

**BEFORE THE  
FEDERAL HIGHWAY ADMINISTRATION**

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In the Matter of )  
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National Retail Transportation, Inc., )  
)  
Respondent. )  
\_\_\_\_\_ )

FHWA Docket No. R1-92-03

Final Order: Decision on Review

**Background**

By Notice of Claim (Notice) dated January 21, 1992, Claimant, the Regional Director for Region 1 (Regional Director), charged Respondent, National Retail Transportation, Inc. (NRT), with 46 violations of 49 CFR 395.8(k)(1) for failing to retain the records of duty status supporting documents of its drivers for a period of six months. 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 the date of receipt. (Emphasis supplied.)

The Regional Director sought a penalty of \$23,000 -- initially written as \$23,800 by mistake (Tr. 12) -- \$500 for each alleged violation. NRT denied the charges and requested a hearing on April 7, 1992. The hearing was held on March 4 and March 5, 1993. On July 20, 1993, the Administrative Law Judge (Judge) issued his decision, finding the violations as charged but reducing the civil penalty to \$9,200, \$200 per violation, The Judge concluded that the phrase

“supporting documents” contemplates all documents reasonably tending to support the information found in the driver logs. He opined that since the rule does not compel carriers to create supporting documents, carriers need retain only those documents that, in the ordinary course of business, pass through their hands. The Judge reduced the penalty because past safety audits showed that NRT had generally complied with agency directives and NRT had begun to take corrective action.

On August 13, 1993, NRT filed Exceptions, Petition for Review, and Memorandum of Law (Exceptions), in which it argued that § 395.8(k) is void for vagueness and unenforceable in a penalty proceeding because it fails to define “supporting document,” and because Federal Highway Administration staff “held confused and conflicting opinions as to the meaning of those words....” NRT attached several FHWA internal memoranda. A 1988 memorandum from the **Office** of Chief Counsel gives the following opinion:

no enforcement case should be brought under § 395.8(k) for failing to maintain supporting documents unless there is articulable reason to believe, based on other evidence, that the documents are business records that are ordinarily retained for business purposes and that they were destroyed, altered, or otherwise not produced in order to conceal other particular violations of Part 395.

In a 1989 memorandum, the Director, **Office** of Motor Carrier Standards, stated that this should be agency policy. A 1991 memorandum from the Office of Chief Counsel said:

The problem, as you know, is that the term ‘supporting documents’ has never been defined in the regulations, and a clear requirement to maintain such records is lacking. . . . We have to **identify** the records we believe are essential to assure **compliance** with the hours of service regulations and then incorporate them into the recordkeeping requirements of Part 395.

NRT took exception to the Judge's "pass through their hands" clarification, arguing that it was retroactively applied in a punitive proceeding. It further argued that even if § 395.8(k)(1) were valid and enforceable, NRT was entitled to the benefit of the exemption provision of 49 CFR 390.3 l(d), which states as follows: "All records except those requiring a signature may be maintained through the use of computer technology provided the motor carrier can produce, upon demand, a computer printout of the required data." The thrust of NRT's argument is that, because the FHWA investigator, when told by NRT that documents were not available, did not "demand" a printout of the computer data, NRT was not required to produce them. The same argument was made to the Judge, who found that NRT should have understood that the broad request to produce any and all documents included computer-generated or -stored documents. NRT asserted, however, that while § 395.8(k)(1) pertains to "documents," § 390.3 l(d) specifies "data."

On September 2, 1993, NRT filed a Supplement to Exceptions, Petition for Review, and Memorandum of Law (Supplement), in which it argued that an FHWA interpretation of § 395.8(k)(1), dated January 28, 1993, was inconsistent with the Judge's "passing through their hands" interpretation.<sup>1</sup>

On September 8, 1993, the Regional Director filed a Reply to NRT's Exceptions, in which he accepted the findings and conclusions of the Judge, including the reduced penalty. He argued that the broad wording of the regulation enables the investigators to verify records of duty status

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<sup>1</sup>On November 17, 1993, after the final substantive pleading in this case had been filed, FHWA published in the Federal Register (58 FR 60734, 60761) another interpretation of § 395.8(k)(1). In addition, there is now a statutory definition of "supporting document." (Section 113 of the Hazardous Materials Transportation Authorization Act of 1994, 49 USC 5 10 1 note.)

while not unduly burdening the carrier with onerous recordkeeping requirements. He further maintained that without the use of supporting documentation, it is virtually impossible to verify the accuracy of records of duty status. With respect to the computer exemption, the Regional Director pointed to the Judge's findings that NRT's computer records did not contain all the information that appeared on the hard copies and, in any event, NRT failed to produce any computer-generated documents for the record.

Also on September 8, the Regional Director filed a letter replying to the Supplement (Reply to Supplement), in which he stated that NRT's argument was without merit, that the January 1993 interpretation was consistent with the Judge's decision, and that the Judge's decision should be affirmed. He contended that the evidence showed that the documents were either prepared or kept by NRT but were destroyed or concealed before the audit.

#### Issue

Even if the term "supporting documents" in 49 CFR 395.8(k)(1) were considered to be ambiguous at the time of the alleged violations by NRT, did NRT have reasonable notice of a duty to keep ordinary business documents so that the record of duty status of its drivers could be verified?

#### Discussion

I agree with the Judge's decision and I endorse his conclusions, including his common-sense definition of "supporting documents." I even support his reprimand of FHWA that the agency should have "got[ten] off the dime" and defined "supporting documents" before the Notice in this case was issued (Tr. 29).<sup>2</sup>

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<sup>2</sup> The agency will publish a proposed definition in the Federal Register shortly.

Notwithstanding the vagueness of § 395.8(k)(1), the regulation provided NRT with reasonable notice of a duty to keep ordinary business documents so that the record of duty status of its drivers could be verified. The “supporting documents” that the Regional Director correctly argued should have been saved, but were not -- driver trip report, trip summary, trip summary report envelope, and delivery manifest (Tr. 14 1-2) -- contain information such as mileage, origin, destination, stops, expenses, tolls, fuel purchase, repairs, and other driver activities (Tr. 35, 38, 39). Surely, this information could have been used by FHWA investigators, and should have been used by NRT, to verify the driver logs.

The vagueness of the regulation may have given NRT pause as to whether it should have been retaining international registration plan receipts (an example in the January 1993 interpretation); it does not save NRT, however, from its responsibility for retaining the documents listed above, documents that are so obviously needed -- and could so easily have been used -- to verify driver logs that no elucidation is necessary. These are the documents that clearly fit into the Judge’s definition of passing through NRT’s hands in the ordinary course of business.

Had NRT retained some documents and not others, its vagueness argument might have been more persuasive. But to say, as NRT’s witness did, that there were no documents received or prepared by the company that it considered to be supportive of a driver’s log (Tr. 208), is incomprehensible. Although NRT’s witness testified that the company had confidence in the accuracy of driver logs (Tr. 209), it offered no explanation for this position and claimed, based only on the word of its drivers, that time stamps on toll receipts are not always reliable (Tr. 216, 249). Not only did NRT’s witness testify that he did not examine any of the toll receipts to confirm his drivers’ claim, but he admitted that he would not have been surprised to learn that

various turnpike authorities have methods for verifying toll receipts (Tr. 249-50). Furthermore, NRT's witness testified that in 1987, records of duty status were compared with all paperwork that drivers submitted and that, sometime after 1987, that policy changed. The reason offered was that the information was now maintained on data base file (Tr. 232-3) As the record shows, however, the information entered into the data base was incomplete (Tr. 274).

NRT contended, however, that it is just as plausible to view "supporting documents" as those that the motor carrier uses -- instead of could have been used -- for log verification. NRT's conclusion -- that since it did not use these documents for log-verification purposes, it was not required to retain them -- demonstrates to me that NRT was not making a good-faith effort to comply with the regulation. If I were to accept NRT's conclusion, then it would be possible for there to be no "supporting documents." Although there may be some question as to all the documents that could be considered as supporting, there is no question that the term "supporting documents" must mean something. If "supporting documents" were considered only those that a motor carrier uses to verify a log, motor carriers could always escape responsibility for retaining them merely by saying that they do not use them. It appears that this is what NRT was attempting to do in this case.

NRT's argument that the Judge's definition was objectionable because it was retroactively applied in a punitive proceeding is flawed. The Judge's common-sense definition does not constitute a retroactive application of law. If NRT had any doubts about the meaning of "supporting documents," it could have, and should have, asked the agency for clarification. By acting in accordance with its own self-serving interpretation, it acted at its peril.

The opinions offered by the Office of Chief Counsel do not help Respondent's case.

Those opinions were internal documents and, accordingly, were not relied upon by NRT. In addition, while I agree that it is always preferable to bring an enforcement case on something more than paperwork violations, the agency was unable to do that in this case because NRT did not retain the key documents that could have been used to determine whether violations of the hours of service regulations had occurred.

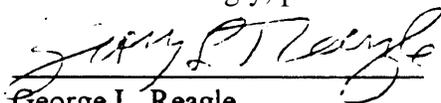
Although “supporting documents” are used by FHWA investigators as a check on motor carrier compliance, the primary function of these documents is verification of driver logs by the motor carriers. Without voluntary compliance with the Federal Motor Carrier Safety Regulations (FMCSRs), we will not be able to achieve our goal of commercial motor vehicle safety. Accordingly, it is the responsibility of each carrier to have a safety management oversight program to assist in achieving this goal. I expect each carrier to effectively monitor compliance with the FMCSRs, especially those aimed at driver fatigue, a major safety concern. In this instance, NRT ignored its responsibility.

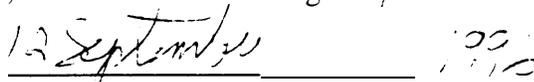
NRT’s second argument -- that it was not required to produce a computer printout of its data because it was asked only for documents -- also has little appeal. Section 390.3 l(a) mandates that all records and documents required to be maintained under Subchapter B, which includes 395, must be preserved in their original form. The § 390.3 l(d) exception provides a common-sense approach to reducing paperwork burdens by allowing motor carriers to use computer technology to store the data from its records. When it was asked for its supporting documents, it was incumbent upon NRT to provide the computer data for those documents that it did not keep. If it thought that keeping computer data allowed it to discard the paper documents, then it should have provided the data when asked for supporting documents.

## Findings

Although the term “supporting documents” is vague, there are certain documents that so obviously fall within the parameters of that term that a formal definition is not necessary to include them. These documents -- driver trip report, trip summary, trip summary report envelope, and delivery manifest -- should have been retained by NRT for its own verification of its drivers’ logs and-for use by FHWA investigators as an additional check. The fact that they were not is unacceptable. I find, therefore, that NRT had reasonable notice of a duty to keep these documents so that the record of duty status of its drivers could have been verified. I also find that its argument that it could put some of the information in a computer data base but not provide the data because it was asked for documents is, in the words of the Judge, “little short of ludicrous.”

Accordingly, pursuant to 49 CFR 386.63, the decision of the Judge is affirmed.<sup>3</sup>

  
 George L. Reagle  
 Associate Administrator for Motor Carriers

  
 Date

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<sup>3</sup> Pursuant to 49 CFR 386.64, a petition for reconsideration may be filed within 20 days of the issuance of this final order.

CERTIFICATE OF SERVICE

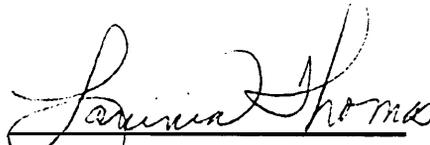
This is to certify that on the 17<sup>th</sup> day of September, 1996, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the parties listed below.

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