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J.B. HUNT TRANSPORT, INC.

30 December, 1998

To: Docket Clerk
U.S. DOT Dockets
Room PL-401
400 Seventh Street, SW
Washington, DC 20590-0001

Re: F HWA Docket No. FHWA-98-4334 - 2

In response to a request for comments, J.B. Hunt Transport, Inc. respectfully submits the following comments regarding the granting of exemptions to these 24 applicants. These 24 applicants are currently medically unqualified and do not meet the current vision standard of 49 CFR 391.41 (b)10.

The summary of this notice of petition incorrectly states that the granting of exemptions will enable these individuals to qualify as drivers of commercial motor vehicles (CMV's) in interstate commerce. The vision of these drivers will not have changed with the granting of an exemption. Therefore, they would remain medically unqualified by action of 49 CFR 391.41 (b)10, but would be exempted from 49 CFR 391.41 (b) 10 by granting of an exemption.

The summary of this notice of petition also incorrectly circumvents the proper consideration of these 24 applicants for a program that is not fully approved. The interim final rule discussed in FHWA docket no. FHWA-984145 will not close its comment period until February 8, 1999. The consideration of these 24 applicants prior to that final rule being established will in effect disregard the rule making process. It is unclear how these drivers can apply for a vision waiver, yet receive a vision exemption via a program that is still being considered and not completely approved. These drivers (as a group) applied before June 9, 1998, for a vision waiver. However, that vision waiver study program was closed to new applicants previously, while drivers already in the program were allowed to continue driving under operation of 49 CFR 391.64. These 24 applicants should be processed under current circumstances; the vision waiver study program they applied for is closed, and the waiver, exemptions, and pilot programs rules have not been fully adopted or implemented. In short, these applicants should reapply under the standards to be adopted and implemented as a result of FHWA-98-4145.

P.O. BOX 598 • LOWELL, ARKANSAS 72745 • 501-820-0000

A discussion of these applicants ultimately centers on the line drawn between the rights of an individual and public safety. These two considerations cannot always be mutually satisfied. In this case where public safety is placed in jeopardy, the rights of the individual should yield to the rights of the general public. J.B. Hunt Transport, Inc. asks that the following three points be considered with discussion:

- I. Minimum safety standards should be applicable to every driver engaged in interstate commerce. Therefore, there should be no supplemental waiver or exemption program attached to any established safety standard. Specifically, there should be no waiver or exemption attached to 49 CFR 391.41(b)10 if indeed these requirements represent the true minimum vision standard necessary to safely operate a CMV in interstate commerce.

This attempt to exempt 24 applicants due to validity or fairness concerns regarding the current vision standard should be addressed only in the context of reassessing the whole vision standard, not by creating a path around the vision standard. The current standard's requirements should be studied and should be shown to represent the minimum visual requirements necessary to safely operate a CMV in interstate commerce. Only in the case that the current vision standard is found to be greater than the minimum visual requirements necessary should an action to diminish or reduce the current visual standard be undertaken.

The current vision standard has been in effect for many years in an attempt to allow only the safest drivers into the interstate commerce environment. The sound logic of the decision Buck v. DOT states "Where the agency (FHWA) has established a certain safety standard...and there is no way in which an individual with a certain handicap can meet that standard, the law does not require the pointless exercise of allowing him to try". The same case summary also states that individuals that do not meet a necessary - as opposed to a merely convenient - standard are not excluded from the application of a general rule. When considering this logic, there is no need to circumvent an established safety standard that is proven to be the minimum safety standard necessary to operate a CMV in interstate commerce.

Should the F HWA decide to review the current vision standard, there are several suggestions that should be included in the review format:

- Any review should consider the safety of the general public. Even with the best study controls and best intentions, the public safety would be subjected to a higher risk than presented by drivers with full vision. The general public deserves only the safest highway possible. Studying the effects of reduced vision as it relates to driving CMV's in a public highway laboratory is inherently unsafe endangerment of public safety, as was shown in the decision Advocates for Highway and Auto Safety v. FHWA.

- If there are trials on public highways, there should be some clear marking of the tractors used to caution the public that the driver is part of a test, or that the driver has less than full vision. Student driver cars are often marked to warn the public the operator is a student. A tractor used on a public highway for experimentation should be marked accordingly.
- Any testing used and subsequent comparisons must be valid. The previous waiver study program boasts that the participants were safer than the average CMV driver. This fact was true before the program began, since the only participants were selected on a stringent safety criteria. The non-medical selection criteria were more stringent for the program subgroup than for the average CMV driver. It could be argued that a subset of non-waived drivers picked using the same selection criteria would be safer than the waived subset. Therefore, the use of only historically safe drivers had a favorable influence on the outcome of the program before it even began.
- The value and accuracy of the comments of a physician should only be used within their medical context. A physician is a medical expert, not necessarily a transportation or safety expert. The description of the 24 applicants includes several references to physicians and their comments about the ability of these drivers to operate a CMV in interstate commerce. A physician lacks the expertise of a transportation or safety authority required to accurately determine if a person is able to safely operate a CMV. Only a transportation or safety expert would be familiar with the unique concerns related to operating a CMV safely in interstate commerce. Further exacerbating the problem, a physician cannot become a transportation or safety expert due to the absence of an official FHWA training or certification program to instruct and insure that physicians know both regulatory requirements and the practical nature of what is required of a driver to operate a CMV in interstate commerce. This knowledge is required of the medical examiner under 49 CFR 391.43(c)1. Without an objective medical test that is related directly to the unique nature of the CMV job, a physician cannot accurately test a monocular driver's performance ability. Comments from physicians should therefore be limited to only the medically relevant content, not an opinion of a driver's ability to safely operate a CMV in interstate commerce.
- The screening method used to evaluate test drivers regarding their safety record should depend on more than is offered by accuracy of a motor vehicle record and the honesty of the applicant. The motor vehicle report may not always be an accurate indicator of the applicant's true driving record. An applicant may also have a financial incentive to be accepted based on the way they complete their application. A more thorough screening process, involving the same thorough verification requirements outlined in 49 CFR 391.21 and 391.23 might reveal additional information from former employers regarding the drivers true safety records.

- A thorough monitoring program must facilitate the removal of drivers deemed unsafe during testing. Clearer definition is needed regarding removal of a driver due to a “lower level of safety”.
- II. If the vision standard is not reassessed as requested above, there should be regulatory relief for motor carriers from the waiver and/or exemption programs which would specifically allow them to maintain the more stringent vision standard found in 49 CFR 391.41(b)10. A motor carrier should have the right to legally decline the use of a driver who is medically unqualified yet waived or exempted from the requirement by another party.

Above and beyond the privilege of a waiver or exemption, a motor carrier should not be prohibited from requiring and enforcing more stringent requirements relating to the safety of operation and employee safety and health, as stated in 49 CFR 390.3(d). The premise of the proposed waiver and exemption program is that the program would only “likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption”. A motor carrier should have the option of participation in this experiment until there is a revised visual standard applied to *all* drivers engaged in interstate commerce.

What is not discussed regarding these exempted applicants is the consequence of the program’s goal not being met, and who specifically will bear the burden of this failure. In the event of a failure of the program directives, the motor carrier using a program driver will have failed in its obligation to:

- Protect the public safety. The public safety will be unjustly experimented upon by these applicants, as it was under the previous waiver study program. In addition, a motor carrier must deliver all types of freight (hazardous and non-hazardous) safely; any failure on the part of that driver would result in events ranging from spilled cargo, property damage, and death.
- Protect the safety of the individual driver. While many of the 24 applicants have satisfactory safety records, these records were accrued while driving in *intrastate* commerce on familiar roadways. These drivers will have an inherently higher risk when faced with unfamiliar roads paired with the hazards of having reduced field of vision. Interstate drivers must quickly interpret signs and directions as well as watch for other drivers on these unfamiliar roadways. The motor carrier has the responsibility to provide a safe work place for their employees.
- Protect the safety of the customer. Any failure of an exempted driver could cause injuries to a customer’s employees as well as property and freight damage while maneuvering on their property.
- Protect the reputation of the industry. The transportation industry must not be perceived as an environment where experimentation that may benefit a few drivers takes precedent over the industry’s duty to the safety of the general public.

III. If the first and second recommendations are not adopted, and a motor carrier has no regulatory recourse but to accept a medically unqualified driver who has a waiver or exemption, the motor carrier should receive a hold harmless agreement from the Federal Highway Administration relieving the motor carrier of any liability or responsibility in the case of accidents or incidents in which the major precipitating factor was the visual deficit of the waived or exempted driver.

The motor carrier, for reasons mentioned previously, should not be required to bear any additional liabilities presented by an exempted or waived driver unless they chose to take on those liabilities. There must be a balance between the liability a motor carrier is held responsible for, and the ability of the motor carrier to choose those responsibilities (whether under the constraints of the FHWA or another federal agency). Should the FHWA or other parties proceed with this program in such a way that a motor carrier is forced to use a waived or exempted driver, those parties should accept the subsequent liability

The notice states "these changes enhance the FHWA's discretion to consider exemptions, thus benefiting the 24 applicants rather than causing an injustice." While the rights and livelihood of these applicants are important issues, perhaps a greater injustice would be to improperly place these drivers into the interstate commerce environment without understanding fully that action's effect on all parties involved. To subject the general public to, at best, an experimental likelihood of safety is unjust to the thousands of motorists these drivers would share the highway with. Granting their request cannot and should not be done in such a way as to precipitate an even greater injustice to the public safety.

Sincerely,



Mike Gray
Qualifications Advisor
3.8. Hunt Transport, Inc.

PH (501)-659-6125
FAX (501)-659-6030
Email graym@mail.jbhunt.com