safety, Region 5, raises no objection to the hearing and asks for the expedited appointment of an Administrative Law Judge.

The Notice of Claim alleges violations of the Federal Motor Carrier Safety Regulations (FMCSRs) in three areas: (1) 49 CFR 387.7(a), failing to have the requisite level of insurance; (2) § 395.8(e), false entries upon a record of duty status; and (3) § 395.8(k)(1), failing to preserve record of duty status.

Respondent has a long involvement with this Agency and its regulations. There can be no excuse based on inadequate knowledge of the requirements of the regulations. There is ample case law to establish that a commercial entity is deemed to have knowledge of regulatory violations if the means were present to detect the violation, see *Riss & Co.* v. *U.S.* 262 F. 2d 245, 250 (8th Cir., 1958) and *U.S.* v. Time-DC. Inc., 381 F. Supp. 730, 739 (W.D. Va., 1974).

Respondent admits to the transportation as alleged in Count 1, but denies knowingly transporting cargo requiring public liability insurance in the amount required. Such knowledge is fundamental to successful business operations. It is simply not enough to say that such a violation was inadvertent. It is my fervent hope that most violations are inadvertent. To assume that any violation is deliberate is callous and in such instance criminal action, not civil, would be warranted. Therefore, I can find no material factual issue here. Respondent transported materials in violation of the requirement. The forfeiture penalty assessed at $1,000 is reasonable.

With respect to the alleged violations in the second count, the falsification violations, Respondent contends that although there are inconsistent records, it denies that the payroll and toll records are necessarily accurate. This is a novel contention in terms of this violation, however, in the absence of any contest by petitioner, I am appointing an Administrative Law Judge to examine these counts, to hear the evidence and to make a judgment concerning the validity of the alleged violations.

With respect to the alleged violations in the third count, failure to preserve a driver's duty record, I am in a quandry as to the underlying claim. Respondent contends that each of these counts involves an exception under the rules and that although not retained, all required records have been prepared. In addition, Respondent contends these same records have been prepared (and apparently disposed of) in exactly the same manner for over 20 years. In that time and through a number of audits, no previous violations of this regulation have been alleged.

These averments stand uncontested by Petitioner. This is different than factual issues in dispute. Either Respondent is within the exception, or not. Either the records are prepared or they are not. If, in fact this has been the mode of operation, and violations have not been discovered or discussed previously, I am giving the Respondent the benefit of the doubt. No *prima facie* violations are established by the material before me. If Petitioner feels that there are substantive violations here, I suggest that it discuss its concerns with Respondent and document its case for any future audits. These counts are dismissed.

Respondent also raises serious concerns with the process of assessment. Obviously, Petitioner feels that serious violations have been discovered. This is a carrier with a fairly long history of involvement with the Agency. I would welcome th Judge's review of the assessment process in this case and any recommendations which would guide Petitioner in the future in applying the statutory requisites to its penalty assessments in the face of Respondent's contentions.

Therefore, it is ordered, That Respondent's request for a Hearing on the matter of transporting material without the proper insurance is denied and Respondent shall pay to the Regional Director the sum of $1,000 within 30 days. Alleged violation counts 18–34, failing to preserve driver's records are dismissed as discussed above.

I am appointing an Administrative Law Judge to hear testimony and consider evidence for counts 2–17, the alleged violations of requiring or permitting a driver to make false entries upon a record of duty status. I am appointing the Judge in accordance with 49 CFR 386.54(a), to be designated by the Chief Administrative Law Judge of the Department of Transportation, to be the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties. specified in 49 CFR 386.54(b).

Dated: July 10, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Edgar J. Anderson

[Docket No. R6–90–225]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, Office of Motor Carrier Safety for a Final Order finding the facts to be as alleged in a Notice of Claim dated February 6, 1990, and assessing a penalty of $1,500.

Respondent has not requested a hearing and settlement negotiations were unsuccessful. Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That the Motion for a Final Order is granted and the Respondent is directed to pay $1,500 the amount of assessed penalty to the Regional Director within 30 days of the date of this Order.

Dated: July 10, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Kenworth of Tennessee, Inc.

[Docket No. 89–TN–031–SA]

Final Order

This matter comes before me upon request for a Hearing by Respondent and Motion for Final Order by Petitioner. Petitioner (Regional Director, Office of Motor Carrier Safety, Region 4) has alleged 10 violations of the Federal Motor Carrier Safety Regulations (FMCSRs). These alleged violations were discovered during a Compliance Review of Respondent.

The violations involve 49 CFR 391.51(c) and (d) and 395.8(i). Respondent admits to certain of the violations but denies others on the basis of a jurisdictional challenge. Respondent argues that some of its drivers are not primarily drivers, are intermittent drivers only, or are not regularly employed. Accordingly, Respondent contends they are not covered by the applicable regulation allegedly violated.

Respondent also contests Agency jurisdiction under the 100 air-mile radius exemption in § 395.8(l) and the imposition of a maximum penalty of $500 for each count. Petitioner has sought to clarify its authority in these very areas through widely disseminated interpretations. There appear to be no factual issues left in dispute. Jurisdictional challenges are not countenanced in the regulations governing these hearings and there is no reason for me to appoint an Administrative Law Judge. Respondent's recourse is in the Courts.

With respect to the imposition of the penalty, I have stated on many occasions that the Regional Director is in the best position to make the original assessment. Only where the circumstances warrant will I intervene to change such an assessment. Respondent has not made a clear

showing that the number of counts is unjustified; Respondent has not convinced the Regional Director that willing compliance will be implemented in the future; Respondent has not substantiated its allegations that it is being treated differently than similar organizations in this Region.

Therefore, it is ordered, That Respondent's Request for a Hearing is denied and petitioner's Motion for a Final Order is granted. Respondent shall pay the sum of $5,000 to the Regional Director within 30 days of the date of this Order.

Dated: July 5, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Tonawanda Tank Transport Service, Inc.

[Docket No. RI–88–130]

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 1, for a Final Order. In its original response to the Notice of Claim, Respondent requested an informal settlement conference and reserved its right to request an administrative hearing. Such a request has not been perfected, and in any case would not be granted as Respondent admits the violations. Respondent has requested mitigation and we will address that point herein. Mitigation alone is not a material factual issue in dispute subject to hearing.

A Notice of Claim issued in September, 1988 following an audit in July, 1988 alleged 18 violations of the Federal Motor Carrier Safety Regulations (requiring or permitting false logs). A penalty assessment of $13,500 was levied. The parties have been unable to resolve this matter informally.

Between June, 1985 and July, 1988 Respondent was the subject of three audits. The audit previous to the one at issue here resulted in a penalty settlement of $9,000 for alleged hours of service and false records of duty status violations.

In its reply to the Notice of Claim, Respondent notes these facts. Respondent then goes on to discuss in detail the many actions taken to stem the tide, including cautioning drivers of the consequences of continuing violations, computerization of log monitoring, hiring of new personnel and maintenance of a strong safety training program. Its brief states: "* * * has simply spent too much time and money in attempting to bring its company into full compliance to risk substantial fines and penalties in the future due to a lack of effort of its employees."

Respondent notes that time was compressed between the settlement for the violations in the 1987 audit and the follow-up audit which resulted in the documentation of these violations. Respondent contends it would have been "more equitable appropriate" to conduct a follow-up audit after the computer system became fully operational.

Petitioner responds to these arguments by applauding any efforts to improve safety, but dismisses the efficacy of Respondent's implemented plans. Petitioner states that it is unsure of the success of such program even if in fact it has been implemented.

The record does' not indicate that the program is now in place, there is no discussion of the success or failure of the program if it is in place, nor is there any indication of the likelihood of a new audit soon.

The violations have been admitted. I would like to state for the record that even had Respondent contested the allegations on the basis of not knowing or requiring the violations, there is ample case law to establish that a corporate entity is deemed to have knowledge of regulatory violations if the means were present to detect the violations, see *Riss & Co.* v. *U.S.*, 262 F.2d 245, 250 (8th Cir., 1958) and *U.S.* v. *Time-DC, Inc.*, 381 F. Supp. 730, 739 (W.D. Va., 1974). I make these observations by way of stating that in the case of Respondent, its present averments should put any such arguments to rest in the future as regards its circumstances.

Judge Kolko, in a recent opinion in the matter of *Drotzmann. Inc.*, Docket No. R10–89–11, indicated that an effective safety program may have an effect on certain types of alleged violations. The effectiveness of such a program is indicated by the presence or absence of continuing violations. Mitigation could accordingly be given where an established program is showing results. I have no such information before me. However, the age of this case and these violations, the upgrading of programs to detect these violations and eliminate them and the Respondent's contention that the passage of so little time between audits worked to its disadvantage, warrant a slight reduction in the assessment.

At the same time, it appears that sufficient time has elapsed for a follow-up audit to ascertain the efficacy of the proferred improvements. The Regional Director should work with the Respondent to select an appropriate time for such an audit. If violations are continuing, then a clear pattern case will have been established. Further action will be predicated on Respondent's good faith implementation and continuation of a program to eliminate these violations.

Therefore, it is ordered, That Petitioner's Motion for A Final Order is granted. However, for the reasons discussed above, the penalty is reduced to $10,000. Respondent shall pay this amount to the Regional Director within 30 days of the date of this Order.

Dated: July 5, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Corey Brothers, Inc.

[Docket No. R3–90–05 (Formerly R3–90–056)]

Order Appointing Administrative Law Judge

This matter comes before me upon request of the Respondent (Corey Brothers, Inc.) for a hearing and opposition thereto and request for a Final Order by Petitioner (Regional Director, Office of Motor Carrier Safety, Region 3). The request for a hearing is occasioned by receipt of a Notice of Claim, dated December 18, 1989, alleging 35 documented violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Petitioner seeks the imposition of a civil penalty in the amount of $18,200.

Respondent replied to the Notice of Claim on January 15, 1990. That reply addressed each claim, denied its allegations and added specific notations, where it deemed appropriate. The reply also noted that a key staff member was apparently incapacitated at the time of the audit, which accounts for some missing documentation. Certain assertions are of little consequence in this proceeding. The fact that most of the transportation provided is at the local level does not affect the jurisdiction of this agency. Respondent does transport in interstate commerce and is subject to the FMCSRs.

Petitioner opposes the request for a hearing and states that Respondent's request contains only general denials. Such is not the case. Statements such as Respondent's answer to Claim 3, to wit, "Corey Brothers, Inc., denies all of the allegations contained in this paragraph and asserts that it maintained the required records in the files * * *", seem to indicate the presence of a fairly specific factual issue in dispute. Petitioner seeks to support its claim by referencing the documentary evidence in appendix B. Without a specific recitation of that evidence, I cannot

agree with the Petitioner. I will note that Respondent contests that allegation that it did not report an accident by stating that no accident occurred. The record before me does seem to provide evidence of a truck, in an accident, with a report, insurance claim and photos as verification. However, being of a relatively open minded disposition, I am willing to allow respondent to explain this discrepancy to an Administrative Law Judge. Respondent also seizes on an apparent typographical error in one count, involving a trip from Charleston, West Virginia, to Bland, WV, and claims no interstate transport was involved. Possibly there is a Bland in both West Virginia and Virginia. Respondent will have to convince the Judge of this.

Counsel for the Petitioner should stand advised that I will not make his argument for him. In the future, if Counsel believes that the documents substantiate an argument, these documents shall be properly referenced and described in the pleading. Counsel for the Respondent should stand advised that this Agency places the highest priority on highway safety. The FMCSRs have been promulgated in furtherance of Congressional objectives to that end. The allegations levied here are serious. Corey Brothers protests its innocence of any violation. Corey Brothers seeks an opportunity to put forth its arguments. I shall grant Corey Brothers that opportunity. However, Respondent should be counseled that I will not countenance frivolous pleadings where highway safety is at stake. The Judge appointed by this Order is hereby requested to examine each of the arguments in this matter and to determine if any pleadings are, in fact, frivolous, and I would welcome any recommendations on further action.

Therefore, it is ordered, That I hereby appoint, in accordance with 49 CFR 386.54(a), an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: June 22, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Drotzmann, Inc.

[Docket No. R10–89–11 (Formerly R10–89–39)]

Final Order

Upon request of the Respondent this matter was assigned to an Administrative Law Judge for hearing. That hearing took place on April 5, 1990. At the close of the evidentiary and argumentation portion of the hearing, the Judge found and concluded that the agency had made out a prima facie case, that it (the agency) had carried its burden of proof with regard to the fact that the violations had occurred, and that the respondent had permitted the violations to occur.

Of particular interest to me was the Judge's discussion on the establishment of a pattern of violations and the interrelationship between a safety program and proof of pattern. The Judge indicated that *an effective safety program* may have an effect on pattern arguments. In this matter, however, although the Judge would not call the Respondent's safety program at the time of the violations a sham, he did state that the program had no teeth in it.

The effectiveness, or lack thereof, was demonstrated by the evidence of continuing violations. The Judge concluded that it was this continuation of violations which establish a pattern.

The Judge then went on to recommend a reduction of the penalty. This recommendation relies on the apparent beginning of effectiveness of the respondent's safety program. The Judge found evidence of actual termination of drivers, whom he characterized as recidivist violators who just won't listen to letters or warnings.

The Judge articulated the reasoning underlying his recommendation as follows:

> I'm doing so in the hope * * * that a future safety audit by the Highway Administration will indicate that the teeth in the enforcement program have finally had some effect upon the pattern of violations, because otherwise, chances are we will be back in another proceeding at some point, and at that point, the respondent will have had its one bite at the apple, because I can't imagine either myself or some future judge reducing the penalty one more time if the program is not working.

The Judge also underscored the establishment of a pattern in noting that when a company has half of its drivers violating the law, this goes beyond the lone ranger theory, and the ability of a company to control a driver. In the Judge's words, "These are not individual driver violations * * this is a company violation".

The Agency has appealed the Judge's reduction of the penalty and means of payment set forth. In its Appeal Memorandum, the Agency contests the Judge' s recommendation for a lower penalty. In so doing, many prior statements of mine are cited. These statements all reference the wide latitude given to the Regional Director in establishing the amount of a civil penalty. I will underscore those statements here; nevertheless, I have also said that the Administrative Law Judge is free to make a recommendation on the amount of the penalty based on the facts presented at the hearing, and I will accept or modify that recommendation. Reference to the *N. L. Industries. Inc.,* v. *FAA* case is not dispositive here. Any final decision on penalties is resident in my office. If I make no modification in a recommended penalty within the 45 day period it becomes my penalty decision. If I do modify the penalty, that remains within my authority. The delegated authority of the Regional Director never supercedes that authority.

At this point, I see no reason to withdraw my offer to the Administrative Law Judges to recommend penalty terms.

Having said this, I partly accept Judge Kolko's recommendation in reducing the amount of the penalty to provide an incentive to compliance. I do not agree with that part of his recommendation stretching out the payments for six months. In view of the sharp reduction in the amount of the penalty, the agency is entitled to receive the amount due as expeditiously as possible.

Therefore, it is ordered, That the decision of Judge Kolko is accepted and affirmed, except as modified above. In addition, in keeping with the spirit of the Judge's ruling, the Regional Director is directed to reaudit Respondent within 6 months. If the pattern of violations continues, then the Agency is directed to prepare an action sufficient to compel compliance. Payment of the assessed civil penalty is to be made to the Regional Director within 30 days of the date of this Order.

Dated: June 20, 1990.

Attachment

(Transcript Pages from Judge Kolko's Hearing).

Richard P. Landis,

Associate Administrator for Motor Carriers.

> There's testimony today that they hired someone who wasn't doing her job, and yet Mr. Kelley nor Mr. Drotzmann was supervising closely enough to figure out that that was the case.
>
> Judge Kolko: Okay. That concludes the evidentiary and argument portion of this, and the case is ripe for decision, which is as follows:
>
> I find and conclude that the government has not only made out a *prima facie* case, it has carried its burden of proof with regard to the fact that the violations occurred—that actually was established before this proceeding started this morning—and that the respondent permitted those driver violations to occur.
>
> How did it permit those to occur? I think we had ample testimony from the government

witnesses, principally Ms. Phillips and Mr. Arnold, with regard to what a better safety program would be, one that actually had teeth in it, and from all of the government's witnesses with regard to the lack of effectiveness of merely jumping up and down and screaming at your drivers or writing them letters, that an effective safety program, even coupled with a training program, has to go past stern looks and words, and that this was a safety program that had no teeth in it.

Whether or not it was a sham, I don't need to find. It may well have been evidence introduced in good faith by the respondent, but nevertheless, by virtue of the fact that after repeated visits from the government—nevertheless, it was a safety program that really had no clout to it, and that clout was—that absence of clout was reflected by the fact that there were continuing violations, continuing violations which, up to the point of this notice of claim, do establish a pattern of violations, as alleged and as I find proven by the government. And those were the matters which the Associate Administrator set this proceeding for hearing to determine and which I so find.

The bottom line, then, comes, what is the sanction to be effected? Ordinarily, given the overwhelming amount of proof which the government has introduced, I would go along with the fine, as suggested in the very persuasive document of Ms. Taylor—I think it's Exhibit P–13; it is Exhibit P–13—in which, for very cogent reasons, she recommended a fine of $15,000, but she also indicated in her examination that that was based upon information which was up to the then most current audit, and not based upon information that—of a more recent nature.

More recently, it appears, and unbeknownst, apparently, to the government, there have been, finally, some actions taken by the respondent which indicate that it is starting to do the very thing that the government witnesses suggest, which is, if you want to run a responsible program, one that makes an impression on the other employees, you start to terminate people who are recidivist violators and just won't listen to your letters and warnings.

And in Exhibit R–1, there are examples of six such terminations, which occurred in December of 1989. Let me ask Mr. Kelley a question, who's still under oath, even though he's not on the witness stand right now. Have any of those drivers been rehired?

Mr. Kelley: By me? No one.

Judge Kolko: By Drotzmann?

Mr. Kelley: No.

Judge Kolko: Very well. So, as I say, ordinarily, up to the date of the notice of claim, a $15,000 fine would be eminently in order, given that a pattern of violation has occurred, and the Highway Administration was quite understandably frustrated in the fact that it was escalating the fines, and nothing was happening.

It now appears that something is finally starting to happen. We don't know all the details yet, because pursuant to its policy of not auditing a respondent while a previous case is ongoing, a safety audit has not been conducted, but we do have indications that six terminations occurred in one month when, during the prior period of time involved in this and the previous notices of claim that established a pattern of violation, there was no termination.

And so for that reason, and that reason alone, I'm going to reduce the amount of the penalty by $1,000 for each of those drivers terminated and establish a penalty of $9,000, since R–1 indicates six terminations. I'm doing so in the hope, Mr. Kelley, that a future safety audit by the Highway Administration will indicate that the teeth in the enforcement program have finally had some effect upon the pattern of violations, because otherwise, chances are we will be back in another proceeding at some point, and at that point, the respondent will have had its one bite at the apple, because I can't imagine either myself or some future judge reducing the penalty one more time if the program is not working.

I am impressed that it may be working based upon the fact that six—which is a very impressive number of terminations, given that there were zero before, and so for that reason, I reduce the penalty.

Just so that you understand, by the way, in response to the argument which you have—the respondent has stoutly maintained, that it really can't control its drivers, when you have half your drivers violating the law, this goes beyond the lone ranger theory of violating the law. These are not individual driver violations, gentlemen; this is a company violation. And as I say, I may be going out on a limb, reducing this penalty, but I am impressed by the fact that the very recommendations which have been made to you off the record and this morning on the record by the Highway Administrations people are finally starting to be implemented, and solely for that reason, because otherwise, I'm very impressed with the Highway Administration's case and very unimpressed with your defense—solely for that reason am I reducing the penalty by $1,000 for each of those terminations.

The result is that each side has a right of appeal, because nobody has won fully, and I might as well read that to you, as I indicated earlier I would.

"The decision of the Administrative Law Judge," which I have just issued, "becomes the final decision of the Associate Administrator 45 days after it is served, unless a petition or motion for review is filed under 49 CFR 386.62. The decision shall be served on all parties and the Associate Administrator." Since it's an oral decision you've just been served, the Associate Administrator will be notified by virtue of the transcript arriving in the docket section.

There are further regulations which deal with the petition for review. I won't read them into the record. I just cited it to you. It's 49 386.62. So if you wish to appeal to the Associate Administrator, you have 45 days to do so, and what you have to do is contained in 386.62.

Is there anything else to occupy us?

Mr. Hanf: Just one point of clarification, Your Honor. When would that penalty be due?

Judge Kolko: That penalty would be due in 30 days, unless the respondent and the government wish to work out a payment schedule, which I have done in other enforcement proceedings for other agencies. It's a payment schedule that's still meant to have some teeth in it, and I would think that six payments of $1,500 would be the most stretching out that I would countenance.

Mr. Hanf: I guess I didn't understand, Your Honor. Are you asking us to work it out, or are you saying that that's an acceptable payment schedule?

Judge Kolko: Well, that's acceptable to me, if you—

Mr. Hanf: It's—

Judge Kolko:—if the respondent wishes to do that. What other agencies do is enter into a promissory note arrangement with the respondent, with the schedule indicated in that note.

Mr. Hanf: Your Honor, our position has to be that you reduce the fine $6,000, as you viewed, appropriately, but that that reduction alone is enough to satisfy Drotzmann, Incorporated and that since—given the fact they have this large line of credit, and they are a large corporation, I mean, relatively speaking—over $3 million a year—that the $9,000 be due in 30 days.

Judge Kolko: Well, I'll tell you why sometimes—I hear what you're saying. I don't necessarily disagree, Mr. Hanf. There are two theories of this. One is which—that writing any large several-digit check hurts and has the required effect upon bringing the mind to bear on the part of the person who's writing that check as to why he's writing it. On the other hand, having to write a check six times, albeit for a smaller amount, has a similar effect. Each time Mr. Leonard sits down and writes that check, he's going to remember why he's writing it, and you could argue it either way as to which has the greater punitive/remedial effect, both, both of which I'm charged to implement. So while I hear what you're saying and don't necessarily disagree, I would like the respondent to be continuously reminded for six more months as to just what has happened, and I think writing that check will do it.

Mr. Hanf: Is it possible to get interest on that money, then, Your Honor?

Judge Kolko: I don't think it works that way. I think, since it all goes to the General Treasury anyway—I don't recall—

Mr. Hanf: Actually, it goes in the Highways Trust Fund.

Judge Kolko: It does go to the Highway Trust Fund? Okay. Well, we certainly could use it.

But, in any event, I'm basically doing this because I want the respondent to—the same as you do, to feel the bite. We just have different avenues of coming at it, and I don't want them to just write a check and walk away from this proceeding.

Anything else to come before us?

Mr. Hanf: Thank you, Your Honor.

Judge Kolko: All right. We're adjourned. Thank you all. You all did a fine job, and, Mr. Leonard, for somebody who's not a lawyer, you might want to consider going to law school; you did pretty good.

Mr. Leonard: Thank you.

(Whereupon, at 2:55 p.m., the hearing in the above entitled matter was closed.)

In the Matter of Schaffner Mfg. & Sales Corp.

Docket No. R1–90–083

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 1 for a Final Order finding the violations to be as alleged and imposing a civil penalty in the amount of $9,500. Respondent has answered with a plea for reduction in the amount of the penalty.

There are several salient points presented by this case. Respondent is a small manufacturer of kitchen cabinets who delivers its own products. Trucking is not its primary operation. The trucking part of the business is ancillary to its operations, however, it appears to provide an essential component of its profitability.

In many previous decisions, I have stated that smallness of size is no excuse for violation of the safety regulations. That continues to be my position. At the same time, however, it must be noted that some distinction needs to be made between those in the transportation services area and those in the manufacturing area, with a distribution sideline. The expanded coverage of the law and regulations is bringing new operators within the scope of coverage. The addition of new investigators means that identification of trucking operations is now more proficient and the possibility of multiple visits to those rated less than satisfactory has increased.

How should the programmatic directions laid out in the guidelines reflect these considerations? Firstly, it is absolutely essential that a degree of decorum be instilled in the process. I recognize that small operations are often pressed for time and personnel. Government requirements for recordkeeping are onerous and seemingly unimportant when viewed in the context of a balance sheet or payroll. Nonetheless, there is no reason to subject the Government's auditors to personal or professional abuse. This record reflects some degree of ridicule, which can easily be translated into noncooperation.

Secondly, the Government has an obligation to schedule its reviews of these smaller operations in such a manner as to ease the scheduling burden. Great care must be taken to impart a sense of understanding, both of the role the regulations provide in enhancing safety and the role we play in ensuring compliance with the regulations.

Respondent has been visited several times in the past 15 years. Enough times, in fact, to know the requirements of the regulations and their importance. The record indicates that on one visit, our investigator was told something to the effect of "give me 6 months and I will be in compliance." Well, more than 6 months has passed since that visit and the Respondent is still in disarray.

Respondent asserts that it has a small, reliable driver force and that it seeks no immunity from Government safety regulations. What the Respondent now needs is to incorporate recordkeeping into its business transaction records. All businesses need to maintain records. The addition of safety records for these few drivers cannot be considered unduly burdensome.

The record indicates that the violations did occur. The Regional Director has already reviewed the record and reduced the original assessment. No hearing is warranted on the issue of penalty alone.

Therefore, it is ordered, That Respondent's request for a hearing is denied. Petitioner's request for a Final Order is granted. I am imposing a civil penalty in the amount of $9,500 as requested. However, I am directing the Regional Director to revisit Schaffner Mfg. & Sales Corp. in 30 days. I expect that by this visit, a proper recordkeeping system will be in place. I am also directing that Schaffner be revisited within 1 year from this Order. If the records are in place and properly maintained, this penalty will be dismissed. However, if the records are not in order, then the full amount is due. In addition, should Respondent remain in noncompliance at that 1 year review, the Regional Director shall institute such action as to compel the cessation of violations.

Dated: June 12, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of D & N Bus Service, Inc.

[Docket No. R3–90–107]

Final Order

This matter comes before me upon request of the Respondent for an oral hearing and the Regional Director's (Petitioner) opposition thereto and request for a Final Order. These motions originate in a Notice of Claim dated February 20, 1990, alleging 19 violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and assessing a penalty of $300 for each alleged violation for a total of $5,700.

Respondent, through Counsel, has replied in a somewhat innovative, if not legally correct manner. Respondent contests the jurisdiction of the Federal Highway Administration (FHWA) in this matter on the grounds that it is, by virtue of a contract with the State of Delaware, an "arm of the State of Delaware." Although Respondent may be contractually responsible to the State of Delaware, the Congress has empowered the FHWA to enforce the FMCSRs, which apply to the transportation of material and passengers, as specified by statute, in interstate commerce. An administrative hearing is not the proper forum for the explication of unsound, even though innovative legal theories.

I fail to understand the thrust of Respondent's defense. The transportation of passengers is a sacred duty; should that transportation involve schoolchildren the burden is of even greater weight. It is of no consequence to this Agency whether Respondent complied with its contractual requirements to the State of Delaware.

With respect to the charge that this action has been the result of selective enforcement, discriminatory enforcement or othervise prejudicial enforcement, the record establishes that such charges are pure bunkum. The Affidavit of Mr. Harlan Tull, the State Transportation Supervisor for the Delaware State Board of Education states explicitly that Respondent is not an agency or department of the State of Delaware, nor is it an agent of the Board. Respondent is properly characterized as a contract carrier of passengers.

The Affidavit of Mr. Walter H. Johnson, Jr., establishes that there have been other enforcement actions against carriers transporting school children in interstate commerce pursuant to contracts with State and local governments.

These arguments of Respondent do not constitute material factual issues in dispute. It is not enough to say that the facts of each individual violation will be addressed at hearing. The regulations are clear and specific: to get to the hearing stage, all material factual issues in dispute must be identified. 'Respondent's pleading has not met this basic test.

On the other hand, the record before me substantiates that there was transportation in interstate commerce and that the alleged violations did take place.

Therefore, it is ordered, that Respondent's request for a hearing is denied and Petitioner's request for a Final Order is granted. Respondent is directed to pay the amount of $5,700 to

the Regional Director within 30 days of the date of this Order. In addition, Respondent should note that the Notice of Claim also provides a Notice of Abatement. The Regional Director is hereby directed to ascertain immediately if the Notice of Abatement has been followed. If Respondent has not complied with the Notice of Abatement, further action to compel compliance should be brought immediately.

Dated: June 12, 1990.

Richard P. Landis

Associate Administrator for Motor Carriers.

In the Matter of Johnny D. Secrest Driver Qualification

[Docket No. 89–03D]

Order Appointing Administrative Law Judge

This matter comes before me upon petition filed by Johnny Dean Secrest, petitioner, requesting review of the Determination of Qualification issued by the Acting Director, Office of Motor Carrier Standards, Federal Highway Administration (FHWA). In support of his request, petitioner submits for our consideration additional information and arguments; and expresses his belief that the Federal Motor Carrier Safety Regulations (FMCSRs) should be changed or revised to permit the interstate operation of commercial motor vehicles by low vision and monocular drivers. Such a change in the regulations is not to be considered as part of this proceeding. Rather, petitioner's physical qualifications to operate a commercial motor vehicle is the matter at hand. Petitioner should note that the FHWA will be considering changes to its regulations, including issues relating to low vision and monocular drivers.

Having carefully reviewed the record, I find that there is a material issue in dispute in this case. The issue is whether petitioner use of an Ocutech Lens System will correct his vision to at least 20/40 in each eye, and whether such a lens system constitutes "corrective lenses" within the meaning of 49 CFR 391.41(b)(10) and 392.9a (1989). Although the second part of the issue appears to be more of a legal issue than one of fact, it is invested with factual characteristics.

It must be determined whether the Ocutech Lens System is something different from glasses or contact lenses and thus, not contemplated in the cited regulation, or whether it is merely a sophisticated or technologically advanced set of glasses. This is a matter of factual proof, including the possible review of technical or medical evidence. The record is replete with reference by all parties to different lens systems—Ocutech, bioptic, telescope types—but there is a lack of substantial information on these systems. Even the type of lens to be used by petitioner was in question. The Acting Director determined that bioptic telescopes are not corrective lenses authorized by the FMCSRs. Petitioner argues that his doctor examined his vision using a Ocutech lens system, which, he alleges, is not a bioptic or telescope type lens.

In view of the above and in fairness to the parties in this case, I have determined that the material factual issue in dispute be submitted to an Administrative Law Judge for additional proceedings. The Judge appointed shall, in addition to the authority cited below, specifically address the matters discussed above and should review the record, oral arguments and briefs prior to making recommendations. Petitioner should be aware that the burden of proof in this proceeding will rest upon him, 49 CFR 391.49(e) (1989).

Therefore, it is ordered, that I hereby appoint an Administrative Law Judge in accordance with 49 CFR 386.54(a) (1989) to be designated by the Chief Administrative Law Judge of the Department of Transportation as the Presiding Judge. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1989).

Dated: May 31, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of A. Weinfeld & Sons, Inc.

Order Denying Petition for Reconsideration and Stay

This matter comes before me upon Petition of Respondent for Reconsideration of a Final Order and Motion for Stay of such Order. The Final Order, issued on March 1, 1990, discussed in detail the reasons for not granting a hearing or other relief as requested by Respondent. This matter involves documented allegations of violations of the regulations. The Respondent has had similar violations in the past. Therefore, this is not a case of first impression for this Respondent.

Respondent's present motion for reconsideration breaks no new ground. Once again, Respondent would like to shift the burden for noncompliance onto an allegedly recalcitrant union. This is not a material factual issue in dispute. For whatever reason, Respondent has violated the regulations. Collective bargaining problems, while they may be real problems for an employer, do not override the safety of the public. The Federal Motor Carrier Safety Regulations are intended to protect the safety of the public.

Petitioner opposes the Motion. Its argument is based on the absence of material factual issues in dispute and the fact that the Respondent was informed in 1988 of the need to establish these files. Yet some 18 months later, Respondent still relies on the excuse that it has labor difficulties.

Although these arguments may be considered in mitigation of a proposed penalty, I find that no further mitigation is warranted. Congress has directed this Agency to secure compliance. In the case of reluctant, recalcitrant or unconvinced carriers, the penalty authority has been increased and strengthened.

With respect to the request for a Stay in the Final Order, I find that no compelling legal or factual argument has been advanced by Respondent. There will be no irreparable harm to Respondent through the imposition of this penalty, there appears to be little chance of success on the merits in a legal action against this Agency, should Respondent wish to pursue that course of action, and whatever public interest considerations are involved must lie in favor of public safety. In this case, the Respondent has been in violation for far too long. The public interest will best be served by the timely resolution of this matter. Respondent has not shown that the Agency has departed in any way from established practice.

Therefore, it is ordered, That Respondent's Motion for Reconsideration and Stay is denied. The terms of the Final Order are to be complied with as written.

Dated: May 7, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of D & D Transportation Co., Inc.

[Docket No. RI–89–276]

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 1, for a Final Order finding the facts to be as alleged in a Notice of Claim dated November 15, 1989, and assessing a penalty of $4,800.

The Notice of Claim alleges 10 instances of failing to maintain a complete driver qualification file (49 CFR 391.51) and 6 instances of failing to require a driver to prepare a vehicle inspection report (49 CFR 396.11). Each of the documented instances involves

separate drivers. The Notice of Claim follows an Enforcement Report/ Compliance Review and a Safety Compliance Review. Little appears to have been done in the way of corrective action and the carrier is rated unsatisfactory.

Respondent has not requested a hearing and appears only casually to dispute the allegations in contending that the drivers lease their equipment to Respondent on a trip lease basis and that they are regularly employed by other motor carriers. I do not find Respondent's answers to be either responsive or dispositive of this action.

The record supports the allegations and I am granting the Motion for Final Order.

Therefore, it is Ordered, That the Motion for a Final Order is granted and Respondent is directed to cease operating in violation of the regulations immediately and to pay to the Regional Director the sum of $4,800 within 30 days of the date of this Order.

Dated: May 7, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Abbey Metal Corporation

[Docket No. R1-90-04 (Formerly R1-90-032)]

Final Order, in Part, and Order Appointing Administrative Law Judge, in Part

This matter comes before me upon Motion for a Final Order filed by the Regional Director, Office of Motor Carrier Safety, Region 1 (Petitioner), and Request for Hearing filed by Respondent. This matter arises out of allegations in a Notice of Claim, dated February 9, 1990, alleging 12 violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

The alleged violations include three cases of using a driver physically unqualified under the regulations, three violations of failing to maintain driver qualification files, and 6 violations of failing to require drivers to prepare vehicle inspection reports.

Respondent employs one driver and makes only occasional trips out of state. Informal discussions resulted in no conclusion to this matter. Respondent contends that its driver, a long-term employee of the company is due to retire in September, 1990, that he is examined on a regular basis by a doctor and that inspection reports have been found.

Having reviewed the record before me, I find that the facts support Petitioner's request for a Final Order with respect to the usage of an unqualified driver in Interstate commerce. The driver acknowledges that he has not had "a DOT physical" and that he is an insulin controlled diabetic. Three trips are documented.

With respect to 'the allegations of failing to maintain a qualification file for each driver used or employed, there is no argument that such file is not kept. However, as there is only one driver, I find that Petitioner's request for a Final Order on this count is supported by the record, but the penalty is reduced to one count—for a file not kept at the time of the audit.

The allegations of failing to require a driver to prepare a vehicle inspection report appear to be a matter of factual dispute. Respondent contends misunderstanding as to what was meant by vehicle inspection report at the time of the audit. The record now contains copies of drivers' daily vehicle condition reports. Petitioner stands prepared tocontest the authenticity of these documents.

Therefore, it is ordered, That the Motion for a Final Order is granted as follows: with respect to the three alleged violations of using a physically unqualified driver, $300 for each (total $900); with respect to the three alleged violations of failing to maintain driver qualification files, $300 for one violation (total $300). Respondent is directed to establish files for each driver now and in the future and to cease using an unqualified driver in Interstate commerce. Respondent is further directed to pay to the Regional Director the sum of $1,200 as discussed above within 30 days of the date of this Order.

To determine the remaining 6 alleged violations, I hereby appoint, in accordance with 49 CFR 386.54(a), an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: April 30, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Rig Runner Express, Inc.

[Docket No. R6-89-11]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, Office of Motor Carrier Safety for a Final Order finding the facts to be as alleged in a Notice of Claim dated February 13, 1989 [not September 5, 1989, as referenced in Motion for Final Order] and assessing a penalty of $10,500.

Respondent has not requested a hearing and settlement negotiations were unsuccessful. Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That the Motion for a Final Order is granted and the Respondent is directed to pay $10,500 the amount of assessed penalty to the Regional Director within 30 days of the date of this Order.

Dated: April 30, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Alamo Distributing Service, Inc.

[Docket No. R6-89-63]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, Office of Motor Carrier Safety for a Final Order finding the facts to be as alleged in a Notice of Claim dated September 5, 1989, and assessing a penalty of $11,000.

Respondent has not requested a hearing and settlement negotiations were unsuccessful. Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That the Motion for a Final Order is granted and the Respondent is directed to pay $11,000 the amount of assessed penalty to the Regional Director within 30 days of the date of this Order.

Dated: April 30, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Uncle Bo's Equipment Company

[Docket No. R6-89-15]

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 6, for a Final Order finding the facts to be as alleged in a Notice of Claim dated April 7, 1989, and assessing a penalty of $4,500.

The Notice of Claim issued on April 7, 1989, alleges violations of the Financial Responsibility Regulations. Three

violations alleging operations without the requisite level of insurance and failure to have an MCS–90 indicating the proper levels of insurance were discovered during a Safety Audit conducted on November 21, 1988. All three trips were entirely within Houston, Texas.

Respondent has not denied the violations and has not requested a hearing. Settlement negotiations were unsuccessful. Respondent indicates that it did not have the required insurance as a result of the economic climate surrounding this business. Insurance of $500,000 rather than the required $750,000 has been maintained.

No evidence of an MCS–90 is in the record. No evidence as to Respondent's current compliance is in the record. The record does substantiate the allegations and Petitioner is entitled to a Final Order. Nevertheless, this does not satisfy the requirements of the regulations.

Therefore, it is ordered, That Petitioner's request for a Final Order is granted. Respondent is directed to pay the sum of $4,500 to the Regional Director within 30 days of the date of this Order, unless it can produce an MCS–90 for the required amount of insurance. If the MCS–90 is produced, this penalty will be reduced to $1,500. In the absence of an MCS–90 under the terms of this Order, Respondent is directed to cease operating in violation of these regulations. The Director will take whatever actions are necessary to ensure compliance herewith.

Dated: April 30, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of James David Caver dba J. D. Caver & Company

[Docket No. R6–89–32]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, Office of Motor Carrier Safety for a Final Order finding the facts to be as alleged in a Notice of Claim dated June 1, 1989, and assessing a penalty of $6,000.

Respondent has not requested a hearing and settlement negotiations were unsuccessful. Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That the Motion for a Final Order is granted and the Respondent is directed to pay $6,000 the amount of assessed penalty to the Regional Director within 30 days of the date of this Order.

Dated: April 30, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Aaron McGruder Trucking, Inc.

[Docket No. R6–89–56]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, Office of Motor Carrier Safety for a Final Order finding the facts to be as alleged in a Notice of Claim dated September 5, 1989, and assessing a penalty of $13,750.

Respondent has not requested a hearing and settlement negotiations were unsuccessful. Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That the Motion for a Final Order is granted and the Respondent is directed to pay $13,750 the amount of assessed penalty to the Regional Director within 30 days of the date of this Order.

Dated: April 30, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Chaparral Van Lines

[Docket No. R6–89–55]

Final Order

This matter comes before me upon request of the Regional Director, Region 6, Office of Motor Carrier Safety for a Final Order finding the facts to be as alleged in a Notice of Claim dated September 5, 1989, and assessing a penalty of $11,000.

Respondent has not requested a hearing and settlement negotiations were unsuccessful. Having reviewed the Motion and the supporting documents appended thereto, I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That the Motion for a Final Order is granted and the Respondent is directed to pay $11,000 the amount of assessed penalty to the Regional Director within 30 days of the date of this Order.

Dated: April 30, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Plating Products Co., Inc.

[Docket No. R1–90–008]

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 1, for a Final Order finding the facts to be as alleged in a Notice of Claim dated January 18, 1990, and assessing a civil penalty of $4,200. Respondent has replied with a letter which for the most part denies the violations.

Once again, we find that we have encountered a problem common to small, private carriers subject to our regulations, but obviously unaware of the importance of keeping proper files and documentation. Petitioner makes the point that the size of the operation is not necessarily relevant to the alleged violations, as set forth in previous decisions. This is true.

Nevertheless, the enforcement actions of this Agency must reflect some relationship to the ultimate goal of the laws and regulations—to wit, safe operations of carriers in interstate commerce. The facts surrounding this matter are striking. Respondent is a small operation, with one driver and two trucks, making limited runs from its home base to Philadelphia. Petitioner acknowledges that for most out of state business common carriers are used. Petitioner does not dispute the fact that throughout the long history of this business there are no known accidents, spills or other life threatening occurrences involving Respondent's trucks or driver.

If we put these alleged violations on a grid and use a simple form-book approach, there can be no denying that violations do exist. If I grant this Order and impose a fine of $4,200, can we be assured that the violations will cease? Can we be assured that the safety of the traveling public will be enhanced?

I would rather that the Agency makes every effort in its power to educate Respondent as to the requirements of the law and regulations and their reason for being. If this means that we sit down with management and carefully articulate the need for records and go so far as to show management how to keep records, then so be it. Only in those instances where management appears not concerned, recalcitrant or refuses to comply with the regulations should we bring an action with a fine of this magnitude, when dealing with these

small one or two truck private operations.

As there are documented violations here, I am granting the motion for a Final Order. However, with respect to the violation of § 391.51 failure to maintain a complete qualification file for each driver, I find that one violation exists and I am assessing the penalty at $100 for this count. For the violation of § 395.8 not requiring the driver to make and submit a record of duty status, again one violation assessed at $300. For the violation of § 396.11 not preparing a vehicle inspection report, one violation assessed at $300. For the violation of § 172.202 one violation at $300. The total assessed amount for these violations is $1,000.

At the same time I am directing the Regional Director to revisit Respondent and to assure himself that Respondent has a complete understanding of our regulations and program and the need therefore. Once having done this, the revelation of future violations through audits should result in an Order of Cessation or injunctive action if necessary.

Therefore, it is ordered, That the alleged violations having been documented as discussed above, I am granting the request for a Final Order and direct the Respondent to pay the assessed civil penalty in the amount of $1,000 to the Regional Director within 30 days of the date of this Order. Respondent, Plating Products Co., Inc., should further be aware of the fact that although I recognize the difficulty of operating in the economic environment surrounding its business, if it continues to operate in interstate commerce then the rules and regulations of this Agency apply. It is far more economical for a business of its size to take the time to know what is required and to adopt practices which will ensure compliance than to receive a civil assessment penalty for each and every violation.

Dated: April 2, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Drotzmann, Inc.

[FHWA Docket No. R10–89–11 (Motor Carrier Safety)]

Order Granting Partial Summary Judgment

By motion dated March 14, 1990, the Regional Director (Claimant) moves for summary judgment pursuant to 49 CFR 386.35 and Rule 56 of the Federal Rules of Civil Procedure. As grounds for that request it states that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. In the alternative, Claimant requests partial summary judgment.

In support of its motion, the Regional Director states that Respondent's answers to its request for admissions establish that the violations of 49 CFR 395.3(a) (1) and 395.3(b) alleged in the Notice of Claim [1] occurred. Furthermore, it argues, the violations were committed by Drotzmann employees acting in the scope of their employment and in furtherance of the company's business. Therefore, it concludes, Respondent "permitted or required" the violations and summary judgment is appropriate. Claimant also contends that the violations constitute a "pattern" within the meaning of the regulations and seeks summary judgment on that issue. Further, it asserts that summary judgment should be granted on the issue of the amount of the fine proposed. It contends that the penalty proposed is not a material issue in dispute and should not be altered absent a showing of abuse of discretion.

Respondent answered the motion and acknowledges that the violations alleged did occur but denies that it required or permitted them within the meaning of the regulations. It also denies that the company's actions have constituted a "pattern" within the meaning of FHwA rules and contends that the proposed fine is excessive. Claimant filed a response to Respondent's motion, asserting that Respondent's answer did not raise any genuine issues of material fact.[2]

I grant summary judgment for Claimant on the issue of whether Droztmann drivers committed the violation alleged in the Notice of Claim. Respondent has admitted these allegations and I find that they took place. However, viewing (as I must) all the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party, see *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970), I find that genuine issues of material fact exist as to whether Respondent "required" or "permitted" these violations and whether a "pattern" of violations exists. While these issues may be legal in nature and thus *prima facie* amenable to a summary judgment motion, Respondent's answers to Claimant's request for admissions and its answer to the summary judgment motion dispute the facts alleged in support of these charges and set out genuine issues of fact for trial.[3] I therefore deny Claimant's motion for summary judgment on these issues and will hear evidence on the question of whether Respondent "required" or "permitted" the violations and whether a "pattern" of violations exists.

My action moots the request for summary judgment as to the level of penalty, since the penalty amount will flow from the proof to be adduced at the hearing. In this connection, the Regional Director's assertion that upon proof the penalty amount cannot be altered absent a showing of an abuse of discretion is a fundamental misconstruction of our respective roles in proceedings under 49 CFR part 386. Complainant's proposed standard of review suggests that it is an adjudicatory entity. Claimant, however, acts only as the prosecutor in these proceedings. It brings charges but plays no role in deciding their legal effect on Respondents. Determination of the penalty by the prosecutor would deprive Respondents of a fair and impartial hearing. Such a practice would run afoul of elementary tenets of due process.

Moreover, my power to preside over these proceedings derives from the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* which forbids prosecutorial and judicial functions to mix.[4] Additionally, FHwA's own

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[1] The Notice of Claim, dated May 17, 1989, sets out 26 violations of § 395.3(a)(1)—which prohibits "permitting or requiring" a driver to drive more than ten hours without eight consecutive hours off duty or in a sleeper berth—and 5 counts of violating § 395.3(b), which prohibits "permitting or requiring" a driver to be on duty for more than 70 hours in eight consecutive days. It seeks a civil penalty of $10,000 for the alleged violations of § 395.3(a)(1) and $5,000 for those pertaining to § 395.3(b), for a total fine of $15,000.

[2] I need not consider Claimant's response, since Rules of Practice, 49 CFR part 386, do not provide for replies to answers. Claimant has not moved for leave to file its response or sought other appopriate relief from the rules. I have nontheless decided to consider the document, noting that it raises no new substantive issues.

[3] Respondent states, for example, that it requires its drivers daily to report-in their activities, and attempts by various means to bring into line those drivers who fail to follow the rules. These alleged facts are relevant to the level of penalty at the very least, to the separate but related question of whether and to what extent a "pattern" of violations exists, and to the question of whether Respondent "permitted or required" the violations committed by its drivers as found herein. While on the latter issue Complainant as a matter of law may have established a *prima facie* case, Respondent is entitled to present evidence in an effort to meet its burden of going forward to overcome that *prima facie* case.

[4] See *In the Matter of Woodbury Horse Transportation Inc.*, FHwA Docket No. R1–88–1, Order served June 13, 1989, p. 5, in which the presiding judge found, in accordance with Regional Counsel's view in that proceeding, that he held authority under the APA which enabled the entry of summary judgment. Here, as there, my power to rule on a motion for summary judgment derives from my power to preside pursuant to the APA.

precedent—including a ruling made in the instant proceeding—permits me to alter the Regional Director's suggested penalty. The Associate Administrator order appointing an ALJ pointedly noted, in response to Claimant's objections, that the Judge is free to recommend a penalty modification based on his determination of the facts, citing *In the Matter of Emnire Gas*, R187–87 (February 24, 1989). Finally, FHwA's own rules enable me to modify Claimant's penalty recommendation. The rules provide that the administrative law judge has the power "to ensure a fair and impartial hearing" (49 CFR 386.54(b)). I would be remiss in my responsibilities under that section were I to submit to Regional Director's proposed level of penalty without affording Respondent its right, here literal as well as figurative, to be heard.

Burton S Kolko,

Administrative Law Judge.

In the Matter of Service Bus Company, Inc.

[Docket No. RI–89–05 (Formerly RI–88–137)]

Denial of Petition for Review of the Decision of the Administrative Law Judge

This matter comes before me upon Petition of the Respondent for review of the Decision of the Administrative Law Judge entered on October 6, 1989. The Regional Director has opposed this Petition.

Having reviewed the record and the Decision of the Judge, I find that Respondent has advanced no valid reason, either in fact or in law to change, alter or amend the Decision in any form. The record and the Decision provide adequate basis on which to sustain the original assessment.

Therefore, it is ordered, that the Decision of the Administrative Law Judge is adopted as written and Respondent is directed to comply with the terms thereof immediately.

Dated: March 26, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Bower Tiling Service, Inc.

[Docket No. R5–90–03 (Formerly R5–89–106)]

Order Appointing Administrative Law Judge

This matter comes before me upon request for a hearing filed by Respondent in response to a Notice of Claim, originally dated September 28, 1989, as amended by Notice of Claim dated December 1, 1989. The amended Notice alleges one violation of 49 CFR 396.7(a) and assesses a civil penalty of $8,000.

Respondent has denied the violation and asserts that some person or persons unknown loosened certain brake assemblies to facilitate removal of the vehicle in question. Respondent also asserts that said brake assemblies were operable and properly adjusted.

There is an obvious material factual in dispute here, acknowledged by Petitioner.

Therefore, it is ordered, that in accordance with 49 CFR 386.54(a), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: March 22, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Charles M. Cephas, Inc.

[Docket No. R3–88–099]

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated December 20, 1988, and assessing a civil penalty of $5,400.

Respondent has not requested a hearing. Petitioner's Motion indicates that there were compromise discussions which took place over a considerable period of time. No compromise having been reached, Petitioner seeks this Order. All references to the compromise discussions have been deleted from the record and Petitioner seeks to have any consideration thereof excluded. Although petitioner is free to delete such discussions from the record, the record submitted should be complete in its documentation of the allegations and the reasoning underlying its penalty reguest. In this matter, the amount requested in the Motion differs from that stated in the Notice of Claim. Am I to divine that notwithstanding the deletion of discussions between the parties and in view of the request that such discussions be given no weight that the new sum in the Motion is the result of a mistake on Petitioner's part? Or perhaps a newfound sense of justice or overweaning development of mercy has taken hold in the administrative process. Petitioner cannot have it both ways. The record is to be supplemented with the reasoning underlying both its allegations and its recommended resolution, or I shall try to develop an understanding of the matter based on what is before me.

Respondent is obviously a marginal operation. This enforcement action arises out of a safety review. The facts and happenstances surrounding these alleged violations are thoroughly documented. Respondent employs three drivers, himself included, however, the last name of one of these drivers appears to be unknown. Produce is hauled in the mid-Atlantic Region. The records, at least as included herein, appear to be at a fairly unsophisticated level.

Having said this, Respondent clearly made a number of interstate trips without the required levels of insurance. Whether these trips were limited to the 6 documented or more is neither discussed nor is its relevance ascertained. Respondent did secure the requisite insurance subsequent to this action. I have no idea if Respondent continues to operate with insurance or is even solvent.

The premium for insurance for this Respondent is in excess of $17,000. The Petitioner has requested a penalty of an additional $5,400, which is coincidentally about the amount of one insurance payment. The record does not indicate if Respondent has had any accidents. The record does not indicate if Respondent is flagrantly abusive. On the contrary, it appears that Respondent is trying to accommodate the requirements of the regulations and at the same time keep its head above the swirling financial waters engulfing its operations.

I cannot ascertain the impact imposition of this penalty will have on Respondent's business or his attitude towards compliance. These violations have occurred. They should not occur in the future. It should be noted that the letter sent to Respondent relating to the Financial Responsibility regulations states, in part, "If the minimum level of financial responsibility has not been obtained for your fleet, you are directed to cease your trucking operation."

As I am unable to fathom the efficacy the requested penalty will have with regard to this Respondent, I am going to reduce it. Some penalty appears warranted, therefore, I am dismissing the $400 claim for not having the form in the file and assessing half the request of the Petitioner in the Notice of Claim. If Respondent is found to be operating in the future without the required insurance then an injunction against his operations appears to be the proper remedy.

Therefore, it is ordered, that the Motion for a Final Order is granted.

modified above. Respondent shall pay to the Regional Director the sum of $3,000 within 30 days of the date of this Order.

Dated: March 15, 1990.

Richard P. Landis

Associate Administrator for Motor Carriers.

In the Matter of Warehouse Exports, trading as Continental Imports, Inc.

[Docket No. R3-89-031]

Final Order

This matter comes before me upon Motion for a Final Order filed by the Regional Director, Office of Motor Carrier Safety, Region 3, finding the facts to be as alleged in a Notice of Claim dated March 31, 1989, and assessing a penalty of $6,300.

The Notice of Claim alleged 21 violations of the Federal Motor Carrier Safety Regulations (FMCSRs), all involving failure to maintain a driver's qualification file. Respondent sought to resolve this matter through a negotiated settlement, however, it appears no resolution was possible. The record does not indicate any perfected request for a hearing.

The record indicates three significant sets of facts to me. First, the Respondent is a relatively small operation, employing 3 drivers and operating within the 100 mile radius provision of the regulations. The alleged violations involve the records for two drivers, with the number of allegations being a composite of trips documented and made by these drivers. Second, Respondent may have been recalcitrant at the time of the initial review. Third, it appears that with certain personnel changes and a new attitude, Respondent now realizes the importance of keeping the required files.

In several earlier cases, particularly, *Continental Petroleum & Energy Co.*, R3-09-066, *Continental Tank Lines, Ltd.*, R3-89-059, and *Corco Chemical Corporation*, R3-88-106, I addressed the documentation of multiple violations in record and files cases. Because of the small, localized nature of the operations and the apparent willingness of management to institute the necessary controls to ensure compliance, I find that violations have occurred. However, as the files were incomplete at the time of the audit, I find that there is one violation in the case of each driver. Each of these violations is substantiated by the record and will be assessed at $500.

Therefore, It Is Ordered, That Petitioner's Motion for a Final Order is hereby granted, except as modified above. Respondent shall pay the sum of $1,000 to the Regional Director within 30 days of the date of this Order and shall take all appropriate steps to ensure that the files are placed and maintained in order.

Dated: March 9, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Arthur Shelley, Inc.

[Docket No. R3-89-034]

Final Order

This matter comes before me upon request of the Respondent for a hearing and a Motion in Opposition Thereto and for a Final Order submitted by Petitioner. Petitioner, the Regional Director, Office of Motor Carrier Safety, Region 3, opposes the request of Respondent on the grounds that no specific factual issues have ever been identified.

This case has a rather detailed history. The Respondent was sent a Notice of Claim on March 20, 1989, alleging 9 "serious pattern of safety violations" for violations of the regulations governing the duty time of drivers. Specifically, Respondent was alleged to have required or permitted drivers to drive after having been on duty more than 70 hours. The civil forfeiture claim was assessed at $900 per violation.

Respondent replied to the Notice by denying the alleged violations, at first specifically denying knowledge of the violations (leased drivers), then averring that if knowledge were to be imputed to Respondent that it wished to contest the amount of the claim. I have discussed the knowledge issue in several recent cases, see, *Trinity Transportation, R9-90-001*, and *Horizon Transportation R3-89-114*. In summary, I will only state here that knowledge, in the circumstances presented in this civil forfeiture claim, is imputed. The case law is clear on this point and is referenced in those Orders.

Respondent also met with Petitioner to discuss settlement of this claim. No settlement was made. Respondent offered up the institution of a monitoring system and disciplinary action to prevent the recurrence of such violations in the future. This was done by way of mitigation. Respondent also contends that it has had no similar penalty actions against it and that it was operating with a satisfactory rating.

There are a number of concerns which I would like to address here. It appears that Respondent acknowledged that violations have occurred. I have expressed a sense of unease with respect to pattern violations in previous cases. In those in which Respondent has provided information of an existing monitoring and disciplinary system, I have called the matter for hearing. In those in which the Respondent made no vigorous protestation, could show no system in place or merely contested the amount of the penalty, I have issued Final Orders.

This case presents a middle ground. The record indicates that the violations documented in the Notice were a mere sampling of violations discovered. Normally, to sustain a pattern violation, I would like to see a significant number of violations documented. However, here it appears that Respondent has come to a recognition of possible deficiencies and is now instituting a system to address these deficiencies. This is a situation which appears to meet the standards established by the Congress for just such "middle violations." The penalty provided was designed to positively reinforce compliance.

Petitioner has taken into account Respondent's actions. Petitioner further has revealed that Respondent, contrary to its assertions has been the subject of previous enforcement action and did not have a satisfactory rating. Nevertheless, in an effort to encourage compliance, a substantial reduction of the civil assessment reducing the claim from $8,100 to $5,300 was offered. This reduction is not considered sufficient by Respondent.

In discussing the issue of penalty assessments in previous cases, I have repeatedly stated that the local judgment of the Regional Director is the standard guiding these matters. The amount of the penalty is not a material issue in dispute and therefore not entitled to hearing status. I will modify the assessment where warranted, but not as a matter of routine. In this case, the reduced penalty requested by Petitioner in his motion appears fair and supportable on the record. Respondent's intransigence is not sustained by the record. Violations have occurred; it appears that Respondent's previous position was, if not acceptance thereof, then a fatalism about their occurrence or reoccurrence. Respondent's new attitude, in instituting a monitoring system and disciplinary action is a positive step in the right direction. The Congressional remedy in this instance appears to be right on the mark.

The record disposes of the matter of material factual issues in dispute. As discussed above, I find that the record supports the allegation that violations have occurred.

Therefore, it is ordered, That Respondent's Request for a Hearing is denied. Respondent's request for a

reduction in the amount of the penalty is likewise denied. Petitioner's request for a Final Order is granted. Respondent shall pay to the Regional Director the sum of $5,300 within 30 days of the date of this Order.

Dated: March 5, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Chemical Commodities, Inc.

[Docket No. R7-90-02 (Formerly R7-89-053)]

Order Appointing Administrative Law Judge

This matter comes before me upon request for a hearing filed by Respondent and Opposition Thereto and Request for a Final Order filed by Petitioner. Petitioner, the Regional Director, Office of Motor Carrier Safety, Region 7, alleged, in a Notice of Claim dated June 14, 1989, violations of the Hazardous Materials regulations and assessed a civil penalty of $5,000. Respondent replied to the Notice on June 26, 1989, requested a hearing and stated that Respondent did not believe that the allegations are accurate or applicable and denied any violations of the regulations.

I have withheld ruling on Motions at the request of Petitioner on the basis that settlement was possible. Such has not been the case.

Petitioner argues that Respondent's request for a hearing should be denied for failure to admit or deny the alleged violations, for failure to list material factual issues in dispute, and for failure to provide a Certificate of Service as required by the regulations.

Respondent's letter clearly and specifically denies any violation of the law. The contention that the allegations are not accurate or applicable appears to constitute a rejoinder to Petitioner's allegations. In sum, Respondent is putting Petitioner to the proof. The record before me is insufficient to dispose of this matter. As there is a clear issue of fact in this case, I am appointing an Administrative Law Judge to hear the matter.

Therefore it is ordered, That Petitioner's Motion for a Final Order is denied and Respondent's Request for a Hearing is granted. In accordance with 49 CFR 306.54(a), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b).

Dated: March 2, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of A. Weinfeld & Sons, Inc.

[Docket No. R3-90-032]

Final Order

This matter comes before me upon request of the Respondent for a hearing, Motion for Final Order and in Opposition to the Request for Hearing filed by Petitioner and Answer thereto filed by Respondent. Petitioner, the Director, Office of Motor Carrier Safety, Region 3, initiated a Notice of Claim, dated November 20, 1989, alleging 24 violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and assessing a penalty of $58,400.

The parties have apparently met to discuss settlement of this case but have been unable to reach agreement.

Petitioner's Motion cites in its support the failure of Respondent to articulate any specific factual issues in dispute failure to present in writing mitigating evidence, and the fact that Respondent was the subject of a prior Safety Review during which similar violations were pointed out.

Respondent's answer avers everything but factual matters in dispute. Respondent contends it has not received documentation or information pertaining to the audit; that it is not legally responsible for the alleged violations; that there are extenuating and mitigating circumstances which would preclude liability; that it is not legally required to present its case at this time; and that the investigator's biased view of the facts is heresay.

The regulations governing the grant of a hearing are clear and straightforward. 49 CFR 386.14(b)(2) states in pertinent part "* * * A request for a hearing must contain a listing of all material factual issues believed to be in dispute * * *." I fail to understand the mystery in Respondent's inability to comply therewith. An administrative hearing under these regulations is a factual hearing. If there are no factual differences, then there can be no hearing. If Respondent has a problem with the legality of the regulation, then its remedy will lie in a legal action following the conclusion of the administrative action. See: *In the Matter of Alan Party Rental, Inc.* Docket No. 89-186.

Respondent has been visited in the past, and received the benefit of a Safety Review. It was given an unsatisfactory rating based on the discovery of similar violations. Respondent is familiar with the requirements of the regulations. The alleged violations all involve failure to have required records in the files. This does not appear a difficult matter in which to identify factual differences. Either the records are in the file, or they are not. If they are not, then they are not because of an act of God, man or mystery of nature. The Notice of Claim specifies the missing records, Respondent cannot rely on the lack of "documentation" as a reason for its inability to articulate factual differences.

There are, therefore, no facts before me upon which determine a difference. The regulations clearly require factual differences for the appointment of an Administrative Law Judge. Respondent has not met this basic test. On the other hand, the record before me clearly establishes that Respondent is subject to the regulations, has knowledge of this and has been audited previously, that similar violations were documented, and that there are no mitigating circumstances before me upon which to reduce the amount of the assessment. The violations stand without controverting opposition.

Therefore, it is ordered, That Respondent's request for a Hearing is denied and Petitioner's Motion for A Final Order is granted and a penalty in the amount of $58,400 is assessed. The penalty shall be paid to the Regional Director within 30 days of the date of this Order.

Dated: March 1, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Arizona Freight Systems, Inc.

[Docket No. R9-89-052]

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 9, for a Final Order finding the facts to be as alleged in a Notice of Claim dated August 24, 1989, and assessing a civil penalty of $6,750. The Notice of Claim alleged nine documented counts of transporting a shipment of hazardous materials not accompanied by a properly prepared shipping paper (49 CFR 177.817(a)).

The Respondent has not requested a hearing and has not denied the violations. Rather, Respondent takes the approach that the violations were the result of incorrect preparation by others, that it has taken action to bring about compliance in the future, that its past actions indicate a posture of

cooperative, voluntary compliance and that the fine is excessive and punitive.

The actions detailed by Respondent have not been disputed. Following a prior visit by the Agency, Respondent hired a motor carrier safety compliance expert, employed a safety supervisor and embarked upon a program to obtain safety compliance. Although Respondent is commended for these actions, it cannot help but raise the question in my mind why this level of noncompliance in the present matter?

Respondent has had ample notice of its responsibilities under the regulations. The violations have been documented, and notwithstanding the actions of the Respondent to prevent their reoccurrence, petitioner has substantiated its case.

Turning to the amount of the penalty, the reasons therefore and the Agency's posture on these matters, I would like to cite a recent study printed by the Senate Committee on Commerce, Science, and Transportation, entitled *Motor Carrier Safety and the Federal Highway Administration's Education and Enforcement Efforts: Options Intended to Improve an Overloaded Program*, S. Print 101–30 (April, 1989). This report noted that the motor carrier safety program is a multi-faceted, essential education and enforcement effort. Education is noted as being useful when motor carriers take significant actions to comply with the regulations. However, the report notes that operational improvement often follows only after the institution of an enforcement action.

In its discussion of enforcement, the report notes that the agency considers the penalty action to be one of several methods to improve compliance. There is a necessarily subjective and judgmental element to penalty actions. Many factors are involved.

In addressing hazardous materials, the report is critical of the Agency for not devoting the level of attention to such transport as is necessary.

Keeping in mind the above thoughts, the report correctly states the Agency philosophy as follows: "FHMA maintains that the purpose of a civil penalty imposed on a motor carrier is not to cripple its operations or financial stability. By getting the attention of management, the penalty is supposed to promote future compliance." The report also discusses the effects of penalties and states: "Too low a penalty sends the unwanted message to industry that noncompliance with the * * * regulations is tolerated by FHMA. Furthermore, low or insignificant penalty actions tend to have adverse impact on the morale of FHWA safety investigators. For some carriers, FHMA's penalties might be considered part of the expected costs of doing business." This is prelude to admonishing the Agency over the need to assess penalties of a sufficiently meaningful magnitude to encourage voluntary compliance.

Whether the policy of an enforcement audit without penalty action, the so-called 'freebie", is effective or not, there is no guarantee that a carrier can expect to receive a visit without penalty for each and every alleged violation. The Agency attempts to notify the carrier community of the applicability of the regulations, then visits to check compliance and advises of shortcomings. The institution of penalty proceedings depends on many factors.

In this matter before me, there can be no argument that the Respondent has received the benefit of an Agency audit. The Respondent avers it has taken positive compliance actions. Yet, there can be no arguing that these actions have left gaps. Hazardous materials transport has been approached somewhat casually, particularly in view of the presence on the payroll of a safety supervisor.

I have addressed the issue of penalty assessment in many previous matters. My view is that penalty assessment is best left to the recommendation of the Regional Director, as this person is closer to the audit, the carrier and the considerations of the investigating officer. Nevertheless, I have also indicated that this does not constrain my ability to modify the penalty requested if the facts and circumstances presented warrant such action.

Respondent is obviously trying to reach compliance. Respondent is also obviously in violation of the regulations. It is my belief that Respondent has gotten a clear message from these proceedings of the importance of compliance. In Petitioner's Motion, these factors are noted. Petitioner notes that of the nine violations, three contain improper hazard class designations, which are viewed as particularly serious. Petitioner states: "In the event of a hazardous material accident, the response team effort to contain a hazardous material spill is often dependent upon the correct designation of hazard class." The remaining six violations involve improper shipping names and sequence. The record appears to indicate that many of these violations were discovered-only these few were documented.

The violations considered significant have been properly assessed. The others appear not to warrant the imposition of a penalty based upon Respondent's actions to come into and remain in compliance.

Therefore, it is ordered, That the Motion for a Final Order is hereby granted finding the Respondent to be in violation of the regulations as alleged and assessing a penalty of $3,000 for the three violations of improper hazard class designations. All other penalty assessments are dismissed. Respondent shall pay the sum of $3,000 to the Regional Director within 30 days of the date of this Order.

Dated: February 20, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of J.L. McCoy, Inc.

[Docket No. R3–88–029]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be alleged in a Notice of Claim dated March 17, 1988.

Having reviewed the Motion and supporting documents appended thereto, I find that no valid request for a hearing has been made. I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That Respondent is directed to satisfy the penalty assessment by paying to the Regional Director the full amount of $58,000 within 30 days of the date of this Order.

Dated: February 20, 1990.

Richard P. Landis

Associate Administrator for Motor Carriers.

In the Matter of Wilmington Tank Lines, Inc.

[Docket No. R3–89–196]

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated September 18, 1989, and imposing a penalty of $6,500. The Notice of Claim alleged five violations of the Hazardous Materials Regulations.

The Respondent requested a settlement conference. No hearing was requested. The record indicates that no settlement has been reached in this matter. I find that the evidence supports the charges and specifications in the Notice of Claim.

Therefore, it is ordered, That Respondent is directed to satisfy the

penalty assessment by paying to the Regional Director the full amount of $6,500 within 30 days of the date of this Order.

Dated: February 20, 1990.

Richard P. Landis

Associate Administrator for Motor Carriers.

In the Matter of Carter's Bus Service, Inc.

[Docket No. R3-89-156]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated August 4, 1989.

Having reviewed the Motion and supporting documents appended thereto, I find that no valid request for a hearing has been made. I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That Respondent is directed to satisfy the penalty assessment by paying to the Regional Director the full amount of $6,400 within 30 days of the date of this Order.

Dated: February 20, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Trinity Transportation, Inc.

[Docket No. R9-90-001 (FORMERLY R9-89-061)]

Order Appointing an Administrative Law Judge

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 9, for a Motion for A Partial Final Order, which in part states opposition to a request for a Hearing made by Respondent and in part agrees that a Hearing appears necessary on some issues. Respondent has countered with a Motion in Opposition to this request and a Motion for Dismissal or in the alternative for Hearing as originally requested.

These proceedings are occasioned by a Notice of Claim letter dated August 14, 1989, alleging that Respondent has violated the Federal Motor Carrier Safety Regulations (FMCSRs). The original allegations of violation included a 7-count pattern violation assessed at $750 for each count, a 6-count pattern violation assessed at $800 for each count and 14 alleged recordkeeping violations assessed at $400 for each count. A total assessment of $15,650 was levied in that letter. Subsequent thereto, as a result of information apparently uncovered in the pleadings, 2 counts have been dismissed and Petitioner agrees to the necessity for a hearing on 3 others, thus modifying the present assessment to $12,500. I have tried to add and subtract these assessments three different ways and cannot arrive at the sum of $12,500. The closest I come is $12,550.

I state this by way of pointing out that I find the original Notice of Claim to be abstruse at best and difficult for a layperson to understand at least. Perhaps the intransigence of the parties in this matter is explained by the difficulty in deciphering the intent of the Notice. In the future, Petitioner should set forth clearly, in tabular form, if necessary, for multiple count violation allegations, the violation and assessment next to each other.

I also fail to understand how it is that the parties could have communicated with each other over the telephone and in correspondence, yet Petitioner waited until the pleading stage to dismiss counts alleged in error. The informal negotiation process is designed to function in such a matter as to clarify and crystallize the issues. Obviously, in this matter the parties talked but did not communicate.

The substantive issues presented here are significant. Allegations of patterns of violation are relatively new and no body of decision or hearing law is available for review. There is, on the other hand, a long history of recordkeeping violation allegation materials available. There are some significant basic facts which I would like to discuss here.

Respondent states, apparently without contradiction, that it was incorporated in late 1987 and began operations in January, 1988. A Safety Review was conducted within 6 months of commencement of operations. Several recommendations were made at the time, and apparently were followed. A Compliance Review was conducted one year later. This is approximately 18 months after commencement of operations.

Each side quotes from the statute or Congressional Report concerning the nature of the violations and the need to account for a totality of circumstances in determining whether an enforcement matter is present. Each side is partially correct in its arguments. Respondent raises some interesting points to consider, i.e., the alacrity with which it was rated and the surveyed for compliance, the necessity to consider a number of factors in making an assessment and the necessity to consider the attitude of the Respondent.

Petitioner correctly points out that Congress has directed stronger enforcement efforts, that patterns of violation cannot be tolerated as simply a way of doing business and that knowledge of the regulations and the behavior of one's employees is imputed to an employer.

Having established these points the trail of this case leads us into the thickets of both legal and factual argument. Respondent contends that it has in place a vigorous system of discovering and taking action against violators. Therefore, Respondent contends it should not be faulted with a violation of the regulations. Petitioner contends that there was no or an inadequate system of review and that violations occurring over as long as a three month stretch before the imposition of disciplinary action constitute clear violations of the regulations, in fact, so clear as to constitute an identifiable pattern.

Respondent argues that its system militates against a finding of "knowing or requiring" violations. Petitioner resorts to the reasoning expressed in *Riss & Co.* v. *U.S.*, 262 F 2d 245,250 (8th Cir., 1958) and *U.S.* v. *Time-DC, Inc.*, 381 F. Supp. 730, 739 (W.D.Va., 1974). Under the holding of these cases, long adhered to by the FHWA a corporate entity is deemed to have had knowledge of regulatory violations if the means were present by which the company could have detected the infractions. Were this a case involving a respondent with a history of regulatory contacts with the Agency or at least an established operating history, I would have no trouble agreeing with Petitioner. The Respondent contends that it has had a monitoring system in place and that it takes disciplinary action. The documentation of violations in such a situation would be sufficient to find a violation of the "knowing or permitting" standard.

Such is not the case here. This Respondent has offered mitigating reasons. It appears that Respondent has had in place some type of monitoring system as drivers have been terminated. The record indicates the Safety Director has taken an active stance in such matters. Petitioner contends that the system was not functioning or has broken down. Time periods as long as three months with records violations have been discovered before the institution of disciplinary action. These are all factual matters.

Under other circumstances I might consider granting a split motion, sending the pattern violations to hearing and issuing an Order for the recordkeeping violations. However, due to the relative newness of Respondent's operations, the

speed with which the Agency has completed both a Safety Review and a Compliance Review, the Respondent's apparent attempts to comply with the regulations and the guidance given at the Rating review and the Agency's stated position that its goal is compliance and that punitive actions will usually only be taken where the record indicates that such encouragement is needed, I am appointing an Administrative Law Judge to hear the arguments in this matter, to sort out the facts and to make recommendations to me.

I am particularly interested in the pattern violations. Has the Petitioner established that a pattern in fact exists? What constitutes a pattern? Are two documented violations of the same section sufficient? Is it necessary to show a history of enforcement actions? Can Respondent show mitigation through vigorous action such as terminating violating drivers? Is mitigation sufficient to rebut the violation or should it be applied only to the amount of the penalty? Similar questions must be answered for the recordkeeping violations where the Respondent can show a program in operation.

Therefore, it is ordered, That Petitioner's Motion is denied in part wherein requesting a Final Order and granted in part for a hearing. Respondent's Motion is similarly denied in requesting dismissal of this action and granted in part for a hearing. In accordance with 49 CFR 386.54(a), I hereby appoint an Administrative Law Judge to be designated by the Chief Administrative Law Judge of the Department of Transportation, as the Presiding Judge in this matter. The Judge appointed is authorized to perform those duties specific in 49 CFR 386.54(b).

Dated: February 20, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Horizon Transportation, Inc.

[Docket No. R3-89-114]

Final Order

This matter comes before me upon request of Horizon Transportation, Inc. (Respondent) for a hearing and Motion in Opposition thereto and for Final Order filed by the Regional Director, Office of Motor Carrier Safety, Region 3 (Petitioner). Respondent seeks a hearing on the alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and the penalty assessed therefore in a Notice of Claim dated August 4, 1989.

The Notice documented 24 alleged violations of 49 CFR 395.8(e) for requiring or permitting drivers to make false entries upon driver records. The record before me indicates that this is not the first instance in which Respondent has been audited, nor is it the first time such violations have been called to its attention.

In a letter of January 26, 1990, Respondent sets forth the basis of its request for a hearing on the grounds that it did not require or permit such violations, as construed in light of the Webster's Dictionary definition of those terms. Respondent also calls attention to the fact that it, along with other old line carriers is struggling to survive the effects of deregulation. Respondent points out the difficulty of paying high fines and assessments and of keeping qualified help in such an environment. Similar sentiments are expressed in an earlier letter dated August 18, 1989.

I am not unmindful of the burdens raised in Respondent's letters. At the same time, I must point out that the burdens imposed upon the industry in the interests of operating safely will not decrease. I would also like to point out that under no circumstances must economics be allowed to overrule safety needs and requirements. I have pointed out over and over in my Orders the stringency of Congressional mandates, the need to know and keep abreast of regulatory developments, and the requirement to be aware of the legal operating framework of the industry. Anyone who reads the newspapers, trade journals or general media should be aware that operations in a modern, technological society such as ours are demanding and maybe even burdensome. The rewards for those who operate successfully are high. The risks, which are shared by the public at large, can be devastating. It is hard to explain to someone who has just lost a loved one in an accident that it is difficult to operate in compliance with safety regulations in a deregulated environment.

All this is preface to consideration of the request before me. I have granted the request for a hearing in several previous instances on the question of whether the knowing or permitting requirement had been violated. In these cases, i.e., *Woodbury Horse Transportation, Inc.*, R1-88-01; *Drotzmann, Inc.*, R10-89-11; and, *Transformer Services, Inc.*, 88-34, Respondent had made a vigorous representation as to why it should not be found to be in violation. The presence of disciplinary programs, actions and even terminations as well as review procedures and the like were all presented and provided a basis on which to find material factual issues in dispute. We do not as of this writing have any guidance from an Administrative Law Judge on this subject.

In the present case, no such information is forthcoming. Reliance on a Dictionary definition is misplaced. This is a legal proceeding. The regulations have been promulgated in a regulatory, therefore legalistic setting. Lay arguments may provide some insight in the absence of legal reasoning, but such is not the case here.

Within the context of these regulations, employers are liable for the actions of employees. This is standard concept from the basic law of agency. The mental state or intent element is not part of the burden faced by an auditing agency in enforcing civil penalty statutes. There is a considerable body of case law along this line, see *United States* v. *Sawyer Transportation,* 337 F. Supp. 29 (D. Minn. 1971), *Riss Co.* v. *U.S.*, 262 F. 2d 245 (8th Cir., 1958), and *Steer Tank Lines* v. *U.S.*, 330 F. 2d 719 (5th Cir., 1963). The fact that the drivers were employed by Respondent at the time of violation, and that Respondent had been put on notice about the regulations and this type of violation previous to this enforcement action are sufficient to establish culpability.

In fact, the Exhibits clearly show that during a prior compliance audit Respondent was advised of the need to institute a progressive system of disciplinary action for hours of service violations and falsification of records of duty status. Obviously, no such system is in place. There is no basis for Respondent's avoiding liability for the actions of its drivers by shifting the burden to their noncompliance. The regulations do not condone a carrier's violations because its drivers do not comply with the requirements.

In the absence of particularized information indicating a vigorous effort on the part of Respondent to educate and discipline its drivers and to review and organize its records in such a manner as to understand the shortcomings of its operations, I must deny the request for a hearing.

Therefore, it is ordered, That Respondent's request for a hearing is denied and Petitioner's request for a Final Order finding the facts to be as alleged in the Notice of Claim dated August 4, 1989, and imposing a civil penalty of $9,600 is granted. Respondent shall pay that amount to the Regional Director within 30 days of the date of this Order.

Dated: February 20, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of John T. Lesnak

[Docket No. R3-88-023]

Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated March 1, 1988, and assessing a penalty of $1,000.

The Notice alleged that Respondent violated the regulations by driving in interstate commerce without having a currently valid medical examiner's certificate. The Notice alleges that the certificate in Respondent's possession was forged.

Having reviewed the motion and the documents appended thereto, Petitioner's allegations are substantiated by the record. Nevertheless, this case is now quite old. No purpose will be served by imposing the full penalty requested, to wit, $1,000, assessed on the basis of $250 for each of 4 documented violations. Many more probably could have been substantiated.

The crux of the matter is whether Respondent has in fact corrected the violation. I have these questions:

1. Is Respondent still employed in a position where he drives a motor vehicle in interstate commerce? If so, does he possess a currently valid medical examiner's certificate?

2. If Respondent is found to be operating a motor vehicle in interstate commerce without possessing a currently valid medical examiner's certificate, why has such activity gone without challenge?

The Regional Director is directed to examine this case and determine whether Respondent is still operating in interstate commerce. If the finding is that Respondent is still operating in interstate commerce, the application of a penalty will have some validity. If Respondent has not come into compliance additional action is necessary to bring about compliance.

Therefore, it is ordered, That Petitioner's motion for a Final Order is granted in part. The record supports the allegations and Respondent is found to have violated the regulations as charged. Respondent is directed to pay the sum of $250 for such violation, if he is still employed in a position where he operates motor vehicles in interstate commerce. If Respondent no longer drives in interstate commerce, the penalty is waived. If Respondent still drives in interstate commerce and remains in violation of the regulations, he is ordered to cease and desist from all violating activity immediately. Any penalty due under this Order is to be paid to the Regional Director within 60 days of the date of the Order.

Dated: February 20, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of A.T. Pinto, Inc.

[Docket No. R3-90-006]

Reconsideration of Final Order

On December 7, 1989, I issued a Final Order in this matter. Relying on the absence of written motions or pleadings from Respondent I found that violations had occurred as alleged. The record indicated that the parties were unable to settle this matter and I therefore granted the request imposing a full penalty of $8,100.

On January 10, 1990, I received a letter from Respondent. No service list was attached. The letter was couched in terms of a simple appeal for relief. The Director, Office of Motor Carrier Safety, Region 3, upon being informed of the letter from Respondent, has filed a Motion in Opposition. That Motion correctly points out that there are many procedural irregularities in Respondent's request.

Ordinarily, I would have no problems granting Petitioner's Motion in Opposition. However, there are certain factual allegations raised in Respondent's letter which provide me with an opportunity to discuss this process. Respondent indicates that he met with Program Officials in the Regional Office. At that meeting, the Agency apparently agreed to some reduction in the amount of the penalty. Respondent's counter offer was rejected as too low. Respondent then alleges that he was told the Regional Office had no authority to reduce the penalty by more than 25 percent. Respondent's letter next states:

> I told him that I would like to appeal to higher authority. * * * indicated that the matter would automatically be brought to your attention (in 5 to 6 months) and that I could appeal to you.

Respondent next admits that in fact violations were present but that corrective actions have been taken. What disturbs me is the casualness which appears to surround this entire process. It is this that I would like to address.

There are several concerns in this regulatory program. The highest concern is to provide a safe highway environment for the entire public. We try to achieve this through the promulgation of rules and regulations implementing congressional laws. Compliance with these regulations is necessary to avoid penalty. Education is a necessary part of the process. Throughout the entire process, however, procedural regularity is required, both for Respondent and Petitioner.

All audited carriers must first be informed of the applicability of the regulations. When a Notice of Claim is sent, the regulations should again be prominently mentioned. The Respondent has an obligation to read the regulations and to conform thereto. In discussing the violations and regulations, Petitioner should advise Respondent of the necessity for procedural regularity. Petitioner must not dispense casual advice as to general nature of the regulatory process and must clarify procedural rights for the Respondent.

In this case, if Respondent is correct he was misled. His appeal to higher authority on the amount of a penalty claim is not provided by right in the regulations. The amount of the penalty is not a material issue in fact entitled to a hearing. Negotiations, if at an impasse, must proceed along the line of enforcement authority. That channel includes the Regional Director and the Director of the Office of Motor Carrier Safety Field Operations. These matters should not be automatically brought to my attention.

Respondent has an obligation to participate in the administrative process fully and in accordance with the regulations. Somewhere in the chain of command note will be taken of his arguments and operations, if documented. I have repeatedly stated that the assessment of the penalty is best left to those closest to the alleged violations. I have also stated that I reserve the right to alter a penalty assessment if the record warrants such change. But I am not the disburser of financial good will in this process.

This program must not become a wooden, bureaucratic regimen, hiding behind such strictures as the 25 percent rule. Penalties should be assessed in line with the violations alleged. Reductions in settlement should rely upon the presentation of good information. Failure of the parties to agree indicates that either the penalties are assessed too high, there has been a breakdown in communications in the enforcement chain of command, or the respondent is not aware of the seriousness of violations and the necessity for high penalties.

I have faith that the Agency's Program Officials are carrying out their responsibilities in a positive, good-faith

manner. We have embarked on a relatively new process here. Everything in that process is underscored by the requirement for procedural regularity. That is the minimum requirement.

It appears to me that Respondent has in fact taken considerable effort to achieve a satisfactory level of compliance. It also appears that the Regional Director was willing to settle this claim for less than originally assessed. For whatever reason, Respondent was misdirected in his attempt to further resolve this matter. Respondent is cautioned that he should remain in compliance, follow procedural requirements and inform himself of his procedural rights.

Therefore, it is ordered, That upon reconsideration of the information as presented to me I am modifying my Order of December 7, 1989. Respondent shall pay the sum of $4,000 to the Regional Director within 30 days of the date of this Order.

Dated, February 20, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of American Bulk Transport Co., Inc.

[FHWA Docket No. R7–89–08 (Motor Carrier Safety)

Order of Civil Penalty and Order Canceling Hearing

By motion dated January 17, 1990, FHMA Regional Counsel requests that final decision be entered in the form of an order of civil penalty. In support of its motion, Regional Counsel states that:

1. On September 19, 1989, Requests for Admission were served on Respondent, by and through its counsel, Robert B. Zeldin, Suite 240, 8330 Ward Parkway, Kansas City, Missouri 64114 * * *.

2. Said requests for Admission requested Respondent to admit or deny every material issue of fact alleged in the Notice of Claim served on Respondent on November 22, 1988 * * *.

3. Said Requests for Admission required Respondent to respond within 20 days of receipt thereof.

4. Respondent has failed to respond to said Requests for Admission within the prescribed time, and has still failed to respond despite the passage of 60 days at the time of the filing of this Motion.

5. Pursuant to the Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR 386.44, "[t]he matter is admitted unless within 15 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission to written answer signed by the party or his/her attorney." (See also Rule 36(a), Federal Rules of Civil Procedure).

6. The Admission of the information contained in the Requests for Admission leaves no material issue of fact in dispute between the parties.

7. There being no material issues of fact in dispute, a hearing on the matter is unnecessary.

8. Findings of Facts based on the Notice of Claim and supporting documents are warranted.

No answer to the motion has been received. Accordingly, pursuant to 49 CFR 386.44 and 49 CFR 386.61, I enter a decision that upholds the allegations in the Notice of Claim dated October 26, 1988 and enters a civil penalty in the amount of $10,500. Pursuant to 49 CFR 386.61 and 62, if no petition for review is filed within 45 days from the date of service herein, this decision and order becomes the final order of the Associate Administrator.[1]

Burton S. Kolko,

Administrative Law Judge.

In the Matter of Channel Solvents and Chemicals, Inc.

[Docket No. R6–88–41]

Final Order

This matter comes before me upon request for a Final Order submitted by the Regional Director, Office of Motor Carrier Safety, Region 6. This motion requests that we find that the allegations of violation of the regulations as set forth in a Notice of Claim issued on July 12, 1988, be established and that a civil penalty of $3,000 be imposed. Respondent (Channel Solvents and Chemicals, Inc.) has not replied. I find that there has been no request for a hearing and that Respondent has not denied the violations as charged.

Nevertheless, it appears that some evidence of Respondent's having the required insurance was produced after somewhat lengthy and protracted attempts on the part of the Regional Director to resolve this matter.

Having reviewed the Motion and the supporting documents attached thereto, it appears that the Respondent did not have in its files as required the Form MCS–90. This is a violation. The Director, in recognition of the fact that the insurance coverage appeared to be in place, but that the documents were not in order in the files as required, offered to resolve this matter on payment of a $1,500 civil penalty.

Therefore, it is ordered, That the Motion for a Final Order is granted. The civil forfeiture penalty is established at $1,500 which Respondent is directed to pay to the Regional Director within 30 days of the date of this Order.

[1] In view of the foregoing, the hearing scheduled for March 13, 1990 is cancelled.

Dated: January 30, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Williams Bus Excursions

[Docket No. R3–88–015]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated February 16, 1988.

Having reviewed the Motion and the supporting documents appended thereto, I find that although informal contacts were made by telephone, no formal written response or request for hearing has ever been made. The evidence stands uncontroverted and therefore supports the charges and specifications in the Notice of Claim relating to violations of the regulations requiring that Respondent maintain proof of financial responsibility at its principal place of business.

Therefore, it is ordered, That Respondent is directed to pay the penalty of $1,000, as requested in the Motion for Final Order. This sum is to be paid to the Regional Director within 60 days of the date of this Order.

Dated: January 30, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Medi-Call Ambulance Services, Inc.

[Docket No. R3–89–202]

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated September 25, 1989, and assessing a penalty of $750.

The Notice of Claim alleged a violation of 49 CFR 387.31(d), failing to maintain proof of financial responsibility at the principal place of business. The Respondent has not requested a hearing.

Petitioner alleges that only a blank MCS–90B, attached to an insurance policy, was in the files at the time of the audit. The petitioner alleges that an incorrect endorsement would nullify the coverage required.

Respondent argues that the deficient MCS–90B attached to the policy was sufficient, that a FAX copy provided to the investigator would have cured any irregularity, that there was no violation. Respondent argues that it has never

operated without maintaining the proper coverage.

The record indicates that this is not the first time Respondent has encountered an investigator or the requirement of the regulation. The regulation is clear. It states: "Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business." The regulation does not state that the proof shall accord with industry practices or that the carrier could decide where to keep the form.

Our audits are designed to ensure compliance with the regulations. The regulations have been promulgated to ensure highway safety. The field agents are to have access to certain documents to ensure that the required information is available. There is then a deficiency here. It may be technical, but it is not petty. The Respondent had prior notice and its records should have been in order.

Therefore, it is ordered, That Petitioner's motion for a Final Order is granted. The record supports the allegations. However, the request for a final order is modified to reduce the assessed penalty to $100. The Respondent shall pay the sum of $100 to the Regional Director within 30 days of the date of this Order.

Dated: January 24, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Vend-Rite Service Corporation

[Docket No. R3-90-050]

Final Order

This matter comes before me upon Motion for Final Order and in Opposition to a Request for Hearing filed by the Regional Director, Office of Motor Carrier Safety, Region 3. This Motion was filed in response to a letter from Vend-Rite Service Corporation (Respondent) which was in turn a reply to a Notice of Claim dated December 4, 1989. The Notice of Claim alleged 16 violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and assessed a penalty of $5,600.

The letter from Respondent reserved the right to request an administrative hearing and contested the Notice of Claim. Respondent advances as reasons for contesting the Claim that it was aware of no other vending companies subject to an audit and that it was not sure that the regulations applied in its case.

Petitioner argues that Respondent is not entitled to a hearing as no material factual issues have been identified as required by the regulations, 49 CFR 386.14(b)(2).

It is unclear from Respondent's letter whether it is in fact requesting a hearing at this time, however, we will review the pleadings as if such a request has been made. Respondent contends that it is not clear in the regulations as to the applicability of the FMCSRs to its case. Respondent cites to § 383.5 in support of its contention

The citation in and of itself provides evidence of some familiarity with the regulations. When viewed together with the evidence in the record of prior contacts (1984 letter and Safety Review in 1988), it appears that Respondent is attempting to hold Petitioner responsible for its own misreading of the regulations. The regulations state in the definition section, § 390.5 under Commercial Motor Vehicle, that the regulations are applicable to vehicles with weight ratings of 10,001 or more pounds. Denial of the allegations on the basis of confusion over the regulations cannot support a hearing in light of the prior experience of this carrier.

Respondent also contends that because no other vending company is familiar with the regulations, it is unfair to hold it to the requirements of the FMCSRs. I do not know whether any other vending companies have ever been audited or cited for violations but if Respondent will provide us with a list of names and addresses, I will be happy to include them in the number of businesses to be audited within the near future. Nevertheless, Respondent should be aware of the fact that we are operating in an atmosphere of heightened enforcement. The Congress has directed this Agency to upgrade its efforts to ensure the safety of the traveling public and many businesses not formerly within the reach of our limited program resources are finding themselves subject not only to the regulations but also to safety audits.

I find that Respondent advances no good reasons either in law or equity to excuse these violations completely. However, as the Regional Director did recognize efforts of Respondent to come into compliance and offered a reduction of the penalty, I find that to encourage a positive compliance posture in the future I will accept the reduced amount quoted in Respondent's letter.

Therefore, it is ordered, that Respondent has not complied with the requirements of the regulations and that no hearing can be granted. Petitioner's Motion to Deny Hearing is granted. Petitioner has requested a Final Order assessing the full amount of the penalty, $5,600. For the reasons set forth above, I am granting the Motion for a Final Order in the amount of $4,200. Respondent shall pay that amount to the Regional Director within 30 days of the date of this Order.

Dated: January 24, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of M & T Trucking Services, Inc. V. I. Gas, Inc., Challenger's Trucking Inc.

[Consolidated Docket No 89-41]

Final Order

This matter comes before me upon request of the Respondents for an Administrative Hearing on the claims against them for failing to comply with the required minimum levels of financial responsibility regulations, 49 C.F.R. part 387. The Regional Director, Office of Motor Carrier Safety, does not contest the unavailability of insurance in the Virgin Islands.

It appears that each of the carriers maintains insurance coverage at the limits available to them. Therefore, following the reasoning set forth in the matter of *Empire Gas, Inc.*, the companies will be found to be in technical violation of the regulations. The Regional Director will periodically monitor the situation with respect to the availability of the required amounts of insurance in the Virgin Islands.

Therefore, it is ordered, that no material issues of fact existing, no cause for a hearing has been shown and the request is denied. However, as there is no insurance available in the required amounts in the Virgin Islands at the time of violation, I find that a technical violation exists and the Respondent carriers shall pay the amount of $1.00 each to the Regional Director within 30 days of the date of this Order.

Dated: January 24, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of White's Bus Rental, Inc.

[Docket No. R3-90-039]

Final Order

This matter comes before me upon request of the Regional Director, Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated November 27, 1989, and assessing a penalty of $9,750.

Respondent has not requested a hearing and the parties have been unable to reach any compromise agreement. The Notice of Claim alleged serious violations, including a substantial health and safety violation for operating a motor vehicle (bus) in

such condition as to be likely to cause an accident or break down.

Having reviewed the Motion and the supporting documents attached thereto, I find that the evidence supports the charges and specifications therein.

Therefore, it is ordered, That Respondent is directed to pay to the Regional Director the sum of $9,750 within 30 days of the date of this Order.

Dated: January 23, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Stenger Gas Corp.

[Docket No. R3-89-185]

Final Order

This matter comes before me upon request of the Director, Office of Motor Carrier Safety, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated September 11, 1989, and assessing a penalty of $6,000.

The Notice of Claim alleged 15 violations of the Federal Motor Carrier Safety Regulations (FMCSRs). The record indicates that the Respondent has had prior notification of the applicability of the regulations and that there has been prior contact with the Agency. Although there has been some ostensible contact on this Notice of Claim, no request for a hearing has been made and no indication of material issues in dispute is present. Upon review of the record, I find adequate documentation to support the findings and allegations of violations.

Therefore, it is ordered, That the Motion for a Final Order is granted and Respondent is directed to pay the full assessed amount of $6,000 to the Regional Director within 30 days of the date of this Order.

Dated: January 23, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Stanford & Inge, Inc.

[Docket No. R3-89-211]

Reconsideration

This matter comes before me upon request for Reconsideration filed by Counsel on behalf of Respondent. In its petition, Respondent avers that it is a small corporation, that it had no intent to purposely avoid or evade the regulations, that it is now in full compliance with the regulations and that it will suffer financial hardship if required to pay the amount levied in the Final Order.

The Regional Director, Office of Motor Carrier Safety, Region 3, has responded to the Motion for Reconsideration. No procedural objections have been raised and I will therefore accept the Petition.

I cannot, however, grant the full relief requested by Respondent. It appears from the record that Respondent has had prior contacts with the Agency and should have been familiar with the requirements of the regulations. Respondent's silence throughout the course of these proceedings speaks of the relatively low importance Respondent apparently considers the regulations, their enforcement and the role of the Agency. It is not until a fairly painful penalty was assessed that the seriousness of this matter came home to Respondent.

I have recently addressed the plight of small, private carriers in complying with the regulations in another case, *In the Matter of Action Metal Co., Inc.* I am attaching a copy of that Final Order. Its contents apply here, except for the final paragraph in the main text.

The regulations are important, the process of determining compliance and enforcing is important, and casualness towards safety is not acceptable. We must make our judgments on the basis of a record review. Employees of this Agency must make determinations based upon the record. As stated in *Action Metal,* the Regional Director is closer to the operations of Respondent. Generally speaking, cogent reasons for the mitigation of a penalty will be brought out in the process of negotiations or discussions surrounding compliance actions.

I cannot find any evidence in the record supporting a major reduction of this penalty. Respondent contends it is now in full compliance. Respondent should have been in full compliance prior to this action based upon its earlier contacts with the Agency. Nevertheless, I am aware of the difficulties faced by smaller entities. As the Regional Director has indicated a willingness to accept a reduced penalty, provided additional evidence is presented supporting the request, I will reduce the penalty assessed subject to the presentment of that evidence to the Regional Director within 30 days of the date of this Order. Further, I will accept a schedule of payments over a period of not to exceed 90 days to be worked out between the parties.

Therefore, it is ordered, That the Final Order issued on November 21, 1989, is modified to the extent accepted by the Regional Director after review of additional information to be presented by the Respondent within 30 days of the date of this Order. Failing the production of such information, the Final Order will apply in its entirety.

Attachment: Final Order: In the Matter of Action Metal Co., Inc., Docket No. RI-89-244.

Dated: January 22, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Industrial Nuclear Company, United States Testing Company, Inc.

[Docket No. R9-90-002]

Order Granting Extension of Time

This matter comes before me upon Motion of Respondent for Additional Time to Respond to a Notice of Claim and also a request for records under the Freedom of Information Act. The Notice of Claim was issued on December 20, 1989, and alleges 7 violations of the Hazardous Materials Transportation Regulations for which a civil assessment of $70,000 is made.

Counsel for the Director, Office of Motor Carrier Safety, Region 9 (Petitioner), does not object to the grant of additional time. The Respondent will be provided with a copy of the Agency investigation report and Petitioner avers that 30 days from receipt should suffice.

Respondent's Motion requests the investigation report and other related materials under the Freedom of Information Act. Such a request is not properly made in a Motion under 49 CFR part 386. However, as Petitioner is providing the investigation report, it is unnecessary for us to discuss this issue further.

As both parties agree that additional time to respond is necessary, I am granting Respondent's Motion. Respondent requested until March 15, 1990, or 30 days after receipt of the requested materials. No good reason having been advanced for the necessity of establishing receipt and determining a 30 day future period, the March date appears to satisfy all requisites of these proceedings.

Therefore, it is ordered, That Respondent's Motion for Additional Time to Respond is granted. The new reply date for the Notice of Claim is March 15, 1990.

Dated: January 19, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Strong Trucking (Ashbell & Mary Strong, d/b/a)

[Docket No. R3-88-061]

Order

On November 24, 1989, I issued an Order setting forth several questions which I wanted Petitioner to consider. Petitioner was instructed to review this

matter and file an amended request or withdraw the motion.

On December 27, 1989, Petitioner filed a Motion Requesting Withdrawal of the Motion for Final Order. It appears that further investigation has revealed that the carrier has gone out of business and that no tangible assets remain.

It is therefore ordered, That this matter is dismissed.

Dated: January 12, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Krug Trucking Co. (Michael Krug d/b/a)

[Docket No. R3–89–125]

Final Order

This matter comes before upon request of the Regional Director, Region 3, Office of Motor Carrier Safety (Petitioner) for a Final Order finding the facts to be as alleged in a Notice of Claim dated July 28, 1989. That Notice alleged that 11 violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and Financial Responsibility requirements had been documented.

Respondent did not request a hearing and in his correspondence reply asserted corrective actions had been taken, requested a compromise offer and requested time to pay any penalty based on financial status.

Petitioner has taken into account Respondent's requests and now asks for a penalty of $3,000.

Therefore, it is ordered, That in the absence of any material factual issues in dispute and any request for hearing, the alleged violations are supported by the record. Respondent shall pay the Regional Director the sum of $3,000 within 90 days of the date of this Order.

Dated: January 10, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Action Metal Co., Inc.

[Docket No. RI–89–244]

Final Order

This matter comes before me upon request of Action Metal Co., Inc. (Respondent), for a hearing and Motion in Opposition thereto and request for a Final Order filed by the Regional Director, Region 1, Office of Motor Carrier Safety (Petitioner). Petitioner alleges that Respondent has committed 9 violations of the Federal Motor Carrier Safety Regulations (FMCSRs). There has been previous contact with the Respondent, earlier violations have been found of a similar nature, and the Respondent has been given a copy of the applicable regulations governing this matter.

Respondent is a small, private carrier, and asserts that it carries only its own steel. The total distance driven is 48 miles one way. The Respondent, through its President asserts that 9 violations of the same charge is unfair and that only one violation and penalty should be charged.

This case presents us with an interesting set of facts and propositions. Many smaller businesses are now falling within the scope of the FMCSRs. The Agency's increased enforcement has reached many businesses not formerly visited by an investigator. We hear quite often that the charges are unfair, the fines too high and due process is unavailable. The Congress has passed stringent laws and has directed the Agency to upgrade its enforcement efforts. The end purpose is a safer highway environment. Smaller businesses are just as culpable as larger entities. The fines imposed may have a greater impact on the bottom line, but a fatality resulting from a violation by a smaller business is just as dead as one resulting from a violation by a larger business.

This Agency operates on a relatively decentralized chain of command. Those officials closest to the audits and violations are in the best position to determine the amount of the fine. We have stated this premise over and over. There are several levels of review, culminating with the potential for administrative review. If there are sufficient, cogent reasons supporting the reduction of a fine, they will be brought out in the process, considered and acted upon.

At the same time, there are rules, regulations and Procedures in place which must be followed to ensure impartiality and equity of treatment and application. It is not sufficient that a business feels it is small and therefore should be held to a lesser standard. It is not sufficient that a business feels it should receive a $10 penalty as if these violations were traffic citations. Human life is sacred. The laws of this Country are important. The regulations of this Agency must be followed. Any company which does less, or believes less places the public at risk and itself at risk. The penalties assessed are designed to create an awareness of the necessity for compliance. Obviously, some entities comply faster than others.

There is not the slightest evidence of any good faith attempt to comply with the regulations here. An attitude of casualness permeates the Respondent's filings. No facts are placed in evidence; only peevish excuses. Such are not enough.

Therefore, it is ordered, That Respondent having failed to comply with the requirements of the regulations governing this process, has not made a valid request for hearing and his request is denied. Petitioner has provided evidence of violations and no reason supporting a request for reduction of the penalty has been substantiated. Petitioner's request for a Final Order is granted and Respondent is directed to pay to the Regional Director within 30 days of the date of this Order the sum of $2,700.

Dated: January 10, 1990.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of J.R. Christoni

[Docket No. RI–89–223]

Final Order

This matter comes before me upon request of the Director, Region 1, Office of Motor Carrier Safety (Petitioner) for a Final Order finding the facts to be as alleged in a Notice of Claim dated September 20, 1989. Respondent has requested a hearing and Petitioner objects thereto on the basis that Respondent's request fails to comport with regulatory requirements.

The Notice of Claim alleges numerous violations of incomplete files, excess hours and false entries upon the record of duty status. These violations have been substantiated by a Compliance Review and report thereof. This is not the Respondent's first contact with the Agency or the regulations. In fact, there have been previous violations.

In its initial reply and request for a hearing, Respondent generally denied the allegations and submitted that its drivers did not engage in "serious" violations. Respondent also stated that the Notice of Claim does not provide the complete factual situation. Respondent then stated that at the hearing it intends to submit its position that there are material factual issues in dispute.

Respondent followed up with a second filing taking umbrage at Petitioner's Motion and objecting on the basis that a denial would limit its right to cross-examination. Without such, Respondent contends, it is unable to be more specific and precise.

Perhaps Respondent and its Counsel should read the regulations. 49 CFR 386.14 clearly requires that each reply must contain an admission or denial and a concise statement of facts and each request for a hearing must contain a listing of all material factual issues

believed to be in dispute. It is not for Respondent to determine violations are "serious" and which are not. The law, the regulations and the administration thereof by this Agency will determine if a violation has taken place and will assess a penalty based on the seriousness of that violation.

The regulations nowhere contemplate the use of the administrative hearing process as a fishing expedition. Surely, if Respondent wishes to advance the argument that its alleged violations are not of a serious nature it should have ample facts readily available to list those material factual issues needing a determination. It boggles the mind to try to understand the claim that violations have not occurred, are not serious, but the specifics to support these contentions are unavailable without cross-examination.

Respondent requested an opportunity to meet informally with Petitioner to resolve these matters. Surely, if there was anything unclear about the alleged violations, the audit report or the hearing process, a simple question to Petitioner would have clarified the entire matter.

The regulations do not contemplate dilatory tactics, lack of preparation or carelessness on the part of pleaders in knowing the basic requirements governing the process.

Of a more substantive nature, examination of the pleadings and the documents appended thereto establish that there have been violations, that these violations are serious and that they stand not controverted by Respondent.

Therefore, it is ordered, That Respondent's request for a hearing fails to meet the basic requirements of the regulations and is hereby denied. Petitioner's motion for a Final Order finding the facts to be as alleged in the Notice of Claim and imposing a civil penalty is hereby granted. Respondent is directed to pay the amount of $22,000 to the Regional Director within 30 days of the date of this Order.

Dated: December 26, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Calgon Corporation

[Docket No. R3–89–171]

Final Order

This matter comes before me upon request of Calgon Corporation (Respondent) for a hearing on the alleged violations charged in a Notice of Claim dated August 29, 1989. The Regional Director, Region 3, Office of Motor Carrier Safety, does not object to the request for a hearing.

The Notice of Claim alleges four violations of the regulations: one is for violation of the Financial Responsibility requirements in that Respondent did not have a copy of an MCS–90 in the files; three are for failure to retain written reports of visual inspections of a cargo tank in the files for two years after the date of inspection. The latter three violations involve only two tanks, however, three interstate trips have been made.

Respondent has corresponded several times with the Director. Respondent denies the alleged violations and has presented a Certificate of Insurance from an insurance agency showing the required level of insurance and a statement of visual inspection from a mechanic, accompanied by proof thereof.

With respect to the violation of the Financial Responsibility regulations, § 387.7(d) specifically requires that a Form MCS–90, issued by the insurer be maintained in the files. Respondent, even now presents only a Certificate of Insurance. Although seemingly innocuous and overly technical, it is only through perusal of the MCS–90 that the Agency can be assured that all requisite insurance coverage, including environmental restoration, is in place. There is a violation, the violation has been proven and the violation is continuing. Respondent shall take all necessary action to obtain the MCS–90 immediately.

With respect to the three violations of the regulations, failing to retain written reports of each visual inspection of a cargo tank for a period of two years, Respondent has provided statement to the effect that the inspections were performed, that there are written inspection reports and that these reports were in the files at the time of the audit. The Director has failed to respond to this information. There are no statements or affidavits from the reviewing agents rebutting this information, nor is there any indication in the record that these forms are in some way inadequate. There is more than a material factual issue in dispute here, there is a failure to prove and substantiate the allegation.

Therefore, it is hereby ordered, That Respondent's request for a hearing is denied. The violation of § 387.7(d) has been established and Respondent shall pay to the Director $750 within 30 days of the date of this Order. The alleged violations of § 177.824(b) are dismissed.

Dated: December 26, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Wonder Chemical Company

[Docket No. R3–88–073]

Order Appointing Administrative Law Judge

This matter comes before me upon a Request for Determination On Agreed Statement of Facts submitted by the Director, Region 3, Office of Motor Carrier Safety. The agreed Statement of Facts has been jointly signed by attorneys for both parties.

On September 25, 1989, a Notice of Claim was issued to Wonder Chemical Company (Respondent) by the Director (Petitioner) alleging 6 violations of 49 CFR 387.7(a) failing to maintain the minimum levels of financial responsibility. The Agreed upon Statement of Facts establish that there were at least 6 trips within the scope of the regulations; that the involved vehicles were leased; that the lessor did have the required financial responsibility coverage; that Respondent had in its possession an MCS–90 in the name of lessor; that the insurance company issued a Certificate of Accord stating that Wonder was covered by the policy issued to lessor; that Wonder did not have an MCS–90 in its own name while operating the vehicles at the time of the alleged violations.

Throughout the discussions between the parties leading up to this request for a determination, Respondent has maintained that it (a) did have the required level of financial responsibility under the regulations, and (b) that the MCS–90 issued to its lessor was sufficient to comply with the regulations There are two subsections of the regulation involved here. In § 387.7(a) motor carriers are required to obtain and have in effect the minimum levels of financial responsibility set forth. In § 387.7(d) it is required to maintain proof thereof at the principal place of business (Form MCS–90 issued by an insurer).

The Agreed upon Statement of Facts do not resolve this matter. There remain two significant material issues in dispute here. Firstly, does the acknowledgement by the insurer that Respondent is covered by the insurance policy issued to the lessor meet the requirements of the regulations, specifically § 387.7(a). Respondent contends it has the required levels of insurance and has proferred proof of such through this Certificate of Accord issued by the insurer. Petitioner apparently contends no insurance or

less than the required level of insurance has been shown to exist.

Secondly, notwithstanding the establishment of the required levels of insurance, it appears that there is a dispute as to whether Respondent has an MCS–90 as required. Respondent has an MCS–90 albeit issued in the name of its lessor. Petitioner has failed to allege a violation of the regulations, to wit § 387.7(d). However, the answer to this question has a bearing on the alleged violation and the quantum of the penalty.

Notwithstanding the Agreed upon Statement of Facts there are material factual issues to be established sufficient for me to assign this matter to an Administrative Law Judge (ALJ) for additional proceedings. The ALJ assigned shall, in addition to the authority below, specifically address the matters above and should review both the record presented, oral argument and briefs prior to makinq his or her recommendation to me, including the quantum of any assessment if a violation is found.

Therefore, it is ordered, That I hereby appoint an Administrative Law Judge in accordance with 49 CFR 386.54(a) (1985) to be designated by the Chief Administrative Law Judge of the Department of Transportation as the Presiding Judge. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b) (1985).

Dated: December 2, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Leroy Randolph

[Docket No. R3–88–090]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, Office of Motor Carrier Safety, for a Final Order finding the facts to be as alleged in a Notice of Claim dated December 7, 1988, and assessing a penalty of $700.

It is alleged that Respondent violated 49 CFR 391.15(a) by operating a motor vehicle on two trips while his license was suspended. Although there has been correspondence between the Respondent and Director, no request for a hearing has been made. The facts are clear: Respondent knowingly violated the regulation. It is unfortunate that such occurrences take place; they should not. This is not a case of reasonable doubt or ostensible excuse. It is a flagrant violation and I am unable to find any rationale warranting a reduction of the amount assessed.

Therefore, it is ordered, That the evidence supports the charges and specifications as set forth in the Notice of Claim and Respondent is directed to pay the sum of $700 to the Regional Director within 60 days of the date of this Order.

Dated: December 21, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the matter of John Steven Johnson, in his Individual Capacity as President of Steve Johnson and Sons Trucking, Inc., and Steve Johnson & Sons Trucking, Inc., a Corporation

[Docket No. R9–89–058]

Denial of Petition For Reconsideration

On October 20, 1989, Respondent submitted a Motion for Reconsideration of the Final Order issued on September 20, 1989. Respondent makes an elaborate argument that his Request should not be denied on procedural grounds for dilatory filing. Without attempting to sort out the facts advanced by Respondent we will accept the Petition for purposes of review.

Notwithstanding this review, we find no reason to recall or otherwise modify the Final Order. To recap briefly, the Final Order found that no request for a hearing had ever been made in this matter, that communications received from the Respondent were querulous and admitted culpability, disclaimed responsibility for the actions of others, to wit, employees, and denied knowledge of the requirements of the regulations despite past encounters with this Agency.

Now suddenly, through Counsel, Respondent recognizes the foolhardiness of venting his spleen in the bizarre manner originally chosen. Respondent seeks another bite of the apple in this Petition. Nevertheless, the basic thrust of his arguments has not changed. There has not been established a request for a hearing in compliance with the regulations. There continues to be a disavowal of the responsibility to manage this business in accord with the regulations, which includes the responsibility to know of the misfeasances or malfeasances of employees by reviewing the record. The issue is not, as Respondent would have it, whether he should require his employees to change any statements after the fact. The issue is: did the corporation or its employees violate the regulations. Clearly in this case, such violation is present.

No letter or communication from Respondent has been responsive. I still have difficulty reading, let alone understanding, the filings of Respondent and Counsel in this matter. The law and regulations do not tolerate financial, legal or administrative skullduggery. This business has been run in a sloppy manner, legal violations have been documented, and no proper defense has been raised. I will state for the record that the silence of petitioner in this matter is a dangerous and unfounded precedent. This matter is clear for us and we find no difficulty in reaching the conclusions reached. However, Counsel is cautioned that lest he find himself in the same Position as Respondent in the future, he should support his case with filed pleadings.

Therefore, it is ordered, That the Petition for Reconsideration is denied and the terms of the Final Order remain in effect.

Dated: December 20, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Williams Bus Excursions

[Docket No. R3–88–015]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated February 16, 1988.

Having reviewed the Motion and the supporting documents appended thereto, I find that although informal contacts were made by telephone, no formal written response or request for hearing has ever been made. The evidence stands uncontroverted and therefore supports the charges and specifications in the Notice of Claim relating to violations of the regulations requiring that Respondent maintain proof of financial responsibility at its principal place of business.

Therefore, it is ordered, That Respondent is directed to pay the penalty of $1,000, as requested in the Motion for Final Order. This sum is to be paid to the Regional Director within 30 days of the date of this Order.

Dated: December 19, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Hunter Oil Company, Inc.

[Docket No. R3–88–089]

Interim Order

This matter comes before me upon request of the Regional Director for a Final Order and his stated opposition to the request of Respondent for a hearing.

On November 30, 1988, Respondent was sent a Notice of Claim alleging 20 violations of the regulation requiring drivers to make daily records of duty status. All of the alleged violations involved one driver. The Notice assessed a penalty of $450 for each of the 20 alleged violations for a total of $9,000.

Respondent (Hunter Oil) in its answer to the Motion for Final Order submits a letter of December 15, 1988, which was in response to the Notice of Claim. This letter requested a hearing and set forth a statement of facts and explanation of the facts. This letter was inexplicably Omitted from the Regional Director's filing.

Discussions between the parties have not resolved the outstanding issues. Nevertheless, the record appears to reveal that there was a technical deficiency of the regulations present here. The facts, as set forth in a letter of February 10, 1989, from Respondent, not controverted by the Director, appear to be that Respondent is a small, family owned business with three drivers. Deliveries appear to be for the most part local in nature. The driver in question has had a change in status with the company. There is no indication in the record of transgressions in the past of the same or similar nature.

Respondent has taken efforts to correct the technical deficiency alleged and contends that there was a compliance in spirit, if not letter with the regulations.

It is my feeling that matters of this nature are capable of resolution at the local level. The transportation of hazardous materials requires an extraordinary degree of caution. Strict compliance is expected by the law and regulations. At the same time, smaller business entities may feel disadvantaged by the onerous requirements placed upon them, and to some degree they are. It is our intent to secure a safe driving environment for the public. This means that carriers subject to our regulations must operate in a climate of compliance.

It does not mean, however, that such entities will or should be subjected to high penalty amounts unless the record clearly shows that the violations are of a magnitude as to warrant high assessments. The Regional Director and his staff are commended for the diligence of effort to visit with, review the record of and document the violations of all carriers in the Region. Such efforts are not to be minimized.

Care must be taken to completely and thoroughly document the reasoning underlying penalty assessments. In the absence of such materials in the record, the thought process remains a matter for dispute. The record here indicates 20 short trips made by a driver with a long-standing record of employment with the carrier, with no apparent noncompliance. Without additional information, I choose to view this as a single infraction, easily correctable. The Director should work with the carrier to reach an understanding of what record-form is acceptable.

As I have indicated in the past, it is only with great reluctance that I will interfere in the assessment of a penalty. The Regional Director is closer to the alleged violation and the circumstances surrounding the carrier's operations. Notwithstanding this reluctance, I do exercise the option of altering the penalty assessment where warranted. A violation exists or it does not exist. The penalty therefore, if proven, is more subjective. My aim in this Order is to ensure the future compliance of the carrier. I cannot find within the four corners of the documents submitted to me a justification for this magnitude of penalty. If there be such it is lost in the mists of bureaucracy.

Therefore, it is ordered, That Respondent is in technical violation of the regulation, although there are factual differences present which could alter this conclusion. There are two choices before me at this time. Respondent may pay a penalty of $450 within 30 days of the date of this Order to the Regional Director and work with the Director to arrive at a mutually agreeable form to bring about complete compliance; or 2. I shall appoint an Administrative Law Judge to determine whether the facts support the establishment of the alleged violations (20 at $9,000). As option 1 is self-executing, payment of the penalty as set forth will terminate this matter. Option 2 needs additional communication before it will be effected. If Respondent still wants a hearing before an Administrative Law Judge, he must forward a letter to the Docket and all parties on the Service List within the 30 day period.

Dated: December 19, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of E.L. Lawson Trucking, Inc.

[Docket No. R1–89–015 (Formerly RI–89–245)]

Final Order and Order Appointing Administrative Law Judge

This matter arises out of a Notice of Claim, dated October 6, 1989, issued by the Regional Director, Region 1 (hereafter referred to as Petitioner or Director). The Notice of Claim alleges that E. L. Lawson Trucking, Inc. (hereafter referred to as Respondent) violated the Federal Motor Carrier Safety Regulations (FMCSRs). It is alleged that four separate regulations have been violated: 49 CFR 391.15; 49 CFR 394.9; 49 CFR 395.3; and 49 CFR 395.8. The alleged violations for two of these regulations, constituting 9 separate alleged violations, have been brought as substantial health and safety violations, which incur much higher penalties.

The Respondent has contested these allegations and has requested an administrative hearing. Among the requirements governing the request for a hearing two elements which must be strictly complied with are the requirement that the request must be accompanied by a denial and concise statement of facts and a listing of all material factual issues believed to be in dispute.

With respect to the alleged violations of § 391.15, Respondent contends that it did not know the driver's license had been suspended and that he was disqualified. The ambiguity surrounding the alleged violation allows the simple statement that knowledge was not present to meet the requirements of the regulation. There are material factual issues in dispute. However, this is not to say that Respondent's reply would have met the test under all circumstances. Could Respondent have been the victim of circumstances by timing or failure of the driver to notify him of the suspension? Was Respondent careless in review of the required files? What is there in this particular violation that constitutes a substantial health and safety violation? Was the Respondent's behavior such that it could be characterized as negligent or wanton? Were the transgressions underlying the disqualification significant in that they involved alcohol or drugs or gave rise to a fear that the motoring public was in jeopardy? The Administrative Law Judge must make two determinations here: 1. Has a violation of the regulation been established? 2. If so, can it be supported that there was something in this violation that raised the threshold of the penalty? If the ALJ finds in the affirmative on question 1, but negative on number 2, then it will be necessary for the Notice of Claim to be amended.

With respect to the alleged violations of § 394.9, it has been documented that Respondent failed to report accidents. Respondent replies he had no knowledge that he was required to report all accidents. The regulations are clear on what must be reported. Respondent has been involved in prior matters with the Petitioner and is

charged with knowing the requirements of the regulations. I am denying the request for a hearing on these violations and issuing a Final Order herein assessing a penalty of $1,500 for three violations ($500 for each violation).

With respect to the alleged violations of § 395.3 requiring or permitting a driver to drive after having been on duty more than 70 hours in 8 consecutive days, Respondent denies the violation and contends drivers were instructed to stop driving. This is sufficient to call the question for hearing. The ALJ should focus on how the drivers were so instructed. Was disciplinary action taken against any driver? Has any driver ever been suspended or terminated for continued driving? How did the Respondent monitor this situation? Neither an oral warning nor even a memorandum without some threat of disciplinary action is sufficient to constitute a complete defense to this charge. Further, in view of the unreported accidents of Respondent and prior enforcement actions in this area, a prima facie case has been made for substantial health and safety violations if the basic violation is established.

With respect to the alleged violations of § 395.8 requiring or permitting false entries upon a record of duty status, Respondent denies the allegations and contends that "when the employer had knowledge of false entries, the employee was told to correct the entries before he would receive his weekly pay check." This reply is sufficient to call the matter for hearing. The ALJ must be convinced that Respondent had a proper review mechanism in place and that its efforts were sufficient to shift the onus of responsibility elsewhere. Respondent is required to comply with the regulations and this requirement includes knowledge or constructive knowledge of the records.

Therefore it is ordered, That Respondents request for a hearing is granted on the issues of compliance with 49 CFR 391.15; 395.3; and 395.8. However, the request is denied for those violations alleged and as found above, proved, for § 394.9. Respondent is directed to pay the Regional Director $1,300 within 30 days of the date of this Order.

To determine the other questions, I hereby appoint an Administrative Law Judge in accordance with 49 CFR 386.54(a)(1985), to be designated by the Chief Administrative Law Judge of the Department of Transportation as the Presiding Judge. The Judge appointed is authorized to perform those duties specified in 49 CFR 386.54(b)(1985).

Dated: December 14, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of A.T. Pinto, Inc.

[Docket No. R3–90–006]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated October 16, 1989.

Having reviewed the Motion and supporting documents appended thereto, I find that no valid request for a hearing has been made. I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That Respondent is directed to satisfy the penalty assessment by paying to the Regional Director the full amount of $8,100 within 30 days of the date of this Order.

Dated: December 7, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Rent-A-Stretch, Inc.

[Docket No. 89–196]

Final Order

This matter comes before me upon request of the Respondent for a hearing and Motion in Opposition thereto and for a Final Order submitted by the Regional Director, Office of Motor Carrier Safety, Region 1. At issue are allegations that Respondent has violated the required minimum level of financial responsibility regulation (49 C.F.R. 387.31).

The Petitioner bases these allegations on the results of an audit which established that Respondent has been operating with public liability coverage of only $500,000 rather than the required coverage of $1,500,000 (not $5,000,000 as stated in the Motion for Final Order, see § 387.33). There has been a prior enforcement case against Respondent for previous violations of this section.

In requesting a hearing, Counsel for Respondent avers that Respondent has attempted to comply in good faith with the spirit and intent of the regulations. It is argued that a violation, if any, is the result of the actions of third parties.

This is not the first time that Respondent has been charged with this alleged violation. What good faith attempt to comply has been made? Counsel has not brought forth evidence of a general inability of Respondent and those similarly situated to obtain the requisite coverage. Counsel has failed to identify any material issues in dispute. The facts appear to be: Respondent is operating in interstate commerce without the required level of insurance.

There can be no good faith compliance in this matter. Respondent has the insurance or does not. Respondent operates in interstate commerce or does not. Am I to assume that some conspiracy lurks behind these allegations? Is it an insurance company cabal which is depriving Respondent of its insurance coverage? Counsel's request reads as a script from Godzilla swallows Manhattan.

Respondent must cease operation until such time as proof of compliance is obtained. There is no valid reason proferred for any other determination. There is no good cause in these motions upon which I can send the matter to hearing.

Therefore, it is ordered, That Respondent's request for a hearing is denied and Petitioner's Motion for a Final Order is granted. Respondent is directed to pay to the Regional Director the full amount of $10,000 within 30 days of the date of this Order. The Regional Director is directed to ascertain whether the Respondent has obtained the required levels of insurance. If not, such action shall be taken as necessary to compel Respondent to cease and desist from noncomplying behavior.

Dated: November 29, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of C & W Enterprises

[Docket No. R3–88–064]

Final Order

This matter comes before me upon request of the Regional Director, Region 3, for a Final Order finding the facts to be as alleged in a Notice of Claim dated August 4, 1988.

Having reviewed the Motion and supporting documents appended thereto, I find that no valid request for a hearing has been made. I find that the evidence supports the charges and specifications in the Notice of Claim relating to violations of the Federal Motor Carrier Safety Regulations (FMCSRs).

Therefore, it is ordered, That Respondent is directed to satisfy the penalty assessment by paying to the Regional Director the full amount of $4,000 within 30 days of the date of this Order.

Dated: November 29, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

In the Matter of Onnie O. Harlow

[Docket No. R6–89–36]

Final Order

This matter comes before me upon request for a hearing and opposition thereto arising out of a Notice of Claim issued by the Regional Director, Office of Motor Carriers, Region 6.

The Notice of Claim, dated June 9, 1989, alleges one documented violation of the Federal Motor Carrier Safety Regulations (FMCSRs), falsifying records of duty status. The Respondent does not deny that the violation occurred. Rather he makes a plea for understanding based upon many years of good driving service and recognition of the practical realities of the industry.

I accept Mr. Harlow's representations as to his driving record. The fact that it is difficult to comply with the regulations in every instance and still make commercial ends meet cannot be denied. The FMCSRs, however, take priority over these arguments as the safety of the traveling public, and indeed, the drivers themselves is involved. Enforcement is not, as Mr. Harlow represents, merely a matter of going by the book. We also have families, we also must pay our bills, we also must meet rules and regulations in our everyday lives, some of which appear onerous. This does not constitute an excuse or rationalization for violation of the rules.

The violations are present; they have been documented. Respondent makes no compelling case for granting a hearing. I would like to assure him that notwithstanding this denial of his request and the imposition of a penalty his arguments have been heard and considered.

Therefore, it is ordered, That Respondent's request for a hearing is hereby denied. Petitioner's request for a Final Order is granted, with the modification the penalty is reduced to $100. This penalty must be paid to the Regional Director within 45 days of the date of this Order.

Dated: November 29, 1989.

Richard P. Landis,

Associate Administrator for Motor Carriers.

Service Bus Company, Inc.

[Docket No. RI–89–05 (Motor Carrier Safety—FHWA)]

Decision of Administrative Law Judge Burton S. Kolko

Served: October 6, 1989.

Complainant Assistant Regional Counsel, Federal Highway Administration (FHWA), charged Respondent Service Bus Company, Inc., a motor carrier, with thirty violations of the Federal Motor Carrier Safety Regulations, 49 CFR part 350 *et seq.*, which are issued under the authority of 49 U.S.C. 3102. The Government's Notice of Claim initiating this proceeding, dated October 3, 1988, cited four counts of failing to maintain driver qualification files for drivers employed, as required by 49 CFR 391.51; twenty-one counts of failing to require drivers to make and submit a record of duty status under 49 CFR 395.8(a); and five counts of requiring or permitting part-time drivers to operate without obtaining from the driver a signed statement regarding duty hours for the previous seven days (49 CFR 395.8(j)(2)). Pursuant to 49 U.S.C. 521(b), FHWA seeks the maximum civil penalty assessment of $500 per count for a total assessment of $15,000.

Respondent denied the charges and requested a hearing. I was appointed to preside over the action under 49 CFR 386.54. The hearing was held May 30, 1989 in New York City, and the parties filed briefs on June 26, 1989. After careful consideration, I find the violations as charged and assess a civil penalty of $15,000.

The Notice of Claim arose from an investigation undertaken by FHWA Safety Investigator Donald Moruzzi. Moruzzi first appeared at Respondent's principal place of business in Yonkers, N.Y. on July 20, 1988 and asked to see certain records to be maintained by interstate motor carriers under federal law. He specifically sought drivers' logs, dispatch sheets, and charter contracts. The President of Service Bus, Salvatore DiPaolo, told him that the company no longer operated in interstate transportation and therefore was not subject to federal requirements (Tr. 22–23). He explained that Service Bus no longer kept such records because it had no need (Tr. 23). Investigator Moruzzi returned the following day and repeated his request. DiPaolo then produced charter contracts involving local transportation but no other documents. He again stated that be no longer kept drivers' logs or dispatch sheets, but this time added that some records might be found at another location used by Service Bus (Tr. 24). Moruzzi was then directed to dispatcher Arnold Jeffries at the second location. Jeffries, who had begun work at the carrier about a week earlier (Tr. 70–71, 73), told Moruzzi that the records and files at the second location were "in a bad disarray" and that nothing could be found (Tr. 73–74).

Shortly thereafter Investigator Moruzzi obtained proof that, contrary to DiPaolo's representations, Service Bus had indeed operated in interstate transportation during relevant time periods. Atlantic City casino records confirmed that Service Bus operated on many occasions between Yonkers, New York and Atlantic City, New Jersey (Tr. 25, 27, 33, 36-37). Confronted with this proof, DiPaolo produced various driver qualification files and records of duty status (drivers' logs) (Tr. 25–26).

A driver qualification file for a regularly employed driver must include a medical examiner's certificate of his physical qualification to drive a motor vehicle; an annual review of his driving record; a copy of his driver's license or certification of road test; an inquiry into the driver's driving and employment records during the previous three years; and the driver's application for employment (49 CFR 391.51; Tr. 27–28). The driver's record of duty status, formerly known as a driver's log, requires a driver to report his duty status for every 24-hour period on a grid divided into four descriptions, (1) Off duty; (2) Sleeper berth; (3) Driving; and (4) On-duty not driving. A regular driver would submit one for each day of the month (See 49 CFR 395.8; Tr. 29–30). Intermittent drivers (as defined in the regulations) must submit a statement showing the total duty time during the previous seven days and the time at which the driver was last released from duty prior to the current assignment (49 CFR 395.8(j)(2); Tr. 30).

Upon reviewing the proffered records of Service Bus, Moruzzi discovered that driver qualification files for four drivers were missing.[1] The company also lacked record-of-duty status files and seven-day statements for various dates between March 7 and July 18, 1988. Moruzzi drew up a checklist of his findings which DiPaolo signed (Exh. 5; Tr. 26, 58).

DiPaolo offered various reasons for the state of his records. He testified that the records had in fact been maintained by Service Bus, but that a former employee charged with maintaining them had left the company in May 1988 coincident with their disappearance (Tr. 43, 58–59, 62). He also claimed that the files may have been located in another office (Tr. 63). DiPaolo also stated that one of the drivers cited for lacking any driver qualification files, Louis Gomez,

[1] A fifth driver alleged to have no qualification file, Joseph Monaco, was not named in the complaint. DiPaolo stated that he was not a driver but a company mechanic who had rented a bus (Exh. 5; Tr. 46).

had actually rented a bus from Service Bus and was therefore not an employee subject to FHWA requirements (Tr. 45–46, 54, 65–66).[2] Additionally, DiPaolo claimed that he required drivers to turn in their logs or else forfeit their pay (Tr. 44–45), implying that it was unlikely that drivers would fail to turn in their records of duty status. This account was confirmed by one of his drivers (Tr. 89–90, 93–94). In sum, DiPaolo maintains that he was in full compliance with all requirements cited by Complainant at all times.[3]

I find the violations as charged. Mr. DiPaolo signed the checklist confirming the findings of Investigator Moruzzi which are the subject of this action. He thereby acknowledged that Moruzzi's findings, with the exception of the status of Gomez, were correct. I need go no further in determining whether the alleged violations which were not contested occurred.

DiPaolo's claims in mitigation of these findings were vague and unsubstantiated, and I do not credit them. He stated that the files may have been stolen, but never offered to show Inspector Moruzzi a police record of such theft (Tr. 36). Nor did he explain why a former employee would make off with these files. Furthermore, while it was also suggested that the files may have been located at a place other than Service Bus' headquarters, dispatcher Jeffries indicated that the records at the second location (assuming they were pertinent) were in disarray and effectively available. The regulations in any event generally require records to be maintained at the motor carrier's "principal place of business" (49 CFR 391.51(f))

Finally, DiPaolo's claim that Louis Gomez was a lessee rather than an employee driver strains credibility. No written lease was executed between Gomez and Service Bus; the company carried the insurance; and the company paid for the gas without reimbursement (Tr. 65–66). Those circumstances are not consistent with a rental agreement. In keeping with the overwhelming weight of the evidence, I find that Gomez was a driver employed by Service Bus and consequently also find the violations alleged with respect to him.[4]

My decision is also grounded in the fact that I have accorded greater weight to the evidence offered by Inspector Moruzzi than to that offered by Mr. DiPaolo. While I see no reason to question Moruzzi's findings and testimony, DiPaolo's credibility suffered by his initial claim that Service Bus made no interstate trips. Only when confronted with written evidence to the contrary did he acknowledge that that claim was untrue. He later stated that the reason he had told Moruzzi that he no longer operated interstate was because he was too "busy" to know where all his buses traveled (Tr. 47; see also Tr. 49). But that claim is of dubious believability in view of the 32 Atlantic City trips undertaken by Service Bus' fleet of only 7–11 buses between March and July 1988 (Exh. 5; Tr. 21, 48). Moreover, DiPaolo acknowledged that some of his drivers operated exclusively to and from Atlantic City (Tr. 60). Against this background, DiPaolo's credibility in this action cannot be accorded the same weight as Morvzzi's.

Under 49 U.S.C. 521(b), Service Bus is liable for a civil penalty not to exceed $500 for each violation. The determination of the amount of any civil penalty is based on

* * * the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history or prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require. In each case, the assessment shall be calculated to induce further compliance.

49 U.S.C. 521(b)(2)(c). The agency seeks the maximum penalty of $500 per violation. It stated that its determinations take into account the carrier's past record and ability to pay (Tr. 40–41).

Service Bus has been the subject of four previous safety audits since 1979. The 1979 audit cited 52 violations (Exh. 2; Tr. 13–14); a 1980 audit listed 51 (Exh. 3; Tr. 15–16).[5] No sanctions were sought on these two occasions. Rather, written recommendations were made to the carrier which essentially set out a program for ensuring compliance. In each case the agency report containing these recommendations was delivered to and signed by Salvatore DiPaolo as President of Service Bus (Tr. 14, 16). As a result of a third audit conducted in 1982, the agency issued a Notice of Claim against Respondent on June 15, 1983 citing eight counts of failing to retain on file driver's daily logs. The claim resulted in a civil penalty assessment of $4,000 (Exhs. 4, 6; Tr. 16–21).

I agree with the recommendation of agency counsel and hereby set a penalty of $15,000 for the violations. I do not arrive at this figure casually. Service Bus has been cited on three previous occasions for the same or similar problems. The responsible company officials have not changed during this period. Service Bus has been more than suitably apprised of the need to comply. The record shows that it has failed in its responsibilities.

These are not mere record-keeping violations. They affect the safety of the traveling public. Failure to adhere to them undermines the integrity of the Congressionally-mandated enforcement program, public confidence in motor carrier safety, and ultimately the safety of motor carriers themselves. The Motor Carrier Safety Regulations are not to be lightly regarded.

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[2] DiPaolo conditioned his signing of Moruzzi's checklist by this claim. See Exh. 5, p. 2.

[3] Tr. 52–56. Respondent also states in support of his case that on September 13, 1988 he was found in compliance with applicable regulations of the state of New York (Tr. 56, 60, 72, 74–75, 84). This claim, however, is irrelevant to the matter before me. No showing was made regarding the New York requirements, the nature and extent of the inspection there made, or the standards utilized in arriving at that result. Indeed, the New York inspection makes reference to the compliance of the company's *school* buses, another operation and not the subject of this action (Tr. 9–10, 79–80). Moreover, even if New York's program and enforcement standards were identical to FHWA's, the State's September 13 findings have no probative value for the findings made at FHWA's earlier July 20–August 5 inspection. Indeed, I rejected Respondent's proffer of two exhibits reflecting New York State's findings and permitted these documents to accompany the record only as an offer of proof. See Tr. 74–83.

[4] The Notice of Claim alleges that Service Bus did not maintain for Gomez a driver qualification file (violation #4) and failed to require him to make and submit a record of duty status for a July 10, 1988 Yonkers-Atlantic City trip (violation #23). See Notice of Claim dated October 3, 1988.

[5] The 1979 safety audit cited the following violations (the number found follows in parentheses): failure to maintain driver qualification files (two); requiring or permitting drivers to drive more than ten hours (two); failure to require drivers to prepare appropriate daily log (forty); failure to require a driver to forward each day the original of his log (seven); and failure to retain vehicle condition reports (one). The 1980 audit cited a failure to maintain driver qualification files (three); missing items from driver qualification files (four); permitting driver to drive more than ten hours (three); permitting driver to drive after having been on duty 15 hours (six); failure to require driver to make a daily log (ten); failure to require driver to prepare an appropriate daily log (twenty-five). See Tr. 13–16.

The statute requires that the penalty be calculated "to induce further compliance". Against the background I have described, I believe the maximum assessment is the only penalty which will fulfill the statutory goal. Additionally, there has been no showing that the carrier lacks the ability to pay.

Service Bus Company, Inc. is hereby ordered to pay a civil penalty in amount of $15,000 for violating Federal Motor Carrier Safety Regulations 49 CFR 391.51, 395.8(a), and 395.8(j).

This decision is issued pursuant to 49 CFR 386.61. This decision becomes the final decision of the Associate Administrator 45 days after it is served unless a petition or motion for review is filed under 49 CFR 386.62.

Burton S. Kolko,

Administrative Law Judge.

[FR Doc. 90-25081 Filed 10-25-90; 8:45 am]

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federal register

Friday
October 26, 1990

Part III

Department of Transportation

Federal Aviation Administration

14 CFR Parts 23, 91 and 135
Small Airplane Airworthiness Review Program Amendment No. 5; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 23, 91, and 135

[Docket No. 25812; Amendment Nos. 23-41, 91-220, 135-38]

RIN 2120-AC14

Small Airplane Airworthiness Review Program Amendment No. 5

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule amends the airworthiness standards for equipment, systems, and installations and establishes airworthiness standards for the installation of electronic display instrument systems in normal, utility, acrobatic, and commuter category airplanes. It also provides alternative airworthiness standards for the instrument configuration for general, air taxi and commercial operations. This amendment updates the airworthiness and operating requirements to reflect advanced technology being incorporated in current designs while maintaining an acceptable level of safety.

EFFECTIVE DATE: November 26, 1990.

FOR FURTHER INFORMATION CONTACT: Ervin Dvorak, Standards Office (ACE-112), Small Airplane Directorate, Aircraft Certification Division, Central Region, Federal Aviation Administration, 601 East 12th Street, Kansas City Missouri 64106, telephone (816) 426-5688.

SUPPLEMENTARY INFORMATION:

Background

This amendment is based on Notice of Proposed Rulemaking, Notice No. 89-6, published on March 6, 1989 (54 FR 9338). All comments received in response to Notice No. 89-6 have been considered in adopting this amendment.

Related Activity

The FAA announced its Small Airplane Airworthiness Review Program in Notice No. CE-83-1 (48 FR 4290, January 31, 1983) and invited all interested persons to submit proposals for consideration. The goal of the review program was to provide an opportunity for the public to participate in improving, updating, and developing the airwothiness standards applicable to small airplanes, as set forth in part 23 of the Federal Aviation Regulations (FAR). Where applicable, the review program was extended to the new communter category requirements because that commuter category incorporated existing small airplane requirements, as set forth in Amendment 23-34 (52 FR 1806, January 15, 1987).

In Notice No. CE-83-1A (48 FR 26623, June 9, 1983), the FAA extended the period for submission of review proposals, invited by Notice No CE-83-1, to May 3, 1984. Approximately 560 proposals were received in response to Notices No. CE-83-1 and CE-83-1A.

Following receipt of the proposals, the FAA published Notice No. CE-83-1 (49 FR 30053, July 25, 1984) containing the availability of agenda, compilation of proposals, and announcement of the Small Airplane Airworthiness Review Program Conference. That conference was held October 22-26, 1984, in St. Louis, Missouri. A copy of the transcript of all discussions held during the conference is filed in FAA Regulatory Docket No. 23494.

After reviewing the proposals and the public comments received at the conference, the FAA's first related rulemaking action concentrated on updating safety standards related to cabin safety and improved crashworthiness. On December 12, 1986, the FAA published Notice No. 86-19, titled, "Small Airplane Airworthiness Review Notice No. 1" (51 FR 44878). Notice No. 86-19 proposed to upgrade the standards for cabin safety and occupant protection during emergency landing conditions, which included dynamic testing requirements for the seat/restrain systems of small airplanes. The proposals from Notice No. 86-19 were adopted in Amendment 23-36 (53 FR 30802, August 15, 1988).

From the Small Airplane Airworthiness Review Program, Notices No. 2 and 5 were published in the **Federal Register** as Notices No. 89-5 and 89-6, respectively. These two notices, No. 89-5 and 89-6, were published March 6, 1989 (54 FR 9276 and 54 FR 9338). Action on Notice No. 89-5 will be accomplished in a separate final rulemaking document. This final rulemaking action, resulting from Notice No. 89-6, has been prepared with the consideraion of all comments received on that notice.

The proposals to amend §§ 91.205 and 135.159 are the result of the petitions for rulemaking action that the FAA has received and were not specifically discussed at the Small Airplane Airworthiness Review Conference. These proposals are related to the proposals for §§ 23.1309, 23.1311, and 23.1321, therefore, this notice was expanded to include these proposals.

Discussion of Comments

General

Interested persons were invited to participate in the development of these final rules by submitting written data, views, or arguments to the regulatory docket on or before July 5, 1989. Five commenters responded to Notice No. 89-6. Minor technical and editorial changes have been made to the proposed rules based on both relevant comments received and further review by the FAA. Two of these commenters strongly support the adoption of these proposals.

One commenter believes that ongoing rulemaking actions have resulted in a continuing increase in the cost and complexity of certification requirements for general aviation airplanes. This commenter cites, as an example of this increased cost, the "dynamic testing of an airplane to prove it will meet the new certification requirements," and states that "For a small airplane, this test would mean the destruction of a minimum of 3 to 9 fuselages costing a total of from one to two million dollars." Consequently, this commenter expresses support for the primary category rulemaking (54 FR 9738, March 7, 1989) and urges expeditious adoption of that rulemaking action.

Proposals in this rulemaking action respond to changes in design technology that were not envisioned in the current airworthiness standards and provide an acceptable level of safety for that new technology. Any additional airplane costs that may occur from these proposed new requirements are the result of an airplane manufacturer's selection of the technology for a new airplane design. In regard to the commenter's example of dynamic testing requirements that would require the destruction of several fuselages, the FAA has not been able to identify dynamic requirements that would require destruction of a single fuselage. The FAA believes that this comment refers to the recently adopted dynamic seat testing requirements of Amendment 23-36. The new seat design and dynamic testing needed to establish compliance may exceed the cost of the seat design and static test needed to show compliance with older requirements; however, the net benefits to be realized from the reduction in occupant fatalities and injuries are expected to exceed the increase in cost. Finally, this commenter's recommendation on the expeditious adoption of the proposed primary category aircraft rule is beyond the scope of this notice.

Discussion of Comments to Specific Sections of Parts 23, 91, and 135

The following comments and discussion are keyed to like-numbered proposals in Notice No. 89–6.

Proposals 1, 5, 7. These proposals contain the authority citations for parts 23, 91, and 135. No comments were received on these proposals.

Proposal 2. This proposal would retain the existing reliability requirements of current § 23.1309 for airplane equipment, systems, and installations that are not complex and do not perform safety-critical functions. For those cases where the applicant finds it necessary or desirable to include complex, safety-critical systems, this proposal also would provide additional requirements for identifying such equipment, systems, and installations and would define additional requirements needed for their certification. This proposal would permit the approval of more advanced systems having the capability to perform critical functions and whose failure condition would prevent the continued safe flight and landing of the airplane.

Two commenters offer comments on proposed § 23.1309. One of these commenters concurs with the concept of updating the reliability requirements applicable to airplanes not limited to Visual Flight Rules (VFR) flight, but does not concur with this updating for all airplanes. As discussed in Notice No. 89–6, this proposal addresses the systems installed on airplanes and is not limited to the operations approval of the airplane. The airworthiness standards, as adopted in § 23.1309(a), are based on single-fault or fail-safe concepts and experience based on service-proven designs and engineering judgment. These requirements should be used for airplanes whose systems are not complex and do not perform safety-critical functions. Therefore, § 23.1309(a) is structured to allow the use of existing procedures for simple airplane system designs.

If the design of the airplane includes equipment, systems, and installations that perform functions whose failure condition would prevent continued safe flight and landing of the airplane, the occurrence of each failure conditions must be extremely improbable. In addition, on airplanes designed for any type of operation not limited to VFR, the systems whose failure conditions would significantly redue the airplane's capability, or the ability of the crew, to cope with the adverse operating conditions must be improbable. It was recognized that any failure would reduce the airplane's or crew's capability by some degree, but that reduction may not be of the degree that would make operation of the airplane potentially catastrophic. The intent of § 23.1309(b) is to require that systems whose failure would be catastrophic or potentially catastrophic be evaluated using the latest available analysis techniques.

Although future airplane designs limited to VFR operations are not likely to include equipment, systems, and installations whose failure condition would prevent continued safe flight and landing of the airplane, the applicability of this requirement, as discussed above, will provide airworthiness standards if the applicant elects to include such systems in the airplane's design. Therefore, the applicability of this requirement has not been revised as suggested by this commenter.

One commenter suggests that the critical environmental system considered in § 23.1309(c) would be better defined by removing the words "such as" from the proposed paragraph and replacing them with the word "including." The FAA agrees that the suggested wording more accurately identifies the intent of this paragraph, as discussed in this notice. The wording of paragraph (e) of § 23.1309 has been revised accordingly.

This same commenter notes that there are proposals being considered for a new §§ 25.1315 and 15.1317, which deal with the effects of lightning and external high energy radiated electromagnetic fields, and suggests that similar actions be considered for part 23 rules. Although this comment is beyond the scope of the actions proposed in Notice No. 89–6, the FAA recognizes the desirability of having the various airworthiness standards address like requirements in the respective sections and will consider this comment in future rulemaking actions.

Proposal 3. This proposal adds a new § 23.1311 to provide the requirements for the installation of an electronic display instrument system. It provides a separate section to address the airworthiness standards for those indicators. A significant number of electronic display systems have been approved for installation in part 23 airplanes by means of special conditions.

One commenter asks if the wording of proposed § 23.1311(c), concerning electronic display indicators with features that make isolation and independence between powerplant instrument systems impractical, will be supported by an appropriate amendment to require such isolation. As discussed in Notice No. 89–6, the current requirements of part 23 address powerplant instruments that could provide the required data only by using individual instruments. Accordingly, the isolation and independence referred to in § 23.1311(c) are currently required in § 23.903(c). The objective of this regulation is to allow the use of electronic display indicators that will not provide the isolation and independence considered in the current requirements. The FAA is not considering an additional amendment to address this issue.

Proposal 4. This proposal would revise § 23.1321 to provide that flight instruments to be used by any required pilot be located so that only minimal eye and head movement are needed to monitor the airplane's flight path and these instruments. This proposal would also extend the T-arrangement of the flight instruments to all airplanes that are certificated for flight under instrument flight rules (IFR) and would provide for electronic display indicators to be located in this T-arrangement. No comments were received on this proposal and it is adopted as proposed.

Proposal 6. This proposal would revise § 91.205 to permit the operation of all airplanes with the installation of a third attitude instrument system instead of the gyroscopic rate-of-turn indicator, providing that the instrument and installation comply with the requirements of § 121.305(j). [Part 91 was reorganized and its sections renumbered (54 FR 34284, August 18, 1989). The original proposal would have revised § 91.33, but that section is renumbered as § 91.205.] No comments were received on this proposal and it is adopted as proposed.

Proposal 8. This proposal would revise § 135.149 to establish uniformity in installation requirements when a third attitude instrument system is installed. No comments were received on this proposal and it is adopted as proposed.

Proposal 9. This proposal would revise § 135.159 to permit part 135 operation of any airplane, with the installation of a third attitude instrument system instead of a gyroscopic rate-of-turn indicator, that is substantially the same as airplanes, similarly equipped, that are permitted in part 121 operation. No comments were received on this proposal and it is adopted as proposed.

Regulatory Evaluation Summary

Introduction

This section summarizes the full regulatory evaluation prepared by the

FAA that provides more detailed estimates of the economic consequences of this regulatory action. This summary and the full evaluation quantify, to the extent practicable, estimated costs to the private sector, consumers, Federal, State, and local governments, as well as anticipated benefits.

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if potential benefits to society for each regulatory change outweigh potential costs. The order also requires the preparation of a Regulatory Impact Analysis of all "major" rules except those responding to emergency situations or other narrowly defined exigencies. A "major" rule is one that is likely to result in an annual increase in consumer costs, a significant adverse effect on the economy of $100 million or more, a major increase in consumer costs, a significant adverse effect on competition, or is highly controversial.

The FAA has determined that this rule is not "major" as defined in the executive order; therefore, a full regulatory analysis, which includes the identification and evaluation of cost-reducing alternatives to this rule, has not been prepared. Instead, the agency has prepared a more concise document, termed a "regulatory evaluation", that analyzes onl this rule without identifying alternatives. In addition to a summary of the regulatory flexibility determination required by the Regulatory Flexibility Act and an International Trade Impact assessment. If more detailed economic information is desired, the reader may refer to the full regulatory evaluation contained in the docket.

Economic Evaluation

The regulatory evaluation examines the effect of a final rule to amend parts 23, 91, and 135. The amendments to parts 91 and 135 contained in this rule allow the installation of a third attitude indicator instead of the currently required rate-of-turn indicator. Flight instrument systems now being proposed for installation need not include the rate-of-turn function. Allowing an additional attitude indicator with a dedicated power supply relieves the burden on the manufacturer and allows safer operations because of the greater utility of third attitude indicators.

The amendments to Part 91 and 135 impose no cost on the aviation community or other persons, but rather, include provisions for an alternative.

The amendments to part 23 contained in this rule upgrade airworthiness standards to include design requirements for complex systems critical for safety in small airplanes. These upgraded standards, which are based on proposals submitted at the Small Airplane Airworthiness Review Conference in St. Louis, apply only to aircraft for which an application for a type certificate under part 23 is made after the effective date of this rule. The amendments require examination of systems and equipment for their critically to continued safe flight and landing of the airplane, require reliability of such systems based on their critically and set forth standards for installation of instrument systems utilizing electronic display indicators.

Current computer and instrumentation technology has resulted in systems and equipment being available for small airplanes that are novel and unusual relative to what was envisioned and considered when the previous part 23 requirements were promulgated. Therefore, the FAA found it necessary to issue special conditions and expend significant resources to assure adequate airworthiness standards for these systems.

The amendments to part 23 are cost-relieving because they eliminate the need for special conditions processing, which often involves costly and unnecessary delays. In addition, these amendments are optional in the sense that the manufacturers are not being directed to incorporate the newest technology in their future models, but instead are being afforded a set of regulations to observe should they choose the new equipment.

Furthermore, it was concluded that an undetermined measure of safety benefits could be attributed to the three amendments to part 23. These benefits are based on: (1) The reduction in accidents that might otherwise occur under the "single fault" or "fail safe" analysis of failure potential for both complex, safety critical systems and multi-function electronic instrument displays, and (2) the reduction in accidents that could be afforded by the use of these advanced systems and displays.

The gross value of these benefits was estimated to range between $2.14 million and $2.46 million, depending on the assumptions concerning equipage rates and accident reduction effectiveness. However, it should be noted that this estimate measures the isolated effect on the regulatory amendments in and of themselves. Future airplane designs with advanced systems and instrument displays could be evaluated without these amendments through the special conditions process of § 21.16. Therefore, only a portion of the gross safety benefit estimate actually will be realized. The net benefit would be determined by the extent to which these amendments, as compared to the special conditions procedures, expedite the development of airplanes that employ advanced systems and instrument displays and improve the analysis of their safety and reliability.

International Trade Impact Analysis

The provisions of this rule will have little or no impact on trade for both U.S. firms doing business in foreign countries and foreign firms doing business in the United States. In the United States, foreign manufacturers would have to meet U.S. requirements, and, thus, they would gain no competitive advantage. In foreign countries, U.S. manufacturers would not be bound by part 23 requirements and could, therefore, implement the provisions of the rule solely on the basis of competitive considerations.

Regulatory Flexibility Determination

The FAA has determined that the rule changes will not have a significant economic impact on a substantial number of small entities. The FAA's criteria for a small airplane manufacturer is one with fewer than 75 employees. A substantial number is a number that is not fewer than 11 and that is more than one-third of the small entities subject to the rule.

A review of domestic general aviation manufacturing companies indicates that only two companies meet the size threshold of 75 employees or fewer. Therefore, the amendments to parts 23, 91, and 135 will not affect a substantial number of small entities.

Federalism Implications

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

This document amends the airworthiness standards for complex, safety-related critical systems and the installation of electronic display systems. These standards provide design options to the manufacturer that are not available under existing regulations. This document concerns rules that do not impose a burden, but merely afford an alternative, and they will not result in an annual increase in consumer costs or have an adverse

effect on the economy. The FAA has determined that this amendment is not major as defined in Executive Order 12291. For the same reason, this amendment is not considered to be significant as defined in Department of Transportation Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). Since there are no small entities affected by this rulemaking, it is certified, under the criteria of the Regulatory Flexibility Act, that this amendment will not have a significant economic impact, positive or negative, on a substantial number of small entities. In addition, these final rules will have little or no impact on trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States. A copy of the regulatory evaluation prepared for this project may be examined in the Rules Docket or obtained from the person identified under the caption "**FOR FURTHER INFORMATION CONTACT.**"

List of Subjects

14 CFR Parts 23, 91, and 135

Aircraft, Air transportation, Aviation safety, Safety.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends parts 23, 91, and 135 of the Federal Aviation Regulations (14 CFR parts 23, 91 and 135) as follows:

PART 23—AIRWORTHINESS STANDARDS: NORMAL, UTILITY, ACROBATIC AND COMMUTER CATEGORY AIRPLANES

1. The authority citation for part 23 continues to read as follows:

Authority: 49 U.S.C. 1344, 1354(a), 1355, 1421, 1423, 1425, 1428, 1429, 1430; 49 U.S.C. 106(g).

2. Section 23.1309 is revised to read as follows:

§ 23.1309 Equipment, systems, and installations.

(a) Each item of equipment, each system, and each installation:

(1) When performing its intended function, may not adversely affect the response, operation, or accuracy of any—

(i) Equipment essential to safe operation; or

(ii) Other equipment unless there is a means to inform the pilot of the effect.

(2) In a single-engine airplane, must be designed to minimize hazards to the airplane in the event of a probable malfunction or failure

(3) In a multiengine airplane, must be designed to prevent hazards to the airplane in the event of a probable malfunction or failure.

(b) The design of each item of equipment, each system, and each installation must be examined separately and in relationship to other airplane systems and installations to determine if the airplane is dependent upon its function for continued safe flight and landing and, for airplanes not limited to VFR conditions, if failure of a system would significantly reduce the capability of the airplane or the ability of the crew to cope with adverse operating conditions. Each item of equipment, each system, and each installation identified by this examination as one upon which the airplane is dependent for proper functioning to ensure continued safe flight and landing, or whose failure would significantly reduce the capability of the airplane or the ability of the crew to cope with adverse operating conditions, must be designed to comply with the following additional requirements:

(1) It must perform its intended function under any foreseeable operating condition.

(2) When systems and associated components are considered separately and in relation to other systems—

(i) The occurrence of any failure condition that would prevent the continued safe flight and landing of the airplane must be extremely improbable; and

(ii) The occurrence of any other failure condition that would significantly reduce the capability of the airplane or the ability of the crew to cope with adverse operating conditions must be improbable.

(3) Warning information must be provided to alert the crew to unsafe system operating conditions and to enable them to make appropriate corrective action. Systems, controls, and associated monitoring and warning means must be designed to minimize crew errors that could create additional hazards.

(4) Compliance with the requirements of paragraph (b)(2) of this section may be shown by analysis and, where necessary, by appropriate ground, flight, or simulator tests. The analysis must consider—

(i) Possible modes of failure, including malfunctions and damage from external sources:

(ii) The probability of multiple failures, and the probability of undetected faults.;

(iii) The resulting effects on the airplane and occupants, considering the stage of flight and operating conditions; and

(iv) The crew warning cues, corrective action required, and the crew's capability of determining faults.

(c) Each item of equipment, each system, and each installation whose functioning is required by this chapter and that requires a power supply is an "essential load" on the power supply. The power sources and the system must be able to supply the following power loads in probable operating combinations and for probable durations:

(1) Loads connected to the power distribution system with the svstem functioning normally.

(2) Essential loads after failure of—

(i) Any one engine on two-engine airplanes; or

(ii) Any two engines on an airplane with three or more engines; or

(iii) Any power converter or energy storage device.

(3) Essential loads for which an alternate source of power is required, as applicable, by the operating rules of this chapter, after any failure or malfunction in any one power supply system, distribution system, or other utilization system.

(d) In detemining compliance with paragraph (c)(2) of this section, the power loads may be assumed to be reduced under a monitoring procedure consistent with safety in the kinds of operations authorized. Loads not required in controlled flight need not be considered for the two-engine-inoperative condition on airplanes with three or more engines.

(e) In showing compliance with this section with regard to the electrical power system and to equipment design and installation, critical environmental and atmospheric conditions, including radio frequency energy and the effects (both direct and indirect) of lightning strikes, must be considered. For electrical generation, distribution, and utilization equipment required by or used in complying with this chapter, the ability to provide continuous, safe service under forseeable environmental conditions may be shown by environmental tests, design analysis, or reference to previous comparable service experience on other airplanes.

(f) As used in this section, "system" refers to all pneumatic systems, fluid systems, electrical systems, mechanical systems, and powerplant systems included in the airplane design, except for the following:

(1) Powerplant systems provided as part of the certificated engine.

(2) The flight structure (such a wing, empennage, control surfaces and their systems, the fuselage, engine mounting, and landing gear and their related primary attachments) whose requirements are specific in subparts C and D of this part.

(3) A new §23.1311 is added under the heading "instruments: Installation" to read as follows:

§ 23.1311 Electronic display instrument systems.

(a) Electonic display indicator requirements in this section are independent to each pilot station required by the airworthiness standards or by the applicable operating rules for each airplane that is to be approved for operation in IFR conditions.

(b) Electronic display indicators required by § 23.1301(a), (b), and (c) must be independent of the airplane's electrical power system.

(c) Electronic display indicators, including those with features that make isolation and independence between powerplant instrument systems impractical must—

(1) Be easily legible under all lighting conditions encountered in the cockpit, including direct sunlight, considering the expected electronic display brightness level at the end of an electronic display indicator's useful life. Specific limitations on display system useful life must be addressed in the Instructions for Continued Airworthiness requirements of § 23.1529;

(2) Not inhibit the primary display of attitude, airspeed, altitude, or powerplant parameters needed by any pilot to set power within established limitations, in any normal mode of operation;

(3) Not inhibit the primary display of engine parameters needed by any pilot to properly set or monitor powerplant limitations during the engine starting mode of operation;

(4) Have independent secondary attitude and rate-of-turn instruments that comply with § 23.1321(a) if the primary electronic display instrument system for a pilot presents this information. Instrument displays that are located in accordance with § 23.1321(d) are considered the primary displays. A rate-of-turn instrument is not required if a third attitude instrument system is installed in accordance with the instrument requirements prescribed in § 121.305(j) of this chapter.

(5) Incorporate sensory cues for the pilot that are equivalent to those in the instrument being replaced by the electronic display indicators; and

(6) Incorporate visual displays of instrument markings, required by §§ 23.1541 through 23.1553, or visual displays that alert the pilot to abnormal operational values or approaches to established limitation values, for each parameter required to be displayed by this part.

(d) The electronic display indicators, including their systems and installations, and considering other airplane systems, must be designed so that one display of information essential for continued safe flight and landing will remain available to the crew, without need for immediate action by any pilot for continued safe operation, after any single failure or probable combination of failures.

(e) As used in this section, "instrument" includes devices that are physically contained in one unit, and devices that are composed of two or more physically separate units or components connected together (such as a remote indicating gyroscopic direction indicator that includes a magnetic sensing element, a gyroscopic unit, an amplifier, and an indicator connected together). As used in this section, "primary" display refers to the display of a parameter that is located in the instrument panel such that the pilot looks at it first when wanting to view that parameter.

4. Section 23.1321 is amended by removing the word "and" at the end of paragraph (d)(3); by removing the period at the end of paragraph (d)(4) and replacing it with "; and"; by revising paragraphs (a) and (b) introductory text and by adding a new paragraph (d)(5) to read as follows:

§ 23.1321 Arrangement and visibility.

(a) Each flight, navigation, and powerplant instrument for use by any required pilot during takeoff, initial climb, final approach, and landing must be located so that any pilot seated at the controls can monitor the airplane's flight path and these instruments with minimum head and eye movement. The powerplant instruments for these flight conditions are those needed to set power within powerplant limitations.

* * * * *

(d) For each airplane certificated for flight under instrument flight rules or of more than 6,000 pounds maximum weight, the flight instruments required by § 23.1303, and, as applicable, by the operating rules of this chapter, must be grouped on the instrument panel and centered as nearly as practicable about the vertical plane of each required pilot's forward vision. In addition:

* * * * *

(5) Electronic display indicators may be used for compliance with paragraphs (d)(1) through (d)(4) of this section when such displays comply with requirements in § 23.1311.

PART 91—GENERAL OPERATING AND FLIGHT RULES

5. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 *et seq.*; E.O. 11514; 49 U.S.C. 106(g).

§ 91.205 [Amended]

6. Section 91.205(d)(3)(i), is amended by removing the word "Large", by capitalizing the following word to read "Airplanes", and by adding the words "the instrument requirements prescribed in" after the words "in accordance with".

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

7. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421 through 1431, and 1502; 49 U.S.C. 106(g).

8. Section 135.149 is amended by revising paragraph (c) to read as follows:

§ 135.149 Equipment requirements: General.

* * * * *

(c) For turbojet airplanes, in addition to two gyroscopic bank-and-pitch indicators (artificial horizons) for use at the pilot stations, a third indicator that is installed in accordance with the instrument requirements prescribed in § 121.305(j) of this chapter.

* * * * *

9. Section 135.159 is amended by redesignating paragraphs (a)(1) and (a)(2) as (a)(2) and (a)(3), respectively; and by adding a new paragraph (a)(1) to read as follows:

§ 135.159 Equipment requirements: Carrying passengers under VFR at night or under VFR over-the-top conditions.

* * * * *

(a) * * *

(1) Airplanes with a third attitude

instrument system usable through flight attitudes of 360 degrees of pitch-and-roll and installed in accordance with the instrument requirements prescribed in § 121.305(j) of this chapter.

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Issued in Washington, DC on October 22, 1990.

James B. Busey,

Administrator.

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