

43281

BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

ORIGINAL
DEPARTMENT OF TRANSPORTATION
98 SEP 18 PM 3:20
FEDERAL HIGHWAY ADMINISTRATION

Out-of-Service Criteria

)

Docket No. FHWA-98-3414 - 14

**COMMENTS OF NATIONAL TANK TRUCK CARRIERS, INC.
IN RESPONSE TO ADVANCE NOTICE OF PROPOSED RULEMAKING**

National Tank Truck Carriers, Inc. (NTTC), hereby submits its comments in response to the "Advance Notice of Proposed Rulemaking" of the Federal Highway Administration (FHWA) issued July 20, 1998 in Docket No. FHWA-98-3414. 63 Fed. Reg. 38791-95 (1998) (ANPRM). The ANPRM seeks comments on an important issue, namely, the appropriate scope and effect of the North American Uniform Out-of-Service Criteria (OOS Criteria). NTTC welcomes this opportunity to comment and strongly urges the agency to act promptly to move beyond this preliminary document to a notice of proposed rulemaking and final rule. NTTC supports efforts by public and private entities to insure that commercial vehicles that constitute an imminent hazard to safety are promptly taken out-of-service when warranted by lawfully promulgated regulations. However, the OOS Criteria should be narrowly focused to insure that they comply with the statutory standard for out-of-service orders and the development of those criteria should be in accord with statutory and due process requirements.

INTRODUCTION AND SUMMARY

NTTC is a trade organization comprised of some 200 carriers operating approximately 40,000 cargo tank motor vehicles in the transportation of bulk liquid commodities within the US and between the US and points in Canada and Mexico. Its members are subject to the

jurisdiction of FHWA and to the OOS Criteria. NTTC supports efforts to insure the safety of American roadways. To that end, NTTC for years has sought to have the criteria under which out-of-service orders are issued conform to the statutory substantive requirements, i.e., properly focused on conditions which constitute an imminent hazard to public safety.

As will be demonstrated herein, government enforcement personnel treat the OOS Criteria as substantive rules. Unfortunately, some of the OOS Criteria are inconsistent with the applicable statutory mandate. Furthermore, there are serious procedural and substantive deficiencies in the way the OOS Criteria are structured and used.

The only rational and legally sound way to rectify those deficiencies is for the FHWA to undertake and complete promptly a top to bottom review of the OOS Criteria. That review should include formal notice and comment rulemaking in order to permit all affected entities, not merely those with influence in the Commercial Vehicle Safety Alliance (CVSA), as well as the general public, to participate. The review should insure that the OOS Criteria comport with the statutory standard, thus insuring that only those commercial vehicles that constitute an imminent hazard to public safety are promptly taken out-of-service. Properly focusing enforcement and compliance efforts will increase public safety by eliminating improper out-of-service orders, as well as insuring that out-of-service orders are implemented in the safest manner.

Under the current system, the CVSA changes the OOS Criteria annually. Given that the definition of “out-of-service order” contained in the FHWA’s regulations incorporates by reference the CVSA OOS Criteria, the annual amendments become part of the regulatory definition of “out-of-service order” via incorporation by reference, without any notice to, or opportunity for comment by, the public. Given the important status the OOS Criteria have, changes to the Criteria should not become effective absent notice and comment rulemaking.

THE OOS CRITERIA ARE CURRENTLY, AND SHOULD CONTINUE TO BE, SUBSTANTIVE RULES WHICH SHOULD ONLY BE ADOPTED OR AMENDED AFTER FORMAL NOTICE AND COMMENT RULEMAKING.

In the section of the ANPRM entitled “Why is the FHWA Undertaking This Action?” that agency claims that a roadside inspector “exercises his or her discretion” in answering the question of whether or not a particular driver or vehicle may resume operations immediately in the face of a particular violation of the OOS Criteria. ANPRM at 38793. Unfortunately, the way the current regulations are structured, no such discretion exists. Furthermore, as evidenced by the attached Affidavit of James Bucko, no such discretion is actually exercised by roadside inspectors.

In fact, the “summary” of the ANPRM correctly observes that the “OOS Criteria is a list of those violations which are so unsafe that they must be corrected before operations can resume.” ANPRM at 38791 (emphasis ours). As the ANPRM also observes: “State inspectors with general police powers have authority under State law to stop and seize summarily. All States participating in the Motor Carrier Safety Assistance Program (MCSAP) have agreed that their inspectors will use the OOS Criteria when exercising this power.” ANPRM at 38792. If commercial motor vehicles are placed out-of-service as a result of a roadside check, it is only by virtue of the OOS Criteria; there is no other basis for doing so and use of the OOS Criteria thus is not discretionary. The only “discretion” exercised by a roadside inspector is the normal police power discretion to determine if a given set of circumstances falls within the OOS Criteria. If so, the vehicle must be placed out-of-service.

To date, the OOS Criteria are not part of the Federal Motor Carrier Safety Regulations (FMCSR), have not been promulgated pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551, et seq., , and are available only informally through CVSA’s offices in Maryland.

The OOS Criteria are the only standards for roadside inspections. Accordingly, the OOS Criteria serve as the protocol for roadside inspections by federal agents.

The FMCSR requires federal agents to order vehicles off the road (or “out-of-service”) if, as a result of a roadside inspection, it is determined that their condition likely would cause an accident or a breakdown. See FMCSR, 49 CFR § 396.9(c) (1997). Federal agents currently use the OOS Criteria to satisfy this FMCSR requirement and to determine when a commercial vehicle should be placed out-of-service. When placed out-of-service, the vehicle must be removed immediately from the road and may not return until the condition is corrected. Consequently, application of the OOS Criteria results in significant financial consequences to owners and operators of vehicles which are removed from the road as a result of their application. Vehicles operated by members of NTTC have been placed out-of-service through application of the OOS Criteria.

The ANPRM asks for comment on the future status and role of the OOS Criteria, but not on the “substance” of the Criteria. Unfortunately, presumably as result of the agency’s misconception of the current scope and effect of the OOS Criteria, the specific questions posed ignore the fact that the OOS Criteria are currently being treated as substantive rules by roadside inspectors. Accordingly, the need to remedy the improper adoption of the present OOS Criteria is ignored in the ANPRM.

NTTC strongly urges the FHWA to reject any proposals to limit the use of the OOS criteria in a way that would not require adoption of the criteria as regulations. Both this agency and the courts have recognized the value of both the notice and comment rulemaking process, as well as the value of promulgating formal regulations. In Rules of Practice NOPR, this agency recognized that:

Standards and practices for the agency's training materials, policy guidance, and internal manuals, which are available to the public but only upon request. Including these standards and practices in the regulations would provide one convenient and authoritative reference source for all regulatees and put them on notice of what may be expected from Federal enforcement officials as well as what is expected of the regulated community.

61 Fed. Reg. 18,866, 18,867 (1996). The same benefits would accrue if FHWA complies with the APA and properly engages in notice and comment rulemaking as to appropriate OOS Criteria.

The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (1996). Under the APA, the issuance of substantive rules must be preceded by the opportunity for public notice and comment. 5 U.S.C. § 553(b), (c) (1996). Interpretative rules, general statements of policy, or rules of agency practice or procedure are exempt from APA rulemaking requirements. 5 U.S.C. § 553(b)(3)(A) (1996).

"If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is – a binding rule of substantive law." Guardian Fed. Sav. & Loan Ass'n v. FSLIC, 589 F.2d 658, 666-67 (D.C. Cir. 1978). Where an agency's "own words strongly suggest that [standards set out in an edict] are not musings about what the [agency] might do in the future" but rather they set a "precise" standard which regulated entities ignore at their peril, in the face of possible enforcement action, the edict is a substantive rule which can only be promulgated after notice and comment rulemaking. Community Nutrition Inst. v. Young, 818 F.2d 943,948 (D.C. Cir. 1987). The court in Community Nutrition continued, "[o]ur holding today in no way indicates that agencies develop written guidelines to aid their exercise of discretion only at the peril of having a court

transmogrify those guidelines into binding norms.” *Id.* at 949. In contrast, in this instance, FHWA’s own actions as well as those of its delegates have resulted in the CVSA Criteria being implemented as binding norms.

The definition of “Out-of-Service Order” contained in FHWA’s Motor Carrier Safety Regulations is:

[A] declaration by an authorized enforcement officer of a Federal, State, Canadian, Mexican, or local jurisdiction that a driver, a commercial motor vehicle, or a motor carrier operation, is out-of-service pursuant to §§ 386.72, 392.5, 395.13, 396.9, or compatible laws, or the North American Uniform Out-of-Service Criteria.

49 C.F.R. § 390.5 (1997) (emphasis supplied). The technical name of the CVSA Criteria is the North American Uniform Out-of-Service Criteria. Accordingly, the definition of “Out-of-Service Order” contained in FHWA’s regulations make it clear that out-of-service orders are to be made “pursuant to” the OOS Criteria.² Thus, FHWA’s own regulations state that the OOS Criteria are a binding norm pursuant to which out-of-service determinations should be made.

FHWA made its intention clear that the OOS Criteria are a binding norm in the “Comparison of Appendix G, and the new North American Uniform Driver-Vehicle Inspection Procedure” set out in 49 C.F.R. Chapter III, Subchapter B, Appendix G. That comparison states, in part: “FHWA’s and CVSA’s out-of-service criteria are intended to be used in random roadside inspections to identify critical vehicle inspection items and provide criteria for placing a

¹ Section 383.5 contains an identical definition of “Out-of-Service Order.”

² While an agency’s characterization of its statement is not binding, in determining whether a statement constitutes a binding norm, courts have looked to whether the agency uses permissive or mandatory language. Compare American Bus Assoc. v. United States, 627 F. 2d 525,532 (D.C. Cir. 1980) (use of the word “will” indicates statement is in fact a binding norm) with Guardian Fed. Sav. & Loan v. FSLIC, 589 F. 2d 658,666 (D.C. Cir. 1978) (use of “may” indicates statement is a “general statement of policy.”). The definition of out-of-service orders as those orders issued “pursuant to” the CVSA Criteria therefore supports the conclusion that the CVSA Criteria are binding norms, rather than statements of policy.

vehicle(s) out-of-service.” Thus, the OOS Criteria do not merely provide “a clarification or explanation of existing laws or regulations” such that they would properly be deemed a policy statement exempt from notice and comment rulemaking under the APA. Stuart-James Co. v. SEC, 857 F.2d 796, 801, (D.C. Cir. 1988) (citing Anderson v. Butz, 550 F.2d 459,463 (9th Cir. 1977)), cert. denied, 490 U.S. 1098 (1989).

THE OOS CRITERIA DO NOT COMPORT WITH THE STATUTORY STANDARD FOR ISSUING OUT-OF-SERVICE ORDERS.

Out-of-Service orders are required to be based upon an “imminent hazard” to public safety. 49 U.S.C. § 521 (b)(5)(A) (1997). An “imminent hazard” to public safety is defined as a condition of commercial vehicle operation “which is likely to result in serious injury or death if not discontinued immediately.” 49 U.S.C. § 521 (b)(5)(B). Section 521(b)(5)(A) states that in making any out-of-service order, “the Secretary shall impose no restriction on any employee or employer beyond that required to abate the hazard.” *Id.* The attached affidavit demonstrate that use of the OOS Criteria sometimes results in vehicles being taken out of service when they do not pose an imminent hazard to public safety.

The “Comparison of Appendix G, and the new North American Uniform Driver-Vehicle Inspection Procedure” states that:

A vehicle(s) is placed out-of-service only when by reason of its mechanical condition or loading it is determined to be so imminently hazardous as to likely cause an accident or breakdown, or when such condition(s) would likely contribute to loss of control of the vehicle(s) by the driver. A certain amount of flexibility is given to the inspecting official whether to place the vehicle out-of-service at the inspection site or if it would be less hazardous to allow the vehicle to proceed to a repair facility for repair. The distance to the repair facility must not exceed 25 miles. The roadside type of inspection, however, does not necessarily mean that a vehicle has to be defect-free in order to continue in service.

49 C.F.R., Ch. III, Subch. B, App. G at 899 (1997).

Currently, the OOS Criteria are directly contradictory to the reasonable interpretation contained in the comparison quoted above.¹ Unfortunately, a number of the violations identified in the OOS Criteria do not correlate to the statutory standard of identifying an “imminent hazard” to public safety, i.e., a condition of commercial vehicle operation “which is likely to result in serious injury or death if not discontinued immediately.” 49 U.S.C. § 521 (b)(5)(B).

For example, the OOS Criteria specify that if a driver does not possess a valid commercial driver’s license, the driver is to be placed out-of-service. OOS Criteria at 3. However, the mere fact that a driver does not possess a valid commercial driver’s license should not automatically constitute a “substantial health or safety violation . . . which could reasonably lead to . . . serious personal injury or death” such that an out-of-service order should be issued. Used Equip. Sales, Inc. v. Department of Transportation, 54 F.3d 862, 867 (D.C. Cir. 1995).

Under the OOS Criteria, a commercial vehicle would be put out of service merely because the driver does not possess a valid commercial driver’s license due to having lost his wallet. As the Court of Appeals for the District of Columbia Circuit stated:

It is difficult to see how the dispatch of a driver whose license is suspended for reasons completely unrelated to safety, e.g., failure to pay a parking fine or to renew his license, “could reasonably lead to . . . serious personal injury or death.”

¹ The Policy Statement to the newly revised OOS Hazardous Materials Out-of-Service Criteria states, in part, that: “Condition(s) categorized in this Appendix as “Out-of-Service” shall not be allowed to continue in commerce until the condition(s) is/are corrected and the shipment complies with the applicable regulations. If, at the discretion of the inspector, it is less hazardous to the public to relocate the vehicle, it shall be towed, transported, or escorted to a safe location only at the direction of an official authority.” OOS Criteria at 39. No similar language appears in the OOS Criteria applicable to nonhazardous materials.

Id. If it is “difficult to see” how a driver whose license is suspended for certain reasons creates an imminent hazard to public safety, it is even more difficult to see how the failure drivers to have in their possession their valid driver’s license would necessarily “lead to . . . serious personal injury or death.” Nonetheless such a failure automatically results in an Out-of-Service Order under Section 3 of the OOS Criteria. Furthermore, “[w]hile possession of an operator’s license, regularly issued, might be some evidence of [a driver’s] competency, the lack of such license would be no evidence whatever that he was not a capable, skilled, and safe driver.” *Lufty v. Lockhart*, 295 P. 975,977 (Ariz. 193 1). While the NTTC does not advocate that operators drive without their licenses, the inclusion of that standard in the OOS Criteria, in direct contravention of legal precedent that such a standard is not a proper OOS Criteria, vividly demonstrates the need for a through review of the OOS Criteria by the agency in a formal notice and comment proceeding.

NTTC MEMBERS AND OTHERS SUBJECT TO THE CVSA CRITERIA FACE SUBSTANTIAL PENALTIES FOR VIOLATION OF THE CVSA CRITERIA.

Appendix A to Part 386 of FHWA’s regulations sets out the penalties for violations of out-of-service orders. To wit:

IV. Out-of-Service Order

a. *Violation* – Operation of a commercial vehicle by a driver during the period the driver was placed out of service.

Penalty – Up to \$1,000 per violation.

b. *Violation* – Requiring or permitting a driver to operate a commercial vehicle during the period the driver was placed out of service.

Penalty – Up to \$10,000 per violation.

c. *Violation* – Operation of a commercial motor vehicle by a driver after the vehicle was placed out of service and before the required repairs are made.

Penalty -- \$1,000 each time the vehicle is so operated.

d. *Violation* – Requiring or permitting the operation of a commercial motor vehicle placed out-of-service before the required repairs are made.

Penalty – Up to \$10,000 each time the vehicle is so operated after notice of the defect is received.

e. *Violation* – Failure to return written certification of correction as required by the out-of-service order.

Penalty – Up to \$500 per violation.

f. *Violation* – Knowingly falsifies written certification of correction required by the out-of-service order.

Penalty – Considered the same as the violations described in paragraphs IVc and IVd above, and subject to the same penalties.

Note: Falsification of certification may also result in criminal prosecution under 18 U.S.C. 1001.

49 C.F.R. Pt. 386, App. A, at 695 (1997). Furthermore, in at least one case, violations of the OOS Criteria have resulted in not only general damages, but also in punitive damages being assessed against the violator. U.S. v. Genesis Express, 97-CV-04083 (N.D. Ill. Apr. 29, 1998).

It also goes without saying that, by virtue of application of the OOS Criteria, the vehicles of NTTC members and other commercial vehicle operators are subject to being placed out-of-service,² with the concomitant loss of revenues and customer good will, without operating in a

² In its Notice of Proposed Rulemaking, “Rules of Practice for Motor Carrier Proceedings, Investigations; Disqualifications and Penalties” Docket No. MC-96- 18 (“Rules of Practice NOPR”) the FHWA stated that over two million roadside inspections of commercial vehicles are conducted each year. 61 Fed. Reg. 18,866-70 (1996). Similarly, the subject ANPRM states that nearly 2 million vehicle inspections are performed each year. ANPRM, at 38793 n.2. The need to insure that the criteria used to conduct those millions of inspections complies with the statutory standard, as well as to insure that affected entities are provided appropriate due process in crafting those criteria, is self-evident.

manner which constitutes a “substantial health or safety violation . . . which could reasonably lead to . . . serious personal injury or death.” Used Equip. Sales, 54 F.3d at 867. The substantial penalties which result from violation of the OOS Criteria provide further support for affording all interested persons a formal procedural venue for formulating the OOS Criteria.

**PROCEDURES SHOULD BE ESTABLISHED SO THAT REVISIONS TO THE OOS
CRITERIA COMPORT WITH SUBSTANTIVE AND PROCEDURAL
DUE PROCESS REQUIREMENTS**

As happens each year, the OOS Criteria were revised, effective April 1, 1998. The cover of the new OOS Criteria proclaims: “This document replaces and supersedes all previous out-of-service criteria.” However, the most recent version of the OOS Criteria, like its predecessors, was issued by CVSA. The revisions were not subject to notice and comment rulemaking, nor any other FHWA procedures.

The revisions set out a number of very specific items the purpose of which “is to identify violations that render the commercial motor vehicle operator unqualified to drive or out-of-service.” OOS Criteria, Policy Statement at 2. The new criteria, which are intended to result in out-of-service orders when identified, include: specifications of minimum quantities of bolts for coupling devices (defined by bolt size) for Upper Coupler Assemblies (OOS Criteria at 17- 18) and Full Trailer Mountings (OOS Criteria at 20); designation of allowable crack lengths in frame members (OOS Criteria at 21); and that required ID numbers must be displayed on bulk hazardous material packages (OOS Criteria at 41). These details were included in the OOS Criteria without any notice to or input from the general public. Furthermore, they were not published in the Federal Register.

The APA is clear that in order to have the force and effect of law, federal regulations must be the result of formal notice and comment rulemaking and be published in the Federal

Register. 5 U.S.C. § 553 (b)(c) (1997). Where an agency desires to issue regulations which utilize the incorporation by reference of materials, such as the OOS Criteria, into a Federal Register notice, it must follow the rules set forth in 1 C.F.R. § 5 1. That section mandates that in order to properly be incorporated by reference into the Federal Register, the publishes regulation must use the words “incorporated by reference” and state the title, date, edition, author, publisher and identification number of the publication to be incorporated by reference. 1 C.F.R. § 5 1.9 (1997). This provision insures that regulated entities are not subject to changing regulatory requirements without notice. To date, the OOS Criteria have been revised annually without complying with these requirements of 1 C.F.R. § 5 1.

As demonstrated, supra, as well as in the attached affidavit, it is clear that the OOS Criteria constitute a substantive definition of what constitutes an out-of-service condition. Nonetheless, those Criteria are amended each year without notice, a formal record, or a hearing. It is well established that a failure to provide procedural due process is a violation of the Administrative Procedure Act, as well as other due process, thus voiding the change in substantive requirements mandated by the agency. “Of course, an order issued without the benefit of notice, a hearing and a record on which the order is based is void.” A.E. Staley Mfg. Co. v. United States, 3 10 F.Supp 485,488 n.4 (D. Minn. 1970) (citing ICC v. Louisville & Nashville R.R., 227 U.S. 88, 91, (1913)); see also Jordan v. American Eagle Fire Ins. Co., 169 F.2d. 281 (D.C. Cir. 1948); Hoxsey Cancer Clinic v. Folsom, 155 F.Supp. 376,378 (D.D.C. 1957); Lang Transp. Corp. v. United States, 75 F.Supp. 915,924 (S.D. Cal. 1948). In order to insure that inspectors are using OOS Criteria which comport with the applicable substantive and procedural statutory requirements, FHWA should not only perform promptly a complete review

of the currently effective OOS Criteria, it should also establish procedures to apply in the event the CVSA proposed to revise those criteria.

CONCLUSION

The tenor of the ANPRM suggests firmly that FHWA is unwilling to commit itself to a course of notice and comment rulemaking as a prerequisite to the maintenance of OOS Criteria, and that FHWA does not wish to entertain comments on the merits of the OOS Criteria until their procedural posture has been determined. While NTTC agrees that the procedural approach to the establishment of OOS Criteria must be resolved, and advocates notice and comment rulemaking as an essential component of those procedures, NTTC also believes that it is both improper and unwise for FHWA to continue to defer consideration of the OOS Criteria on the merits. It is clear from controlling statutes and precedent that the OOS Criteria are dispositive, substantive rules of ongoing application, which have never been subjected to notice and comment rulemaking as they should have been. FHWA's concern with policy issues does not overcome the need for timely due process of law. NTTC calls upon FHWA promptly to recognize that the OOS Criteria cannot be applied absent current and continuing notice and comment rulemaking, and to provide for such rulemaking on the merits of those criteria.

Respectfully submitted,

NATIONAL TANK TRUCK CARRIERS, INC.



Lawrence W. Bierlein

Andrew P. Goldstein

Kathleen L. Mazure

McCarthy, Sweeney & Harkaway, P.C.

1750 Pennsylvania Avenue, N.W.

Washington, DC 20006

(202) 393-5710

Dated: September 18, 1998

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION**

Out-of-Service Criteria

)

Docket No. FHWA-98-3414

**AFFIDAVIT
OF JAMES BUCKO**

My name is James Bucko, and I am employed in the capacity of the Director of Safety of Rogers Cartage, of Crestwood, Illinois.

Rogers Cartage is a member of the National Tank Truck Carriers, Inc., and is engaged in the transportation of materials by tank truck throughout the United States.

The company operates 300 tractors and 529 trailers, and we transport all types of liquid bulk cargo, including hazardous materials.

In my capacity as the Director of Safety, I am responsible for my company's compliance program under the U. S. Department of Transportation's Motor Carrier Safety Regulations and Hazardous Materials Transportation Regulations.

I am familiar with the federal regulations, and with the CVSA out-of-service criteria, used by inspectors to determine which vehicles should be taken from service.

It is the experience of Rogers Cartage that the CVSA criteria are used as a regulation. Inspectors use the items written in the criteria as operative rules, not as mere guidelines. Accordingly, if an inspector finds a vehicle with an out-of-service item on the list, the inspector will take the vehicle from service, even if the vehicle does not constitute an imminent hazard to public safety. While the CVSA criteria include provisions on the exercise of discretion by the inspectors, in our experience they do not exercise discretion but apply the criteria rigidly.

We have had vehicles taken out of service when, in our view, it was more appropriate for safety that the vehicle be allowed to travel to an appropriate location for repairs. These have included hazardous materials vehicles, stopped in public locations.

Attached are several Commercial Driver/Vehicle Inspection Reports and related materials which demonstrate that the current CVSA out-of-service criteria are overly broad and are being applied to remove vehicles from service which do not constitute an imminent hazard to public safety:

Illinois Commercial Driver/Vehicle Inspection Report No. 783 8 18: This report involves a driver, and thus his vehicle, being placed out of service due to the fact that his license had been suspended. The driver's license was suspended as a result of his not having proof of insurance for a motorcycle on which the driver had an accident. As explained in the attached letter dated February 24, 1998, the driver had been admitted to the hospital as a result of the accident and had submitted his proof of insurance to the State upon his release. The driver was unaware of the fact that his license was suspended. While the reason for the suspension of the driver's license had nothing to do with his fitness as a commercial driver, the vehicle was nonetheless placed out-of-service. This resulted in our having to have the vehicle towed to a safe location.

Missouri Driver/Vehicle Examination Report No. 873923: This report resulted in one of our trucks being placed out of service for an inoperative brake light, despite the fact that the light actually was working. The report also states that there was a small air leak at relay valve connection above axle #2, but as evidenced by the repair order, there was no air leak.

We have had a driver and his vehicle ordered out of service for failing to come to a complete stop at a railroad crossing.

We have had vehicles taken out of service for obscured placards, discolored placards, or one of the four required placards missing.

We have had vehicles ordered out of service, and then told by the inspector to proceed to an alternate location, risking our liability for moving a vehicle described by that inspector as being improper to move on the highways. Instead of exercising the discretion in applying the CVSA criteria to allow the move to a safe location, the criteria were applied rigidly to take the vehicle from service, and then to force the driver to continue to operate it unlawfully.

I am a member of the CVSA committee preparing these criteria. If the CVSA criteria were made the subject of notice-and-comment rule making, Rogers Cartage would submit comments seeking changes to some provisions. In particular:

- 1) The provisions for moving a vehicle to another location for repairs should be clarified;
- 2) The placarding provisions should be revised to take into account the reality that placards may become discolored or blow off of trucks in the normal course of business, especially in severe weather conditions;
- 3) The provisions relating to driver licenses (CVSA OOS Criteria Section 3) should be revised so that trucks are taken out-of-service only when permitting the driver to operate the vehicle would constitute an imminent hazard to public safety;
- 4) The "Steering Wheel Free Play" standards set out in Section 8 of the CVSA vehicle out-of-service criteria are within the standard tolerances for some vehicles and should be revised.

ILLINOIS COMMERCIAL DRIVER/VEHICLE INSPECTION REPORT IL 783818

GENERAL VEHICLE

MCS level 1 3 4 5 6
 HM Present No Yes
 HM Level A B
 NAV VTR INSP X
 Date: 02/23/98 Time: 05:00 District: 157 Accident Report #
 County: LPSAWE Location: I 80 ETR M 15.89
 Driver's Name (Last, First, MI): CANTWELL ROBERT L DOB: 11-19-51
 Driver's License # 8938-DB-2944 Class: A Endor: XTM State: IN

Type = TR - Straight Truck TT - Truck Tractor ST - Semi Trailer PT - Pole Trailer FT - Full Trailer OC - Dolly Connector BU - Bus OT - Other

Unit	Type	Make	Yr.	Fleet #	Registration	State	Yr.	Vehicle Identification #
1	TT	PETERBILT	96	534	P78456	IL	98	1XPFD98X3TN400616
2	ST	KAR RITE	78	9091	133807ST	IL	98	CTK7340
3								
4								

Brake Measure	1	2	3	4	5	6	7	CVSA Decal Number Applied (See reverse side of page)
R								Unit 1 Unit 2 Unit 3 Unit 4
L								

Private Common Contract Inter Intra Fed. ICC # MC 64932 US DOT # IL ID # MC 8684

Carrier: RIDGERS CARTRAGE CO, 4428 W. MILWAUKEE AVE, TURNPIKE, KENWOOD, IL 60145
 Shipper: RHODIA INC, RHONE-POULENC NA CHEM CO, CHICAGO HEIGHTS, IL 60611
 Consignee: EEL INDUSTRIES, 110 E. AVE H, ROCHELLE, IL 61068

Carrier/PRO # Shipper/BL # 100284 Photos: Placards Placards ID # ID #
 Req'd displayed ID # ID #

Shipping Name: PHOSPHORIC ACID W/ACT RESIDUE
 QTY: 80 UN 1905 PG: III NI
 HAZCLS: UN 1905 PG III NI
 SAFETY DEPT
 FEB 24 1998

Seal # removed: NONE Time ID # Seal # replaced: Time ID #

Unit D = Driver OUT OF SERVICE ACTION(S): O = Out of service T = Towed/Out of service C = Corrected at scene

Unit/D	Violations	O.O.S. Reason	GC/WW No.	Violation description and remarks
2	172.516(c)(1)			PLACARD NOT SECURED TO VEHICLE. FRONT IN HOLDER IN TOP PORTION
DR	6-507(b)(1)		P-9642272	DRIVING COMMERCIAL MOTOR VEHICLE WHILE DRIVER'S LICENSE IS SUSPENDED - (IN) DRIVER STATE CO. TAG CALLED IN & LICENSE SUSPENSION IS FAILURE TO PROVIDE PROOF OF LIC. IN MOTOR CYCLE CALLED IN & TAGGED IN A/V. RELEASED & ORDERED AT SAUNDERSVILLE ILL. 11.02

DRIVER: [Signature] OFFICER: [Signature] HAZMAT: [Signature]

Copy received by: [Signature] Inspected By: [Signature] ID: 2944 Authorized ID: Release Time: 2:43 AMR

HAZMAT VIOLATIONS

February 26, 1998

Ill. State Police
Motor Carrier Safety Unit
500 Iles Park Pl., Suite 104
Springfield, IL 62718

Re: Inspection #783818

Dear Sir/Madam:

Our driver, Robert Cantwell, was placed out of service for his driver's license being suspended. When he called us we immediately went into his personnel file and we had a motor vehicle record dated 11/25/97 and it was clear! When he called us we called the State of Indiana and found out his license was suspended for no proof of insurance on a motorcycle which he was involved in an accident with.

He was admitted to the hospital from this accident. He claimed he had sent the State of Indiana his proof of insurance once he was released from the hospital and thought no more of it. He claimed he had no notification that his license was revoked starting 2/19/98 through 5/19/98, as we found out when we called the State of Indiana.

He is in the process of getting this straightened out and will notify us when it is.

Very truly yours,



Jerry E. Hall
Asst. Safety Dir.

: frg

Enc.



April 24, 1998

Missouri State Highway Patrol
Commercial Vehicle Enforcement Div.
P. O. Box 568
Jefferson City, MO 65102-0568

Re: INspection #873923

Dear **Sir/Madam:**

On 4/14/98 our unit was written up as o/s for inoperative brake lights. Our driver, Mr. Copas, called in as instructed and said when he pulled onto the scale he was asked to pull around back of the scale for an inspection. When the inspector walked up he told the driver that now his brake lights were working but they weren't when he pulled onto the scale. Our driver told the inspector that he didn't use his brakes on the scale and he only eased the unit onto the scale. The inspector wrote him up anyway even though the brake lights were working.

I would like to have this o/s removed from our record. Also attached is a copy of the work orders from our shop where they could find nothing wrong.

Very truly yours,



Jerry E. Hall.
Asst. Safety Dir.

: frg

Encs.



46

7096

4 15 98

ENTER PARTS INFORMATION HERE

- 1. BEECHER/AVIATION/AVIA
- 2. PRECISELY P.O.D
- 3. OTHER

ASSTY.	PART	PART NUMBER	QTY.	UNIT PRICE	AMT.
	O/C	3/8 HOSE	8		

INSTRUCTIONS

Replace 8 FT AIR BRAKE HOSE

CHECK BRAKE LIGHTS (OK, WORK FINE)

- 01. AIR FILTER
- 02. AIR FILTER ELEMENT
- 03. AIR FILTER HOUSING
- 04. AIR FILTER MOUNTING BRACKET
- 05. AIR FILTER SERVICE KIT
- 06. AIR FILTER SERVICE KIT
- 07. AIR FILTER SERVICE KIT
- 08. AIR FILTER SERVICE KIT
- 09. AIR FILTER SERVICE KIT
- 10. AIR FILTER SERVICE KIT
- 11. AIR FILTER SERVICE KIT
- 12. AIR FILTER SERVICE KIT
- 13. AIR FILTER SERVICE KIT
- 14. AIR FILTER SERVICE KIT
- 15. AIR FILTER SERVICE KIT
- 16. AIR FILTER SERVICE KIT
- 17. AIR FILTER SERVICE KIT
- 18. AIR FILTER SERVICE KIT
- 19. AIR FILTER SERVICE KIT
- 20. AIR FILTER SERVICE KIT

REPAIR ORDER V-558612

- REPAIR CLASS
- 1 SCHEDULED
- 2 URGENT SCHEDULED
- 3 EMERGENCY
- REPAIR SITE
- 1 FACILITY
- 2 TERMINAL
- 3 FIELD
- 4 OUTSIDE COMPANY

CONTRIBUTION NO. CHECK HERE!

ENTER LABOR INFORMATION HERE

MO.	DAY	TIME	SYS	ASSTY.	YR	ACTIVE	STD TIME
		226				1.0	
		226				1/4	

VEHICLE IDENTIFICATION

ENTER OUTSIDE REPAIR INFORMATION HERE

MO	DAY	SYS	ASSTY.	YR	ACTIVE	STD TIME

RESET/REPLACEMENT AND RETURN

SET/REP. ADM.

LABOR S

State of Illinois)
)
County of Crestwood) SS:

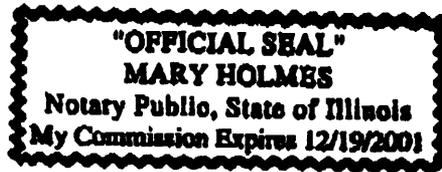
AFFIDAVIT

James Bucko, being duly sworn, says: that he, Yams Bucko is responsible for the prepared affidavit attached hereto; that he caused such affidavit to be prepared; that the materials appearing therein are true to the best of his knowledge, information anti belief.


James Bucko

Subscribed and sworn before me
this 18th day of September, 1998.


Notary Public



My Commissions expires: / 2 - 19 - 2001