

FHWA-1998-3706-2

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

NATIONAL RETAIL TRANSPORTATION, INC.

FHWA DOCKET NO. R1-92-03
(Motor Carrier Safety)

DECISION OF
ADMINISTRATIVE LAW JUDGE
BURTON S. KOLKO

This case had its germination in a compliance review. On October 18, 1991, two Federal Highway Administration (FHWA) investigators, George Cowan and Susan Drabant, inspected certain NRT records at Respondent's offices in North Bergen, NJ., to assess its compliance with the Federal Motor Carrier Safety Regulations (FMCSRs). In 1990 NRT owned 137 trucks and utilized 138 drivers, grossing \$42 million (CX-7). Finding that Respondent in many cases lacked supporting documents for drivers' logs, the investigators filed a report recommending enforcement (CX-7; Tr. 58, 98). This action followed, in which the Assistant Regional Counsel, Federal Highway Administration (Claimant or Regional Director), has charged Respondent National Retail Transportation, Inc. (NRT), a motor carrier subsidiary of National Retail Systems, Inc., with forty-six violations of the FMCSRs, 49 C.F.R. Part 350 et seq., and seeks a civil penalty of \$23,000.^{1/} Respondent denied the charges. A hearing was held, from which I find the violations as charged and assess a civil penalty in the amount of \$9,200.

^{1/} The FMCSRs are issued under the authority of 49 U.S.C. 3102 of the Motor Carrier Safety Act of 1984 (the Act), P.L. 98-554, 98 Stat. 2829.

PROCEDURAL **BACKGROUND**

The Regional Director initiated this proceeding by filing a **Notice** of Claim (the Notice) under 49 C.F.R. **§386.11(b)** on January 21, 1992.^{2/} The Notice cited the Respondent for failing to preserve supporting documents for certain driver records of duty status (driver logs) for six months (Id.; **CX-17** through -62). The regulation, in pertinent part, states:

(1) Driver's records of duty status for each calendar month . . . shall be forwarded to the carrier's principal place of business where they shall be retained **with all supporting documents** for a period of 6 months from date of receipt. (emphasis supplied)

Each proven failure constitutes a violation of 49 C.F.R. **§395.8(k)** and is subject to a civil penalty of \$500 per day, up to a maximum of \$2,500 for any single offense. 49 U.S.C. **§521(b)(2)**. Claimant seeks a penalty of \$500 for each of the alleged forty-six violations, or a total fine of \$23,000.

DISCUSSION

In conducting their compliance review investigators Cowan and **Drabant** initially saw **NRT's** safety consultant, Vincent **Mariano**, its general counsel, Marc Zoldessy, and its dispatcher, Richard Sullivan (Tr. **24-26**, 42, 105; cx-7); they later met with its safety director, William Cluver (Tr. 43). The investigators sought certain examples of records NRT is required to maintain under the **FMCSRs** (Tr. 16, **24-26**; CX-8). In response, NRT produced driver logs, drug-testing records, and other files (Tr. 25, **45-46**; **CX-8**), but did not present

^{2/} **CX-A**. The penalty sought by the Regional Director is erroneously stated in the Notice of Claim. The correct figure is \$23,000. Tr. 177.

documents (highlighted in the discussion that follows) that would have tended to support information stated on the drivers' logs, such as **records** relating to a driver's pay (Tr. 25-26, 95-96, 139, 171).

A. Cowan and **Drabant** spotted a dispatcher-completed **outbound dispatch log** -- a record of routes to be undertaken, vehicles utilized, money advanced, and anticipated **backhaul** -- on dispatcher Sullivan's desk, but could not obtain one, despite their entreaties. They were instead given a blank copy of the form NRT used, which was entered into evidence as CX-2 (Tr. **27-28, 52, 69-71, 98; 269**). The following January, however, NRT did deliver **dispatch logs** corresponding to the 46 transactions in response to a subpoena. The Claimant's charges do not encompass outbound dispatch logs (Tr. **70-71, 87, 91, 98, 143; see R-2**).

B. Sullivan told the investigators that drivers are required to prepare and submit upon return a driver's **trip report, or DTR**, which indicates the driver's origin and destination, his pick-up and delivery points, the routes he took and the mileage involved. To the DTR he attaches toll and fuel receipts and the like, and then submits it all to a payroll clerk for payment purposes. A blank DTR was given to the investigators and entered into evidence as CX-3 (Tr. 32-33, 264).

C. The **trip summary**, somewhat like the DTR, asks for mileage between stops, expenses and advances, and fuel and oil charges. It is also a document upon which drivers' pay is based, drivers being paid by the mile. The dispatcher enters the information and,

forwards it to payroll (Tr. 251, 254). Investigators Cowan and **Drabant** were given a blank copy of the trip summary, which became CX-4 (Tr. 34-35, 37).

D. CX-5 is a blank **trip summary report, or trip envelope**. The driver places all his documents into a trip envelope and submits it at the end of his trip. The envelope asks for trip mileage, all origins and destinations, road expenses, and advances. It also contains a separate section for fuel purchases. The trip envelope is given to payroll upon return (Tr. **38-40**, 210, 266, 268).

E. Sullivan informed the investigators -- in response to a specific query -- that drivers also submit a **delivery manifest** following each trip. The manifest recaps the trip: stops, arrival and departure time at each, shipper's name, elapsed miles per stop, and aggregate delivery time and miles. A blank copy of Respondent's delivery manifest was submitted for the record as **CX-6**.^{3/}

Cowan and **Drabant** had attempted to obtain completed **DTRs**, trip summaries, trip summary reports and delivery manifests (i.e., CX-3, -4, -5, and -6 respectively; see Tr. 141-42) (Tr. **98**), but were told by both general counsel Zoldessy and company Vice-President George LaFitte either that **NRT** did not retain them or that they were unavailable (Tr. 34, 43-45, 84, 93, 95-96, 98-99, **103-04**, 106-09, 141, 168).

LaFitte explained that any completed forms were kept only until

^{3/} Tr. 38-41, 104, 108. The manifest's title indicates generation by "National Retail Trucking, Inc." Respondent's in-house counsel **represented that** National Retail Trucking is an affiliated entity of Respondent. Tr. 285-86.

he drivers were paid -- about two weeks later -- and were then discarded (Tr. 44, 262-63). When Cowan asked for NRT documents pertaining to the most recent two weeks, LaFitte produced one trip envelope (Tr. 44, 168). The carrier's size indicated that several hundred should have been turned in, even for that relatively short period (Tr. 44). Cowan later questioned safety director Cluver about the carrier's retention, policy, but again was told that nothing was retained (Tr. 45).

On January 14 or 15, 1992, in response to Claimant's December 10, 1991, subpoena, NRT did deliver some documents to the government, producing bills of lading, dispatch logs, and documents it described as "computerized trip file summaries." ^{4/}

FINDINGS AND CONCLUSIONS

I conclude that Respondent National Retail Transportation, Inc., violated §395.8(k) of the FMCSRs in forty-six instances by failing to preserve supporting documents for driver logs for the requisite six-month period on forty-six occasions.

As a threshold matter, I will deal with the meaning of the term "supporting documents." It is nowhere defined or described in the FMCSRs. NRT argues that, as such,, it is being held to a formless. standard, thus depriving it of fair warning of the kind of conduct the regulation requires or prohibits. This lack of notice amounts to a violation of due process of law, it states; NRT cannot be held

^{4/} R-2; Tr. 85-92, 144-45. NRT had also produced bills of lading at the time of the compliance review the previous October. Claimant's investigators asserted, however, that such documents contain little or no information tending to support the accuracy of driver logs, and so did not consider them to be supporting documents. Tr. 84-86, 88-89, 143; see R-2.

to have transgressed a provision whose meaning and parameters are unknown. As a corollary, Respondent asserts that the term cannot be defined by prosecutorial whim. Claimant asserts that "supporting documents" is adequately defined.

On this record I find that the phrase is sufficiently clear and informative to apprise regulated entities of the behavior expected of them. The rule speaks in terms of retaining "supporting documents" for driver records of duty status (see p. 2). The context makes it plain that the quoted phrase contemplates all documents reasonably tending to support the information found in driver logs (see Tr. 147). Since the rule nowhere compels carriers to create supporting documents (see Tr. 119), carriers need retain such documents only if they already deal with them -- that is, if in the ordinary course of business, such documents pass through their hands (see Tr. 111-13).

The "supporting-documents" rule is a rule of reason that, by its nature, must be interpreted on a case-by-case basis (see Tr. 30). **But it** does not follow that the rule thus lacks parameters adequate to warn regulated entities of conduct required. I find that the rule is sufficiently clear to pass due-process muster. ^{5/}

I have found that Respondent handled completed **DTRs**, trip summaries, trip summary reports and delivery manifests. These

^{5/} Respondent argues that because it did not use the documents to verify driver logs, it cannot be held in violation of §395.8(k). Tr. 210; Resp. Br., p. 9. However, the use to which the regulated entity put the documents is not dispositive of the question of their status as supporting documents. The purpose of the rule is to determine, by enabling FHWA investigators to cross-check the accuracy of log entries, whether drivers are complying with hours-of-service regulations. See Tr. 12, 121. Thus the critical inquiry is whether the documents themselves reasonably tend to verify driver-log entries, not whether Respondent used those documents for that purpose.

uments were issued by or transmitted to NRT in the ordinary course of business and passed through its hands. They contained information tending to substantiate the information contained in driver logs. NRT officials failed or refused to turn these documents over to agency investigators (see pp. 3-5). The evidence further shows that NRT failed to retain these documents for six months in connection with 46 trips made in interstate commerce (CX-17 through -62). These circumstances impel me to conclude that Respondent violated **§395.8(k)** on the forty-six occasions cited.

Respondent, however, also maintains that it preserved supporting documents on its computer system, as 49 C.F.R. **§390.31** allows, and in doing so, has in fact complied with the **FMCSRs (Resp. Br., p. 10)**. This contention does not avail Respondent for two reasons. In the first place, although the scope of their request was broad -- encompassing "*any and all documents related to payroll and all the documents . . . that the drivers prepared and the carrier prepares or requires their employees to prepare . . .*" (emphasis supplied) -- the investigators were never offered or shown any computer-generated or -stored documents. ^{6/} Further, section 390.13(b) requires computer records to contain all information set out in the originals, **and NRT's** computer records -- according to Respondent's own witnesses -- do not contain all the information that appears on the hard copies. Respondent's practice was to pull

^{6/} Tr. 139. Respondent contends that the investigators' failure to inquire specifically whether supporting data was stored in computers sinks Claimant's case (Resp. Br., pp. 10-11), but it places responsibility on the wrong actors. NRT officials should have understood Cowan and Drabant's broad request to include all manner of document generation or storage. To put the investigators to a guessing game in these circumstances, as Respondent would, is little short of ludicrous.

only certain data from the supporting documents for use in its database. For instance, it did not enter individual toll receipts, fuel receipts, and times and dates from Respondent's trip envelopes (CX-5; Tr. 268-69, 274-75). NRT also failed to show that it had entered any information contained in the driver's trip report (CX-3), stating that both copies of the DTR were sent to a third party in order to compute road and fuel taxes incurred (Tr. 205-06, 264-65). Respondent in any event failed to produce any **computer-generated** documents for the record. ^{2/}

The "computerized trip file summaries" NRT submitted in response to the government's subpoena could not be considered supporting documents. As investigator Cowan pointed out, the summaries were incomplete and their origin uncertain. There was no way to know where the information contained in them came from. In short, their validity as log-supporting documents was dubious and unproven (Tr. 97, 100, 137, 145).

PENALTY

The Notice of Claim seeks an assessment of \$500 for each of the forty-six violations, for a total civil penalty of \$23,000 (CX-A; see also p. 1, n. 1). The operative statute, 49 U.S.C. **§521(b)(2)(C)**, states that the determination of civil penalty shall take into account:

^{2/} In these circumstances, I need not determine whether a carrier that enters supporting documents into a computer and stores them for six months, destroying the hard copies, has complied with **§395.8(k)**. See Tr. 133-34, 166. In light of modern technology and business practice, nonetheless, it might be worthwhile for the agency to determine in advance of an **enforcement proceeding** whether and how it would find compliance in these circumstances. See Tr. 134.

the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require.

It also states that the assessment "shall be calculated to induce further compliance."

The agency stated in its Notice of Claim that its determination of penalty was based on "the seriousness of your violations, your past history, your financial status, and other factors" (CX-A, p. 1). Fred Gruin, FHWA Federal Program Manager who is responsible for the region's enforcement program and who set the proposed assessment, described it as the "maximum penalty" ^{8/} and explained that it was set in light of two previous audits of the carrier, one in 1981 and the other in 1987, and on agency guidelines (Tr. 179-80; CX-10 and CX-11).

The 1981 audit recommended that the carrier "maintain adequate records to monitor drivers logs for accuracy" (CX-10, p. 2); the 1987 safety review suggested continued monitoring of driver hours of service (CX-11, p. 4). No penalties were assessed as a result of either of these audits (Tr. 192-93). Nor was the carrier cited for violations of §395.8(k) either time (Tr. 151-53, 185-86). Further, in response to a question on the FHWA form, "Does the carrier have a system to effectively control the drivers' hours of service?", the 1987 investigators checked the box marked "Yes" (See CX-11, p. 4). In the judgment of FHWA, then, the carrier generally hewed to the

^{8/} While the maximum civil penalty per offense is \$500, each day of a violation is considered a separate offense, except that the total civil penalty per violation cannot exceed \$2,500. 49 U.S.C. 521(b)(2). In this case, then, the maximum allowable penalty may be \$2,500 per violation.

regulatory line in each instance, at least in the area of driver logs and hours of service.

These, considerations warrant an assessment lesser than that suggested by the Regional Director. While **NRT's** violations were continuing and hampered the agency in carrying out its safety responsibilities, past audits showed that it had generally complied with agency directives. Additionally, in light of the fact that Respondent has begun to save toll receipts (Tr. 257-59), I will exercise my discretion to lower the suggested penalty in order to provide an incentive to further compliance. ^{9/}

I find and conclude that a civil penalty of \$9,200, or \$200 per violation, fairly accounts for the mix of factors the statute and agency policy considers in determining an appropriate fine. I further find and conclude that it will encourage future compliance as well, by this carrier and others.

National Retail Transportation, Inc. is hereby ordered to pay a civil penalty in the amount of \$9,200 for violating Federal Motor Carrier Safety Regulation 49 C.F.R. **§395.8(k)** in forty-six instances³

Burton S. Kolko

Burton S. Kolko
Administrative Law Judge

^{9/} See *In the Matter of Drotzmann, Inc.*, Docket No. R10-89-11, Final Order of the Associate Administrator dated June 20, 1990.

^{10/} This decision is issued pursuant to 49 C.F.R. **§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 C.F.R. **§386.62**.

SERVICE LIST

Larsh B. Mewhinney, Esq.
535 Fifth Avenue
New York, New York 10017
Tel: (2-12) **370-5493**
Fax: (212) **370-5446**

Kenneth Dymond
Assistant Regional Counsel
Federal Highway Administration
Leo W. O'Brien Federal Bldg., Rm. 719
Albany, New York 12207

Thomas P. Holian, Esq.
Federal Highway Administration, **HCC-20**
U.S. Department of Transportation
400 Seventh Street, S.W., Room 4224
Washington, D.C. 20590

Motor Carrier Docket Clerk
HCC-20, Room 4217
Federal Highway Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

The Honorable Burton S. **Kolko**
Administrative Law Judge
Office of Hearings, M-50
Room 9228
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590
TEL: (202) 366-2142
FAX: (202) **366-7536**