

TESTIMONY

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HOUSE TRANSPORTATION AND INFRASTRURE

APRIL 29, 2015

‘THE FUTURE OF COMMERCIAL MOTOR VEHICLE SAFETY: TECHNOLOGY,
SAFETY INITIATIVES, AND THE ROLE OF FEDERAL REGULATION’

Chairman Graves, Ranking Member Norton, Members of the Subcommittee; on behalf of members of the United Motorcoach Association, thank you for calling this hearing today and the opportunity to represent the bus and motorcoach industry in my testimony. This Committee has a long and distinguished record of promoting commercial motor vehicle safety and a reasonable and defensible regulatory climate.

The United Motorcoach Association (UMA) is North America's largest association for bus and motorcoach companies providing charter, tour and regular route services. Founded in 1971, UMA is comprised of over 900 professional bus and motorcoach companies who provide transportation services in all fifty states, Canada, and Mexico; and more than 250 suppliers, manufacturers, and travel partners. Membership represents the full spectrum of bus and motorcoach operations; from small family charter and tour companies - to nationwide scheduled and commuter service operations. 90% of our members are small businesses, with 10 units or less. Many companies, like mine, are second or third generation family businesses.

Approximately one-third of our members also operate school buses. Headquartered in Alexandria, VA, UMA is dedicated to protecting and promoting the interests of the entire bus and motorcoach industry and providing its members with programs and services to enhance safety and success of their operations.

I am the President of Escot Bus Lines; an established, second generation family owned and operated charter, contract transportation, and scheduled service bus operation with offices and facilities located in Tampa Bay (Largo), Orlando, and Sarasota, Florida. Not unlike most bus companies when they first start out, Escot began in 1983 when my parents purchased two mini-buses. Currently we operate a fleet of 84 motorcoaches, transit, and mini-buses serving a varied clientele with equally diverse services ranging from cross-country tours to employee-shuttle systems to working with local schools, senior citizen groups, churches, etc. in the local Tampa Bay and Central Florida communities. Our company has an active role in various capacities with

emergency services. In particular, Escot provided buses for power crews in the Florida panhandle and Mississippi areas after hurricanes Katrina and Rita and in Central and South Florida after Hurricane Charlie. Escot currently has emergency service agreements with an array of retirement communities in the Tampa Bay and Central Florida areas. I serve on the Board of Directors of UMA having previously served as Chairman of the Board, and I currently serve as the Chairman of the Risk Management Committee. I am a former Chairman of the International Motorcoach Group, President of the Florida Motorcoach Association and Director of the Global Passenger Network. I currently serve as a member of the Pinellas Suncoast Transit Authority Board of Directors with additional responsibilities on the Finance and Performance Management Committee, and Vice Chairman of the Pinellas County Local Coordinating Board for the Transportation Disadvantaged.

Mr. Chairman, I want to frame this conversation from one critical perspective - bus and motorcoach travel is extremely safe. And while we all agree that even one accident is one too many, the bus and motorcoach industry averages approximately 20 fatalities annually¹ while operating in a highway environment that yields nearly 34,000 fatalities annually. Percentage-wise, that is less than 1/10 of 1 % of the annual highway fatality toll. This remarkable safety record is no small achievement and is largely attributable to the vigilance and dedication of the men and women that drive, maintain, own, and manufacture our equipment. In a nutshell, our business is moving people safely, timely and economically. Most importantly, if we are not safe, we don't have customers. Contributing to our professionals' personal commitment to safety, we are a heavily regulated industry at Federal and state levels. Moreover, while our equipment is largely operated out of the direct oversight of management, we must acknowledge the men and

¹ Number of bus occupant fatalities in crashes involving cross-country, other, and unknown buses with a GVWR > 11,793 kg (26,000 lb) except for transit and school buses (categorized by bus body type). (FARS 2000-2009 data files.)

women of law enforcement that dutifully enforce the myriad of laws and regulations that impact bus and motorcoach travel on our nation's roads and highways.

The Federal Motor Carrier Safety Administration also plays a critical role in facilitating interstate commerce and ensuring the safety of commercial motor vehicles. We supported its creation 15 years ago and have worked closely with the agency on a myriad of bus and motorcoach safety issues over that time. However, UMA is becoming increasingly concerned that the culture of the agency and many of its actions in recent years have not served the cause of public safety and have been harmful to existing bus and motorcoach carriers and the continued growth and health of the industry. UMA supports active and legitimate enforcement of federal regulations to address unsafe practices through corrective actions; and as a last resort, termination of operating privileges. However, it appears to UMA the agency has declared war on the industry as a whole, and we are concerned enough to worry about the continued viability of this important transportation sector. Chairman Graves, Ranking Member Norton, Members of the Subcommittee, I have doubts that my parents, Louis and Diane Scott, could start Escot Bus Lines today and survive under the current regulatory environment.

For the first time I can recall in my thirty-year career, today the nation's motorcoach industry is in decline. A recent census report by John Dunham & Associates for the American Bus Association Foundation² concludes that in 2013 the number of interstate passenger carriers decreased by nearly 5%; a net loss of 153 carriers in one year alone and 177 since 2011. Total passenger trips by motorcoach in the U.S. dropped 5.1 percent in 2013, falling to 605.1 million from 637.4 million in 2012. Total passenger trips dropped by a whopping 32 million in the past year alone.

²Motorcoach Census - A Study of the Size and Activity of the Motorcoach Industry in the United States and Canada in 2013 John Dunham & Associates for the American Bus Association Foundation – March 12, 2015

UMA believes the regulatory climate at FMCSA is a significant contributing factor³. There are many real life examples of carriers with longstanding compliant histories that have been targets of overzealous enforcement or the agency taking an inordinate amount of time to process administrative remedies, leading many carriers to cease operations through bureaucratic inaction. And make no mistake, if the bus and motorcoach industry ceases to exist, most of our customers, which include students, athletes, retirees and others who rely on our services, will be forced to travel by private passenger automobile; a significantly less safe mode of travel.

We appreciate this Subcommittee's attention to the future of commercial motor vehicle safety and the impact of technology, safety initiatives, and the regulatory climate, to which I will focus the majority of my comments.

First, let's look at the impact of equipment mandates and safety technologies.

When I testified before this Committee in 2007, the cost of a motorcoach was \$425,000. A standard motorcoach today can exceed \$600,000. In the last ten years, Congress directed an industry-supported initiative that concluded, after research and testing, the inclusion of three-point seatbelts on all new motorcoaches. Electronic stability control is now a routine component on most motorcoaches and an electronic logging device mandate is only a few months away. Currently, the National Highway Traffic Safety Administration is considering new regulations addressing roof strength, window glazing, fire mitigation, and emergency egress. Some passenger carriers are currently assessing evolving technologies such as lane departure warning and collision warning devices for effectiveness in avoiding crashes. There are many technologies and safety equipment that can make motorcoach travel incrementally safer; but mandates must be supported by research and testing, and balanced with additional costs and

³ From 2012 to 2013, the industry decreased in size by 153 companies. Of the decline, 71.2% was due to companies going out of business, 18.3% was due to companies discontinuing motorcoach service, and 10.5% was due to mergers and acquisitions in the industry. - Motorcoach Census - A Study of the Size and Activity of the Motorcoach Industry in the United States and Canada in 2013 John Dunham & Associates for the American Bus Association Foundation – March 12, 2015

impact on the industry. Customers select bus and motorcoach travel for its convenience, efficiency, and economy as well as safety. Well known for razor thin margins, the industry and its customers' ability to absorb increased costs associated with mandates must always be a consideration.

A greater issue of concern to UMA is the current regulatory climate at the FMCSA.

I would like to highlight four primary issues of concern: overzealous regulatory enforcement and lack of due process, the Compliance, Safety and Accountability (CSA) program, the rulemaking proceeding to increase minimum levels of financial responsibility, and delays in processing new entrant applications. Let me share some real-life examples of the negative impacts of the current hostile enforcement posture of FMCSA.

In January 2003, Baldwin Nicholson established Lakim Bus Service in Moncks Corner, South Carolina with one motorcoach to supplement his income operating a diesel mechanic shop. Mr. Nicholson is a respected member of the bus and motorcoach community and over the last decade has served on the Motorcoach Association of South Carolina Board of Directors and its various committees. A decade later, Mr. Baldwin's daughter demonstrated a growing interest in the business and the fleet grew to three motorcoaches. The company received "Satisfactory" ratings from FMCSA as a result of routine Compliance Reviews in 2003, 2007, and 2011. In September 2014, Lakim Bus Service received what Mr. Nicholson assumed would be another routine Compliance Review. It was not. Through an interpretative documentation error and other findings, such as a new emergency window that the inspector recorded as not working, (Mr. Baldwin still disagrees with the assessment, and the window functioned as specified on a subsequent inspection) he was notified his company was now "Unsatisfactory". He was summarily ordered to cease operations in 45 days barring an acceptable corrective action plan. He submitted a corrective action plan in a timely manner. However, FMCSA failed to prioritize

Mr. Nicholson's corrective action plan, resulting in his company ceasing operations per the Federal order on the 45th day, despite customer, employee, and loan commitments. There are no requirements for FMCSA to review a corrective action plan on a timely basis. Seventeen days after Mr. Nicholson was ordered to shut down his operations, he was advised that his corrective action plan was now accepted and they were upgrading his rating; however, since 45 days had passed his authority could no longer be reinstated and he must now apply for NEW operating authority – essentially sending him to the “end of the line”. FMCSA acknowledged receipt of Mr. Nicholson's NEW application for interstate authority on December 12, 2014; however, Mr. Nicholson's company is languishing today, exhausting financial savings and a decade of customer and company goodwill. Nobody at FMCSA will even tell him why his application is delayed or when he might anticipate approval. Mr. Nicholson is considering leaving the business entirely. FMCSA's actions – or rather inaction – is inexcusable, unnecessarily punitive, and surely exceeds Congressional intent.

Another example is bus driver Jeff Rodgers, who dreamed of one-day owning his own bus company. Together with his wife Judy, and along with family support, that dream materialized over two-decades ago when they founded Southeastern Tours in Greenville, North Carolina. Similar to Mr. Nicholson, Jeff and Judy passed Compliance Reviews with satisfactory ratings in 2003, 2005, and 2010. In August 2013, they were scheduled for what they thought would be another routine Compliance Review. This Compliance Review began very differently when the FMCSA representative stated, “I'm going to warn you now that we have done five audits like this and we've put four out of business.” Paperwork snafus in combination with other correctible deficiencies, despite a longstanding compliant history, led to the company being placed out-of-service, and like Mr. Nicholson, they were also forced to reapply for new operating authority. Meanwhile, with no operating revenues, the company's finances rapidly deteriorated and like most small business owners, so did their personal finances. A long trail miserable trail of

employee layoffs, equipment repossessions, foreclosures, and unpaid creditors are the hallmark of FMCSA's unwarranted out-of-service orders. Despite hiring consultants, attorneys, and submitting corrective action plans, today Jeff and Judy Rodgers remain on the sidelines with an uncertain future. A twenty year satisfactory safety history should mean the company was doing most things right and that putting them out of business was not warranted.

It is Congress' intent for FMCSA to provide oversight of a safe and thriving industry, yet how many companies have now failed financially while waiting some undeterminable time for FMCSA to acknowledge their corrective actions. Surely, Congress wants FMCSA to direct companies to correct deficiencies when they find them, but not to put companies' with longstanding good safety records out-of-business - the equivalent of the corporate death penalty. Marked as Exhibit "A" and attached to this testimony are the findings⁴ of U.S. Administrative Law Judge Richard C. Goodwin regarding an Imminent Hazard/Out-of-Service Order issued to DND Trucking. The "Findings of Fact" should send tremors through this Committee, every motor carrier, and every U.S. citizen. Perhaps the decision is best summarized in one sentence: "The [FMCSA] Field Administrator's allegations are *unsupported by the totality of the evidence and testimony* in this case (emphasis added). UMA encourages Congress to investigate abuses of administrative authority by this agency.

The FMCSA's Compliance, Safety, Accountability program, otherwise known as CSA, is another concern. Like most motor carrier representatives and professionals, UMA supported the creation of this program rolled out in 2010 as a data-driven way to identify carriers more at risk of crashes. However, the methodology and implementation is so riddled with inaccuracies and incomplete information that it is only marginally effective for targeted enforcement intervention. UMA's largest concern is FMCSA has chosen to publicly promote the inaccurate and often

⁴ In The Matter Of: D N D INTERNATIONAL, INC. (U.S. DOT No. 1434005) Docket No. FMCSA-2014-0159 (Imminent Hazard OOS Order)

misrepresentative data and Safety Measurement System (SMS) scores to customers who have no ability to neither interpret such data nor discern whether a carrier is truly safe or unsafe. In fact, the misinformation is causing many customers to erroneously choose carriers who actually may be less safe. The bus and motorcoach industry, in concert with our colleagues in the trucking industry, collectively appealed to Secretary Foxx last summer for retraction of these scores from public view, only to be declined. FMCSA continues to actively promote use of the program with our customers, most recently with a new mobile application.

The CSA system's methodology is flawed by using data that is not predictive of motor carrier crashes. Low-level violations such as "emergency exit markings" and minor paperwork errors such as a driver inadvertently failing to record his last stop, and the recording of non-preventable crashes, are not only scored against a carrier but result in misleading safety scores. Perhaps more important to Congress is that these minor violations are utilized as indicators or substituted for effective risk mitigation when professionals know that basic traffic violations are the true predictors of crashes. Data consistently shows that future crash risk is primarily driven by unsafe operation in traffic such as speeding, following too close, failure to use or improper signal, improper passing, or erratic lane changing.

If a driver of a private passenger automobile crashes into a bus legally stopped at a red light, nobody believes the bus driver or company should be held accountable for a non-preventable crash; yet FMCSA insists on showing these crashes to the public as a recorded fatal crash absent any specific context. While UMA knows collecting crash data is important for possible risk mitigation in the future, the display of non-preventable crashes to the public is malicious, irresponsible, discouraging for motor carriers and misleading to the public.

CSA's basic methodology is seriously flawed and requires complete restructuring rooted in actuarial science, not politics or misguided desires to keep doing the "same-old, same old". At

best, CSA confuses the public in its ability to select carriers, does not appropriately address the differences between passenger carriers and property carriers or allow them to be effectively compared, and does not take into account the vast discrepancies in volume of inspections in some areas as opposed to others. These flaws are not just UMA's views, but the government's own auditing agency agrees. The Government Accountability Office (GAO) report of February 2014 concluded that "...FMCSA identified many carriers as high risk that were not later involved in a crash, potentially causing FMCSA to miss opportunities to intervene with carriers that were involved in crashes". The report recommended that FMCSA revise their SMS methodology. GAO's Director testified just two months ago before the Senate Commerce, Science and Transportation Committee and stated that CSA's Safety Management Scores should be shielded from public view. GAO also recently castigated FMCSA for putting out a mobile application to make it easier for prospective customers to view flawed information into customers' hands. Chairman Graves, Ranking Member Norton, Members of the Subcommittee, I suggest to you that the airlines would never stand for such flawed misrepresentations of their companies to the public and nor shall we. UMA urges the Committee to direct FMCSA to remove the SMS scores and raw data from public view immediately and resolve the foundational and structural problems with CSA. UMA supports a bill introduced by a Member of this Subcommittee, Congressman Barletta, The Safer Trucks and Buses Act of 2015 (HR 1371), as a good first start; and every day that passes is a day that more businesses fail under this deeply flawed system.

Surely the single largest threat to passenger carriers today is FMCSA's decision to propose a potentially massive increase in minimum financial responsibility limits for passenger carriers. Current limits set in statute are \$5 million per vehicle for vehicles with 16 passengers. MAP-21 directed FMCSA to study the adequacy of current limits and submit their findings in a report to Congress, which, like every state legislative body in the Nation, has historically established

minimum financial responsibility limit requirements. The agency issued the report last April and failed to include any analysis of passenger accident claims data or consultation with the industry's insurance carriers. The report's limited data focused exclusively on trucks; yet suggests that limits well in excess of \$20 million would be appropriate for large buses - a 400% increase! After releasing their required study, FMCSA announced that a rulemaking proceeding to increase limits was now a high priority, despite no directive from MAP-21 to do so and superseding other MAP-21 directives. In November of 2014, FMCSA released an Advanced Notice of Proposed Rulemaking seeking comments; and further stated their intention to finalize the rule by the end of the year. Insurance data indicates current limits cover all but a tiny fraction (1/10 of 1%) of accidents. The suggestion that passenger carrier minimum financial responsibility limits should be increased 400-500% or more without any study whatsoever of the industry's claims and accident history and adequacy of current limits is unconscionable. One major passenger carrier insurer has stated that just doubling the current limits from \$5 million to \$10 million would result in a 60% increase in premiums. The proposal is uniformly opposed by passenger carriers and perhaps surprisingly, also by the passenger carrier insurance industry. It is notable that a 2014 USDOT/Volpe Center study on which the FMCSA report to Congress was based states. "There is no realistic dollar amount that will necessarily ensure that every possible crash victim is fully compensated". The report also fails to make any correlation between increased insurance limits and improved safety, and yet FMCSA casts this proposal as a safety initiative.

UMA believes current minimum levels of insurance that have been set by Congress are adequate and opposes the rulemaking proceeding. UMA supports a bill introduced just this week by a Member of this Subcommittee, Congressman Scott Perry, that clarifies that minimum levels should be set by Congress and directs FMCSA to do a comprehensive study of current limits and

accident claims history of passenger carriers, consult with both the bus and insurance industries on the study, and submit the study to Congress.

Finally, UMA is concerned about the delays in approving new entrant applicants for operating authority. Established in August 2008, FMCSA's vetting program is designed to assess the ability of an applicant for new operating authority to comply with Federal Motor Carrier Safety Regulations and, in part, to determine whether a new applicant may be an individual or company previously placed out-of-service by FMCSA, or may still owe fines for past violations. UMA supports the intent that these applicants deserve additional scrutiny; however, a 2012 GAO study found that over 98% of new entrant applicants did not display any attributes of these so called "chameleon or reincarnated carriers" and that similar results could be accomplished more effectively in a much shorter period. In their zeal to afford additional scrutiny for the less than 2% that may exhibit certain characteristics, and by delaying approval of new entrant applications, there appears to be an adverse impact on the growth of new and safe carriers to the industry. If potential new bus and motorcoach company owners are discouraged by the regulatory morass they must hurdle to enter the industry, the industry ceases to thrive, creating a bleak future for existing carriers. UMA requested specific information about new entrant applications from FMCSA in August 2014 under a Freedom of Information Act request. We have yet to receive a response. UMA is aware that many new entrant applicants are compelled to wait as long as six or more months for approval granting operating authority with no communication from FMCSA as to when they may anticipate receiving such authority or why their application is delayed. In the meantime, they are attempting to arrange financing to purchase equipment, hire drivers, line up customers and secure insurance. The financial drain of interminable waits from the federal agency charged with granting authority is having a negative impact. While FMCSA advises most applications are eventually approved, UMA believes that many prospective applicants who endure financial losses while waiting for approval simply

abandon the pursuit. UMA believes there should be expedited review and due process protections in the law for new entrant applicants. UMA supports a provision requiring approval or disapproval within 30 days of submission. In addition, prior to disapproving an applicant, FMCSA should be required to provide a detailed explanation stating which criteria the carrier has failed to satisfy. There should also be an appeal process on the decision. Without a Congressional mandate to correct these deficiencies, it is clear FMCSA will continue to discourage new entrant applicants and the capital investments and job expansion our Nation so desperately needs today.

In conclusion, the bus and motorcoach industry remains a vital component to our Nation's economy. The essential service our industry affords provides access to jobs, education, and healthcare and is a critical component to our Nation's travel and tourism industry.

The United Motorcoach Association stands ready to assist this Subcommittee, Full Committee and Congress create a regulatory climate at FMCSA that ensures safe practices by drivers and operators, reasonable regulations grounded in sound science and testing and, strong but fair enforcement of regulations, that will improve the safety for our passengers and the travelling public, at the same time supporting a vibrant and growing passenger transportation industry. We do not believe these goals are mutually exclusive.

Chairman Graves, Ranking Member Norton, Members of the Subcommittee, on behalf of UMA and the dedicated men and women who work hard every day to assure every passenger arrives at their destination safely, I thank you for inviting me here today. We are confident this hearing will contribute positively to the discourse on bus and motorcoach safety and look forward to working with you on these important issues.

SERVED APRIL 16, 2014

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

In The Matter Of:)
)
D N D INTERNATIONAL, INC.) Docket No. FMCSA-2014-0159
(U.S. DOT No. 1434005))
) (Imminent Hazard OOS Order)
Respondent)

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

I. Key terms

CI	Comprehensive Investigation
CMV	Commercial Motor Vehicle
CR	Compliance Review
Dimitar	Dimitar Dimitrievsk, Operations Manager of DND
DND	D N D International Inc.
EEC	Eastern European carrier
EOBR	Electronic On-Board Recorder
FI	Focused Investigation
FMCSA	Federal Motor Carrier Safety Administration
FMCSR _s	Federal Motor Carrier Safety Regulations
FRE	Federal Rules of Evidence
GE	Group Exhibits – generally referring to FMCSA exhibits
HOS	Hours of Service
IHOOS	Imminent Hazard Out of Service
IHOOSO	Imminent Hazard Out of Service Order
IEPs	Intermodal Equipment Providers
IME	Intermodal Equipment
ISMP	Ineffective SMP
ISP	Illinois State Police
ITA	Illinois Toll Authority
ITTR	Illinois Tollway Transaction Report
<i>Kobs</i>	<i>In the Matter of Jerry J. Kobs, Inc.</i> , FHWA-97-2869-10 (September 26, 1997)
MCSR	Motor Carrier Safety Rating
MC	Michael’s Cartage
MSFR	Motor Safety Fitness Rating
MV	Motor Vehicle
Natasha	Natasha Dimitrievski, President of DND

NTSB	National Transportation Safety Board
OPPD	Omaha Public Power District
OTR	Over the Road
OTRD	OTR drivers
RV	Renato Velasquez
SMP	Safety Management Program
SMS	Safety Management System (SMS)
TP	Transponder
<i>Two Dayes</i>	<i>Henry T. Daye dba Two Dayes Transport, et al FMCSA 2013-0006, (May 17, 2013)</i>

II. Introductory Comment

Both parties were constrained by time limitations in the presentation of their cases. The statute and regulation are clear;

49 U.S.C. § 521 (5)(A):

If upon inspection or investigation, the Secretary determines that a violation of a provision of subchapter III of chapter 311 (except sections 31138 and 31129) or section 31302, 31303, 31304, 31305(b), or 31502 of this title or a regulation issued under any of those provisions, or combination of such violations, poses an imminent hazard to safety, the Secretary shall order a vehicle or employee operating such vehicle out of service, or order an employer to cease all or part of the employer’s commercial motor vehicle operations. In making any such order, the Secretary shall impose no restriction on any employee or employer beyond that required to abate the hazard. Subsequent to the issuance of the order, opportunity for review shall be provided in accordance with section 554 of title 5, except that **such review shall occur not later than 10 days after issuance of such order.** [emphasis added].

49 C.F.R. § 386.72(b)(4):

Upon issuance of an order under paragraph (b)(1) of this section, the motor carrier employer, intermodal equipment provider or driver employee shall comply immediately with such order. Opportunity for review shall be provided in accordance with 5. U.S.C. 554, except that **such review shall occur not later than 10 days after issuance of such order,** as provided by section 213(b)... [Emphasis added].

*Two Dayes*¹ held the language to mean that a decision must be issued within 10 days of the respondent filing a request for review.

As set forth hereinbelow, we find a review/decision shall occur not later than 10 days

¹ *In the Matter of Henry T. Daye dba Two Dayes Transport, et al, FMCSA 2014 – 0006 (May 17, 2013).*

after the issuance of an “Imminent Hazard Out-Of-Service Order”.

III. **Order Appointing an Administrative Law Judge (hereinafter “ALJ Order”)**

The ALJ Order states:

ORDER APPOINTING ADMINISTRATIVE LAW JUDGE²

1. Background

On April 4, 2014, DND International, Inc., (Respondent) served a request for review of an Imminent Hazard Out-of-Service Order (IHOOS Order). The Field Administrator for FMCSA’s Midwestern Service Center (Claimant) served the IHOOS Order on April 1, 2014. Respondent’s request for review also requested review of the Notice of Revocation of Operating Authority Registration and Suspension of USDOT Number (Notice of Revocation) served on April 1, 2014. The Notice of Revocation was based on the IHOOS under 49 U.S.C. 13904(f)(2).

Opportunity for review of an IHOOS Order is provided by 5 U.S.C. § 521(b)(5)(A) and 49 C.F.R. 386.72(b)(4). The statute provides: “Subsequent to the issuance of the [imminent hazard] order, opportunity for review shall be proceed in accordance with section 554 of title 5, except that **such review shall not occur later than 10 days after the issuance of such order**”. [Emphasis added] The regulation contains the same 10-day language. Accordingly, this matter is forwarded to the U.S. Department of Transportation’s Office of Hearings.

2. Appointment of Administrative Law Judge

In accordance with 40 CFR 386.54, an administrative law judge is hereby appointed, to be designed by the Chief Administrative Law Judge of the Department of Transportation, to **preside over this matter and render decisions on all issues**. The proceeding shall be governed by subparts D and E of 40 CFR 386 of the Rules of Practice and all orders issued by the Administrative Law Judge. [Emphasis added]

Accordingly, we will address both the IHOOS Order and Notice of Revocation.

IV. **Procedural History**

On Tuesday, April 1, 2014, the Federal Motor Carrier Administration (hereinafter “FMCSA”) issued and served on the Respondent, D N D International, Inc. (hereafter “DND” and/or “Respondent”) an “Imminent Hazard Out-Of-Service (hereinafter “IHOOS”) Order”.

That order stated:

EFFECTIVE IMMEDIATELY YOU MUST CEASE ALL COMMERCIAL MOTOR

² Signed April 7, 2014 by the Assistant Administrator, FMCSA.

VEHICLE OPERATIONS, INCLUDING ALL INTERSTATE OR INTRASTATE
TRANSPORTATION FROM ALL DISPATCHING LOCATIONS OR TERMINALS.

FMCSA's alleged:

The Secretary and FMCSA find DND International, Inc.'s operations and continued operation of any commercial motor vehicle, referred to herein as "commercial motor vehicles" and/or "vehicles", constitute an imminent hazard to public safety. This finding means that based upon your present state of unacceptable safety compliance, your operation of any commercial motor vehicle(s) poses an imminent hazard to public safety.

That same day, April 1, 2014, the Federal Motor Carrier Administration issued and served on DND a "Notice of Revocation of Operating Authority Registration and Suspension of US DOT Number" (hereinafter "Notice of Revocation"), which stated as follows:

...As a result of the issuance of the April 1, 2014 Imminent Hazard Out-of-Service Order, and pursuant to 49 U.S.C. § 13905(f)(2), DND INTERNATIONAL's Federal operating authority registration is revoked. Further, in accordance with 49 U.S.C. § 31134(c)(1) DND INTERNATIONAL's USDOT number is suspended.

On Friday, April 4, 2014, the DND filed a "Petition for the Immediate Rescission of Imminent Hazard Out-Of-Service Order and Order for Revocation of Authority" (hereinafter "Respondent's Petition").

On Monday, April 7, 2014, the Assistant Administrator for the FMCSA issued an Order Appointing an Administrative Law Judge.

That same day, on April 7, 2014, a "Notice of Assignment of Proceeding" was issued, assigning this case to Judge J.E. Sullivan. In addition, Office of Hearings ("OH") staff contacted FMCSA and DND to schedule an expedited Litigation Conference.

On Tuesday morning, April 8, 2014 (9:24am), DND filed a "Motion for Expedited Discovery".

That same day, on April 8, 2014 (9:30am), the parties appeared by telephone for an Expedited Litigation Scheduling Conference before Judge Sullivan. The parties discussed their calendar availability, discovery status, and other litigation and procedural issues. The parties

agreed to address some discovery issues privately, and then reconvene that same day for further proceedings.

On April 8, 2014 (12:00pm), the parties appeared by telephone before Judge Sullivan for a continuation of the Expedited Litigation Scheduling Conference. The parties agreed to limited expedited discovery, and to an expedited hearing schedule.

This matter was reassigned to the undersigned late afternoon on April 8, 2014.

We immediately scheduled an emergency hearing.

Testimony and evidence was heard and considered on April 10, 11 and 14, 2014, in Courtroom 1300, U.S. District Court, Northern District of Illinois, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604. Closing arguments were presented on April 15, 2014.

The matter is now ready for decision.

V. Jurisdiction

DND International was a for hire property motor carrier engaged in interstate commerce using commercial motor vehicles and was therefore subject to the Federal Motor Carrier Safety Regulations (hereinafter "FMCSRs"), *49 C.F.R. Parts 350-399*, the hours of service regulations at *49 C.F.R. Part 395*, as well as the Orders of the USDOT and FMCSA. (See *49 U.S.C. §§ 506, 507, 13501; 31133, 31136 and 31144*). DND International was required to comply, and to ensure its drivers complied, with the FMCSRs and Orders of the USDOT and FMCSA. (See *49 C.P.R. §390.11*).

The IHOOS Order had the force and effect of any other Order issued by FMCSA and was and is binding upon DND and its officers, members, directors, successors, assigns and closely affiliated companies. The IHOOS Order applied to all motor carrier operations and to all motor

vehicles owned, leased, rented or otherwise operated by and/or for DND.

VI. Basis for Order

FMCSA alleged the basis for determining that DND's motor carrier operations posed an imminent hazard to the public was DND's serious noncompliance with the FMCSRs, specifically *49 C.F.R. Parts 395 and 392*. FMCSA alleged DND did not have adequate safety management practices in place to ensure its drivers prepared and submitted accurate records of duty status and that DND drivers did not comply with the hours of service driving limitations. FMCSA further alleged DND's drivers routinely falsified their records of duty status and exceeded the hours of service limitations permitted in the FMCSRs. FMCSA also alleged DND did not have adequate safety management practices in place to prevent its drivers from operating their commercial motor vehicles in an unsafe manner.

FMCSA further alleged DND's failure to establish an effective driver hours of service Safety Management Program (hereinafter "SMP"), including an effective driver's records of duty status monitoring system, was a key contributing factor to a recent catastrophic crash resulting in the death of one person and severe injuries to another.

FMCSA alleged on January 27, 2013, a DND driver, while in violation of *49 C.F.R. Parts 395 and 392*, crashed his commercial motor vehicle into two stationary Illinois government vehicles, causing one death and one serious life-threatening injury.

Therefore, FMCSA alleged individually and cumulatively, these violations substantially increased the likelihood of serious injury or death to DND drivers and the motoring public.

VII. Burden of Proof

FMCSA is the petitioning party with the initial burden of proof in a post-deprivation hearing³.

³ See *Two Days*, FMCSA 2013 – 0006, p. 1, FN #1.

VIII. Summary of Facts

A. FMCSA's recitation of facts

On January 27, 2014, Renata Velasquez (hereinafter "RV") was driving for DND in DuPage County, Illinois on US Interstate Highway 88 when his commercial motor vehicle struck two emergency vehicles (an Illinois State Police cruiser and an Illinois Toll Authority vehicle). Both vehicles had activated emergency/warning lights. The immediate result of the accident was the death of a Toll Authority worker and life-threatening injuries to an Illinois State Police officer.

On January 28, 2014 FMCSA initiated an investigation to examine the circumstances of the fatal crash and driver RV's compliance with the FMCSRs. FMCSA found that at the time of the crash driver RV was driving after having been on duty in excess of 26 hours and having had an opportunity for no more than a five (5) hour break from duty. Driver RV's hours on duty were in direct violation of the maximum allowable duty hours established by the FMCSRs to prevent driver fatigue and impairment while operating a commercial motor vehicle. The investigation also concluded that RV falsified his records of duty status on four (4) out of the seven (7) days immediately leading up to the day of the crash. As a result of these findings, on February 10, 2014, FMCSA declared RV's egregious violations and reckless operation of a commercial motor vehicle to pose an imminent hazard to him and the public and ordered RV to cease operating any commercial motor vehicles.

FMCSA expanded its investigation to examine additional records of driver RV and six (6) more drivers operating under the authority of DND⁴. FMCSA's investigation concluded that

⁴ According to testimony of FMCSA's investigator, DND had 49 driver positions at the time of the incident. Tr. p. 23 l. 21 to p. 24. l. 5.

Q. Through either your conversations with DND or through FMCSA records, do you recall how many trucks DND operated at the time of the compliance review?

DND's safety performance history reflected a continuous pattern of violations - with the carrier's Safety Management System (SMS)⁵ BASIC scores in Unsafe Driving and Hours of Service (HOS) Compliance being above the intervention threshold in each of the previous 24 months. DND's BASIC score in Unsafe Driving was 91.1% and in HOS Compliance was 88.9%. FMCSA concluded numerous roadside citations contributed to DND poor Unsafe Driving performance over the past year [prior to the accident], including six (6) speeding violations, three (3) citations for failing to obey a traffic control device, three (3) citations for failing to use a seat belt while driving a commercial motor vehicle, one (1) citation for an improper lane change and one (1) citation for an improper turn.

FMCSA alleged DND did not have in place an effective management oversight and control system to ensure drivers complied with hours of service requirements in *Part 395* of the safety regulations. In the past year, FMCSA alleged, DND drivers had accumulated several roadside hours of service violations, including six (6) false records of duty status violations, five (5) 14-hour duty limit violations, two (2) 11-hour driving limit violations and eight (8) violations for driving more than eight (8) hours since the last break of at least 30 minutes. FMCSA alleged DND had no effective system in place to insure that drivers were only dispatched when they had sufficient hours available to complete the assigned trip or that drivers would pull off the road and take required rest breaks. FMCSA alleged DND's drivers routinely traveled on Illinois Toll

A. 49.

Q. Same question regarding drivers. How many drivers?

A. I'm sorry. 49 drivers, 49 driver positions.

⁵ The SMS is a tool for assessing available roadside performance data and ranking an entity's relative performance in any of the six Behavior Analysis and Safety Improvement Categories (BASICS). The SMS quantifies the on-road safety performance of individual entities to identify entities with significant safety problems, determine the specific safety problems an entity exhibits, and monitor safety problems through the Intervention Process. The SMS computes a percentile for each BASIC using a time-weighted methodology, and computes a percentile for each BASIC using a time-weighted methodology, and assigns a percentile rank to each BASIC, on a 0-100 scale, with 100 indicating the worst performance.

Roads, but DND refused to compare toll transaction information to its drivers' logs to monitor hours of service compliance. FMCSA alleged when FMCSA's investigators compared toll transaction data with the logs from the seven (7) sampled drivers, an unmistakable, dangerous pattern of serious falsification emerged - the drivers had falsified in excess of 25% of their records of duty status. FMCSA concluded all seven (7) drivers had falsified their logs during this period.

B. DND's recitation of facts:

DND alleged the Field Administrator's actions arose from an investigation into a crash that occurred during the evening hours of January 27, 2014 when an Illinois tollway worker was killed and an Illinois State Police Trooper severely injured. The accident occurred when another commercial motor vehicle operated by Michael's Cartage, Inc., (hereinafter "MC") USDOT No. 655112 broke down in the east bound right travel lane⁶ of I-88 at or near Aurora, IL. An Illinois tollway worker stopped his vehicle behind the MC's vehicle, and an Illinois State Trooper stopped his vehicle behind the tollway vehicle. RV, operating for DND, was traveling eastbound in the right lane of I-88 behind another, unidentified tractor-trailer, when the unidentified tractor-trailer made a sudden lane change to move around the vehicles stopped in the right travel lane of the interstate highway. RV, his view of the stopped vehicles blocked by the tractor-trailer in front him until the tractor-trailer's sudden lane change, was unable to stop in time, and he crashed into the stopped vehicles.

Investigation by the Illinois State Police resulted in allegations that RV was in violation of the hours of service rules at the time of the accident and had falsified his log book to conceal those hours of service violations. DND averred there was no evidence that driver fatigue caused

⁶ It is significant that MC's vehicle is stationary in the travel lane of traffic on an Interstate Highway.

or contributed to this crash. There was no evidence that RV's vehicle drifted onto the shoulder or otherwise performed in a manner indicating that RV fell asleep or was not in control of the vehicle.

DND asserted the crash resulted in a comprehensive investigation by both the National Transportation Safety Board (hereinafter "NTSB") and the FMCSA. DND alleged it fully cooperated with both investigations. There was not a document requested that was not provided. There was not a question asked that was not honestly answered. There was not a vehicle that the NTSB or FMCSA wanted to inspect that was not made available for inspection. There was not a driver, dispatcher, or other DND official who the NTSB or the FMCSA wanted to interview who was not made available for an interview⁷.

During both the NTSB and FMCSA investigation, DND explained and provided documents related to their policies, processes, and procedures for training drivers on the hours of service rules and auditing drivers logs and for ensuring compliance with *Part 395*. For example, it was explained to both the FMCSA and NTSB that all new hires receive and sign for DND's written hours of service policy, which explicitly prohibits drivers from violating the hours of service rules. New hires were also provided hours of service training as part of the orientation process. Existing drivers had their logs audited by DND staff for hours of service violations and falsification. Falsification was determined by comparing the driver's log with fuel purchase reports. Drivers who were found to be in violation were provided retraining. Drivers who were cited on the road-side had their pay deducted. Admittedly, DND had not required drivers to submit Illinois toll receipts and had not audited the logs against Illinois toll receipts or toll

⁷ See also Tr. p. 243, l. 13 to p. 245, l. 21.

reports.

DND asserted its drivers were independent contractors⁸. Accordingly, DND did not direct the drivers in the manner or means in which they performed their work, including what routes they took and whether they operated on the Illinois toll roads or not. DND did not reimburse its drivers for the toll expenses and did not have an Illinois Toll Authority commercial account. All Illinois Toll Authority accounts held by DND drivers were held by the driver individually, and DND had no electronic access to the accounts. A FMCSA investigator explained during the meeting he had with DND officials and their counsel at the close of the investigation, DND's program of auditing the logs against fuel purchase reports was not effective because it still permitted the drivers' to falsify their logs, as he was able to demonstrate by comparing the logs to Illinois toll records.

DND alleged it took FMCSA's findings that its log auditing program was not effective very seriously and began planning for the implementation of Electronic On-Board Recorders (hereinafter "EOBRs") to fully abate any and all hours of service compliance issues. The FMCSA investigator was informed during his closing interview that DND was going to implement a plan for EOBRs. On March 25, 2014, DND entered into a lease to purchase contract for 25 Qualcomm, Omnitrax MCP-50 EOBR units. It was initially believed that only 25 EOBRs would be needed to equip 100 percent of DND'S fleet because DND anticipated downsizing due to business lost because of the publicity surrounding the accident and the pending "Conditional" rating, and the fact that some drivers would not want to use an EOBR and would leave the

⁸ The FMCSA investigator confirmed this on cross examination Tr. p. 257, ll. 13 – 19.

company⁹.

On March 28, 2014, DND'S counsel emailed the FMCSA and NTSB investigators informing them of this development, provided them a copy of the lease to purchase contract, and provided them documentation regarding the Omnitrax system and its compliance with *49 C.P.R. §395.15*. Counsel for DND told the FMCSA and NTSB investigators that "DND International is committed to operating in full compliance with all applicable FMCSR regulations and to doing everything they can to make sure the events that transpired on January 27, 2014 never happen again."

On April 1, 2014, DND entered into a revised lease to purchase agreement to provide for 35 EOBR units after it was evident that 25 units would not be sufficient to equip 100 percent of its fleet.

IX. Brief Summary of Hearing Evidence and Hearing Motions

All admitted testimonial and documentary evidence was reviewed and considered. Only brief highlights are summarized herein.

A. FMCSA's Case

Bunting

FMCSA called as its first witness Charles Bunting (hereinafter "Bunting")¹⁰. Bunting was the lead FMCSA investigator. The substance of Bunting's testimony and findings was contained in his Compliance Review at Group Exhibit C-1. Bunting testified about the methodology of the CR, his sampling, sampling techniques, breadth of the investigation and how and what conclusions he reached in the CR. We found Bunting to be truthful, candid and

⁹Respondent Exhibit #4, page 5 to 8. Tr. p. 315, l. 16 to p. 318, l. 24; p. 330 l. 1 to p. 343, l. 24.

¹⁰ Tr. p. 12, l. 22.

credible. His answers were straightforward and responsive in both direct and cross examination. Bunting spent over two days on the stand.

Rogers

FMCSA called Rod Rogers, manager of corporate security at Omaha Public Power District in Omaha, Nebraska. Mr. Rogers testified about information contained on Exhibit C-27, Exhibit D. (Tr. p. 321) which indicated RV had been at the facility at a certain time set forth in the exhibit. The telephonic examination of Mr. Rogers took only a few minutes.

Jones

FMCSA called Darin Jones (hereinafter "Jones"). He was and is the Field Administrator, Midwest Service Center, FMCSA. He signed and approved the issuance of the IHOOS Order and Notice of Revocation. He explained the procedure and review incident to the issuance of both the IHOOS Order and Notice of Revocation. He explained his reasoning for issuing the IHOOS Order and Notice of Revocation:

DND failed to control drivers' hours of service, as documented and referenced in the falsification, the falsification to conceal, and the unsafe driving behavior of their drivers¹¹.

As in this case, we have evidence of seven out of seven drivers with falsification records... 25 percent falsification, as well as evidence of falsification to conceal excess hours, including the driver involved in the fatal crash.¹²

Q. It would be speculation on your part to say that those other hours -- other false logs concealed an hours of service violation, true?

A. It would be speculation and based on experience that it's not been my experience in 27 years the drivers falsify to put hours of service onto the records of duty status¹³.

Q. Six hours of service limitations violations does not even rise to the level of a critical violation of Part 395, does it, Mr. Jones?

A. That's correct¹⁴.

¹¹ Tr. p. 519, ll. 3-6.

¹² Tr. p. 520, ll. 2-8.

¹³ Tr. p. 520, l. 20 to p. 521, l. 6.

¹⁴ Tr. p. 524, l. 15 – 18.

...he sampled seven drivers for a 30-day period covering those different – not October through January for seven drivers, but for a 30-day sampling one driver may have been October, one driver may have been November, one driver may have been December. That combination. Not that all seven drivers were examined for four or five months.

Q. Six hours of service limitation violations over a span covering four months and seven drivers, that's not an imminent hazard, is it, Mr. Jones?

A. It's not a critical violation. It's a violation that existed as part of the consideration but the imminent hazard was based on the falsification and the false to conceal when looking just at 395¹⁵.

Q. And six violations out of 210 checked does not meet the critical rate for -- to have an impact on the carrier's safety rating, true?

A. Correct.

Q. A motor carrier -- assuming you found no other violations, a motor carrier that had six hours of service limitation violations out of 210 records checked would receive a satisfactory safety rating, true?

A. With no other violations, right¹⁶.

Q. And you don't have any evidence that any of the other false logs were to conceal hours violations, true?

A. That is correct.

Q. The conclusions you reached are based upon a review of seven drivers, true?

A. Correct.

Q. Are you aware of how many drivers DND had at the time of the investigation?

A. I believe it was the upper 40's, 48 maybe or 49¹⁷.

Q. So it's your testimony that seven drivers -- sampling of seven drivers, using the sampling methodology employed by Mr. Bunting, was sufficient for you to get a fair picture of DND's level of compliance with Part 395?

A. Yes.¹⁸

Q. What would an example of an adequate safety management practice that a motor carrier could use to prevent its drivers from operating their commercial motor vehicles in an unsafe manner?

A. Examining the roadside performance data, having education and training programs for drivers, having a means to oversee that roadside performance activity, checking the internal records to determine whether the conditions exist, such as speeding with other

¹⁵ Tr. p. 524, ll. 8 – 24.

¹⁶ Tr. p. 526, l. 18 to p. 527, l. 3.

¹⁷ Tr. p. 528, ll. 2 - 9.

¹⁸ Tr. p. 535, ll. 18 23.

drivers or with any driver within the data or system records that they have.

Q. Do you have any evidence that DND did not review their roadside inspection data?

A. No.

Q. Do you have any evidence that DND did not provide training to their drivers?

A. No.

Q. Okay. Do you have any evidence that DND did not do any of the other safety management practices that you just mentioned?

A. No, except to the extent that if they did, they did not appear to be effective in Controlling the driver's behavior¹⁹.

...A. Because during the course of the investigation, Investigator Bunting established a speeding violation and -- I'm sorry -- speeding violations, and the carrier's performance through roadside data showed an ongoing pattern of violations.

Q. Okay. And by that do you mean the roadside data that appears in DND's unsafe driving CSA BASIC?

A. Yes, that would be the traffic records, right.

Q. So the sole basis for you to make this statement that DND does not have adequate safety management practices in place to prevent its drivers from operating commercial motor vehicles in an unsafe manner, the sole basis for that statement is the one speeding violation calculated by Mr. Bunting and the roadside performance data, as indicated in the unsafe driving BASIC, true?

A. Can I refer to the review real quick? Based on the review, which I show as seven, not one, along with the continued performance from the SMS data that would be correct.²⁰

Q. [violation 5] That citation reads, "Operating a motor vehicle not in accordance with the laws, ordinances and regulations in the jurisdiction in which it was being operated", correct?

A. Correct.

Q. He gives one example, Umberto Ramirez?

A. Correct.

Q. The violation is that he averaged -- his average speed was 68.42 in a 65 mile-per-hour zone, correct?

A. Correct.

Q. Three miles over the speed limit, correct?

A. The average, correct.²¹

¹⁹ Tr. p. 537, l. 7 to p. 538, l. 6.

²⁰ Tr. p. 538, l. 8 to p. 539, l. 6.

²¹ Tr. P. 539, l. 17 to p. 541, l. 6.

Q. ...Perhaps I'm being a little bit unfair to you. 203 drivers found to be in total compliance with the laws, ordinances and regulations of the jurisdiction in which their motor vehicle is being operated. That is not evidence and that does not indicate a lack of an adequate safety management practice to keep drivers from operating in an unsafe manner, is it, Mr. Jones?

A. Correct. I would just say that the 203 were not confirmed to be operating compliance. We did not find violations by those drivers during the investigation.²²

Jones presented no admissible testimony and/or evidence that “DND International's failure to establish an effective driver hours of service safety management program, including an effective driver's record of duty status monitoring system, was a key contributing factor in a recent catastrophic crash”. His testimony contradicted the allegations in the IHOOS Order issued over his signature.²³

Q. Did the investigation reveal any evidence that DND was knowingly dispatching drivers in violation of the hours of service rules?

A. No.²⁴

Q. Your imminent hazard order says DND International's current BASIC score for unsafe driving is 91.1, true?

A. True.

Q. But on March 28 it was 81.2, correct?

A. Correct.

Q. You had access to their CSA BASIC data on March 28th, correct?

A. Yes.

Q. It's a rather significant improvement, is it not, Mr. Jones, to go from 91.1 to 81.2 in the span of one month?

A. It's a drop in the percentile score. We would look more closely at the data to see what came on, came off, but that is a reduction from, as you state, 91.1 to 81.2²⁵.

Q. We have a seat belt violation, one improper lane change, two speeding tickets, 2.7 million miles, and you characterize that as unsafe, correct?

A. I characterize it as the carrier's had that violation history and that coupled with the other violations were the basis for the order as specified in Section 2²⁶.

²² Tr. p. 545, l. 2 to 13.

²³ Tr. p. 545, l. 17 to p. 549, l. 9.

²⁴ Tr. p. 553, ll. 2 – 5.

²⁵ Tr. p. 561, l. 4 – 19.

²⁶ Tr. p. 573, l. 19 to p. 574, l. 2.

Jones testimony contradicted most of the allegations in the IHOOS Order.

Mr. Jones tended to be indirect in his responses to questions on cross-examination, would not answer some questions with a direct yes or no, true or false, when the question was posed as a yes/no, true/false question. When queried about the methodology used in issuing the IHOOS and Notice of Revocation, his responses were less than direct and/or responsive to the inquiry. When queried directly about statements in the IHOOS Order supporting the issuance of the IHOOS Order, he did not respond directly and was evasive in his responses. The responses he gave contradicted the allegations in the IHOOS. At other times Jones would give a lengthy rambling response to query of the Respondent's counsel. As a result, we give Jones testimony limited weight in our analysis of this case²⁷.

B. Respondents' Case

Respondent presented no testimony.

Respondent introduced several exhibits into the record.

X. **Requirement that review shall occur not later than 10 days after issuance of such order (IHOOS Order)**

The full language of the statute and regulation are set forth herein above. In substance the statute and regulation both provide that the **opportunity for review shall occur not later than 10 days after issuance of such order**²⁸. (See *49 U.S.C. § 521 (5)(A)* and *49 C.F.R. § 386.72(b)(4)*)

FMCSA argues that a decision does NOT have to be rendered within 10 days. Citing *49 U.S.C. 521(B)(5)(a)*, *57 A.L.R. 2d 302*, FMCSA argues:

... We believe that the basis for this decision was produced in the waiver forms that were supplied by the Office of Hearings. They cite to *57 A.L.R. 2d 302* and the year is 2012...

²⁷ See testimony pp 538 to 582, et al.

²⁸ Meaning the IHOOS Order.

And that apparently supports the proposition that the hearing must be concluded and the decision must be issued within ten days.

What we would find at that cite is a discussion of cases relevant to the question of the waiver or loss of an accused's right to a speedy trial under the sixth amendment...

Our position is that it has to start within ten days. We agree with that. But it can go beyond the ten days.

...Now the decisions that are discussed at *57 A.L.R. 2d 302*, I mentioned the Federal Speedy Trial Act. I wanted to give you the cite to that...

...*18 U.S.C. 3161*. And there it discusses the fact that the criminal trial needs to commence within 70 days. I believe Judge Sullivan is analogizing from the 70 to the 10, but it only mentions commence. It doesn't mention that it has to end at any given point. (Tr. p. 438, l. 5 to p. 440, l. 8)

We are not persuaded. The citations are to criminal cases. The statute and the FMCSA regulation are clear. The law has been settled since *Kobs*²⁹ was issued in 1997. We are bound by the case law of the Department.

Two Days, discussed a motion for waiver of the "10 day rule" set forth hereinabove³⁰.

The discussion is worthy of being repeated in the context of this decision, arguments of FMCSA and analysis of the issues in this case.

On May 9, 2013, at the close of the hearing, the Respondents jointly moved for a third limited waiver (i.e., 4 calendar days) of the ten day time for administrative review to allow the Judge time to receive the hearing transcripts and to write and issue this Initial Decision by May 17, 2013. The Field Administrator, after consultation with her supervisor, Herb Ford, objected to the motion.

The Judge heard oral arguments, and then granted the motion over objection. As noted during the May 9, 2013 hearing, this waiver objection was originally raised by the Field Administrator in her motion materials filed on March 14, 2013.

As part of her oral argument on May 9, 2013, the Field Administrator asserted that the post-deprivation ten day administrative review period was not a

²⁹ See discussion below. *Jerry J. Kobs*, FHWA 97-2869, (Sept. 26, 1997)

³⁰ See statutory citations hereinabove.

benefit provided for the respondent motor carrier. (5/9113 TR 582:22-25.)
Instead, it was a time limit that should be strictly construed, to show that
FMCSA had provided the process of a post-deprivation "expedited" hearing. (5/9/
13 TR 583:1-9.)

We want to make sure that we maintain that ability and authority to be
able to issue imminent hazard, and then not open ourselves up to
arguments that you are closing the business down, you know, what are
we going to do.
(5/9/13 TR. 583:10-15.)

In response, the Respondents repeated their assertion that the post-
deprivation ten day time period was provided by statute for the benefit of the
respondent motor carriers. It was specifically created to protect the respondent
motor carriers' rights to a post-deprivation, constitutional due process hearing
after summary government actions had been taken. The respondent motor
carriers should always have the right to move to waive or extend the time for a
post-deprivation hearing provided for their benefit. (5/9113 TR 583:22-584:13.)

"Waiver is the intentional relinquishment or abandonment of a known
right." *Wood v. Milyard*, 132 S. Ct. 1826, 1835 (2012) (quoting *Kontrick v.*
Ryan, 540 U.S. 443.458, n. 13 (2004)). "A party may waive any provision,
either of a contract or of a statute, intended for his benefit." *Shutte v.*
Thompson, 82 U.S. 1 51 (1872); *28 Am. Jur. 2nd Estoppel & Waiver*, §200
(2012).

When considering the waiver of a statutory right it is necessary to determine
the purpose of the right. The waiver of the right cannot work to frustrate the
purpose of the statute, or come at the expense of a broader public right. Due
process rights are subject to waiver. *Warner v. US*. 103 Fed. Cl. 408, 417 (Fed. Cl.
2012) (citing *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972)).

As established by *In re Jerry J. Kobs*, Docket No. FHWA-97-2869-10,
Order of Administrative Law Judge at 3 (Sept. 26, 1997), and the instant case
(Order Denying FMCSA 's Mot. to Dismiss and Granting/Denying Other
Relief, FMCSA-2013-0006, Apr. 30, 2013) the ten day review period is for the
benefit of the Respondent. The Field Administrator's argument that the ten day
review period is not designed to protect the respondent, but rather to satisfy
general due process requirements is not persuasive. The requirements - namely
an Administrative Procedure Act ("APA") hearing within ten days - are in place
to protect the respondent's right to post-deprivation due process. In the case of

IHOOS orders, Congress satisfied due process requirements by providing for APA review within ten days. It is not a violation of due process if the respondent motor carrier, for whatever reason, elects not to avail itself of those protections and instead moves to waive them.

The Field Administrator is correct that the overall purpose of 49 U.S.C. § 521(b)(5)(A) is the protection of the public. (5/9/13 Tr. 583:5-16.) However, that purpose is in no way frustrated by allowing the Respondents to request a limited waiver of the ten day time period for administrative review. While it is possible that allowing a respondent motor carrier in an IHOOS action a limited waiver might result in a slight increase of litigation for the government, this should not serve as a basis to deny or thwart the respondent motor carrier's right to a prompt, meaningful post-deprivation review. The Respondents choose to remain out-of-service during any granted waiver of time, and the public safety interests presumptively remain protected while the IHOOS Order remains in effect. As noted in the April 30, 2013 Order Denying FMCSA's Motion to Dismiss, it is highly unlikely that any respondent motor carrier - whose business has been completely shut down - will seek to extend the time for any significant time, since the motor carrier is already experiencing severe consequences from the close of all business operations, and is seeking relief from such summary government action as soon as meaningfully possible.

We adopt the analysis in *Two Days* to the extent it is applicable to the facts of this case.

However our reading of the statute and regulation is that “**review shall occur not later than 10 days after issuance of such order**” [emphasis added], that is the Imminent Hazard Out-of-Service Order.

49 U.S.C. § 521 (5)(A):

... Subsequent to the issuance of the order, opportunity for review shall be provided in accordance with section 554 of title 5, except that **such review shall occur not later than 10 days after issuance of such order.** [Emphasis added].

49 C.F.R. § 386.72(b)(4):

... Opportunity for review shall be provided in accordance with 5. U.S.C. 554, except that **such review shall occur not later than 10 days after issuance of such order**, as provided by section 213(b)... [Emphasis added].

When interpreting a regulation, words should be given their ordinary meaning. The clear

meaning of the statute and regulation is that the ‘order’ triggers the commencement of the ten (10) day period of review NOT any action of the Respondent. There is only one order which could trigger that event, the “Out-of-Service Order”³¹.

There is no language in either the statute or regulation to support FMCSA’s position that the review “...has to start within ten days...But it can go beyond the ten days...”

In *Jerry J. Kobs*, FHWA 97-2869, (Sept. 26, 1997) (hereinafter “*Kobs*”), the court held:
...the out of Service Order was issued August 19, 1997... (*Id.* p. 2)...

The Out of Service Order specifically noted that the time for review began on the date of issuance. That order also stated that the review would be completed within “ten working days of the issuance of this order”, i.e., September 3. Nothing in the statute or the FHWA rules supports such a conversion of “ten days” into “ten working days”. [Emphasis in the original]. Respondent was entitled to a review completed by August 29...(*Id.* p. 3, para. 6).

The statute and/or regulation do not use the words “Petition for Review” “Request for Review” or any other descriptive language indicating the Respondent has an obligation to file anything to trigger the review. The statute and/or regulation do not use language indicating the review may extend beyond the 10 day period.

The IHOOS Order served on DND was issued April 1, 2014 at 2:35 p.m. and served on Natasha Dimitrievski according to notations on the IHOOS Order. The IHOOS Order specifically states:

VIII

RIGHT TO REVIEW

You have the right to administrative review in accordance with 5 U.S.C. § 554 pursuant to 49 C.F.R. § 386.72(b)(4). An administrative review, if requested, **must occur within 10 days of the issuance of this Order**. [Emphasis added]. (49 U.S.C. § 521(b)(5) and 49 C.F.R. § 386.72(b)(4)). A request for review must be addressed to the Assistant Administrator, United States Department of Transportation, Federal Motor Carrier Safety

³¹ See *Jerry J. Kobs, Inc.*, FHWA-97-2869, (1997), where the Judge states “...opportunity for review of an order requiring an employer to cease all or part of its commercial motor vehicle operations because of an imminent hazard to safety “**shall occur not later than 10 days after issuance of such order**” [emphasis added]. The OSS Order was issued ... on August 19, 1997.” Order Appointing Administrative Law Judge, dated August 29, 1997.

Administration; with a copy sent to the FMCSA's Adjudications Counsel by mail and electronic mail, and the Field Administrator, Midwestern Service Center at the following addresses: Service Center at the following addresses:

Assistant Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, S.E. Washington, DC 20590

Federal Motor Carrier Safety Administration
Office of the Chief Counsel- Adjudications
1200 New Jersey Avenue S.E., W61-323
Washington, DC 20590
FMCSA.Adjudication@dot.gov

Field Administrator, Midwestern Service Center
Federal Motor Carrier Safety Administration
4749 Lincoln Mall Drive, Suite 300A
Matteson, IL 60443

The request must state the material facts at issue which you believe dispute or contradict the finding that DND International's operations constitute an imminent hazard to the public.

A REQUEST FOR ADMINISTRATIVE REVIEW DOES NOT IN ANY WAY SUSPEND OR DELAY YOUR DUTY TO COMPLY WITH THIS ORDER IMMEDIATELY. This Order is separate and independent from all other orders or actions that may be issued by FMCSA, and does not amend or modify any other such orders or actions. Any request for administrative review of this Order does not attach to or apply to any other order or action.

Date: April 1, 2014

Darin G. Jones, Field Administrator
United States Department of
Transportation
Federal Motor Carrier Safety
Administration

The meaning is clear in both the U.S. Code, FMCSRS and the IHOOS Order. It is unambiguous.

Subsequent to the issuance of the order, opportunity for review shall be provided in accordance with section 554 of title 5, except that **such review shall occur not later than 10 days after issuance of such order.** [Emphasis added].
(See 49 U.S.C. § 521(b)(5) and 49 C.F.R. § 386.72(b)(4)).

Again, review is NOT triggered by any action of the Respondent. It is NOT triggered by the filing of a Petition by Respondent. It is NOT triggered by a request for review by the Respondent. It is a right of the Respondent to have a review as clearly set forth in the statute and regulation. The IHOOS Order only sets forth the contents of the request for review. IHOOS Order does NOT toll, waive, extend and/or otherwise alter the due date for the completion of the **review which must occur within 10 days of the issuance of this Order (IHOOS Order).**

To paraphrase *Kobs*,

“Nothing in the U.S. Code, FMCSRs or the IHOOS Order of April 1, 2014 supports a conversion of ‘within 10 days of the issuance of this Order’ into ‘ten days from the filing of a petition for review by the Respondent’”.

nor

“Nothing in the U.S. Code, FMCSRs or the IHOOS Order of April 1, 2014 supports a conversion of ‘within 10 days of the issuance of this Order’ into “...has to start within ten days...But it can go beyond the ten days...”

Completion of the review is contingent on the issuing date of the IHOOS Order.

To review the chronology:

On Tuesday, April 1, 2014, the Federal Motor Carrier Administration (hereinafter “FMCSA”) served the Respondent, DND International, Inc. (hereafter “DND” and/or “Respondent”) with an Imminent Hazard Out Of Service (“IHOOS”) Order.

On Tuesday, April 1, 2014, the Federal Motor Carrier Administration (hereinafter “FMCSA”) served the Respondent, DND, a “Notice of Revocation of Operating Authority Registration and Suspension of USDOT Number”

Day 1: April 1, 2014 IHOOS Order issued.

April 1, 2014 Notice of Revocation issued.

Day 4: April 4, 2014, DND filed a “Petition for the Immediate Rescission

of Imminent Hazard Out Of Service Order (hereinafter “Respondent’s Petition”) and Order for Revocation of Authority”.

Day 7: April 7, 2014, the Assistant Administrator for the Federal Motor Carrier’s Safety Administration (“FMCSA”) issued an Order Appointing an Administrative Law Judge.

Day 7: April 7, 2014, a Notice of Assignment of Proceeding was issued appointing Judge J.E. Sullivan as the presiding judge.

Day 8: April 8, 2014 DND filed a Motion for Expedited Discovery.

April 8, 2014 the parties appeared for an Expedited Litigation Scheduling Conference before Judge Sullivan.

On April 8, 2014 the parties appeared for a continuation of the Expedited Litigation Scheduling Conference.

April 8, 2014, a Notice of Assignment of Proceeding was issued reassigning this matter to Judge Goodwin.

Day 10: Due Date for completion of review
49 U.S.C. § 521 (5)(A); 49 C.F.R. § 386.72(b)(4);
IHOOS Order dated April 1, 2013

The review in this case should have been completed ten (10) days from the issuance of the IHOOS Order dated April 1, 2014. That date was April 10, 2014.

In the case of IHOOS orders, Congress satisfied due process requirements by providing for Administrative Procedure Act (hereinafter “APA”) review within ten days. Not providing review within ten (10) days as set forth in *49 U.S.C. § 521 (5)(A)*, *49 C.F.R. § 386.72(b)(4)* and the IHOOS Order dated April 1, 2013, violates the APA.

The IHOOS Order was referenced in the Notice of Revocation as the basis for the issuance of the Notice of Revocation. In the case of Notices of Revocation, Congress satisfied due process requirements by providing for Administrative Procedure Act (hereinafter “APA”) review within ten (10) days. Not providing review within ten (10) days as set forth in *49 U.S.C. § 521 (5)(A)*, *49 C.F.R. § 386.72(b)(4)* and the IHOOS Order dated April 1, 2013, violates the

APA.

Respondent was entitled to a completed review by April 10, 2014. Respondent herein was denied a completed review ten (10) days from the issuance of the IHOOS Order and the Notice of Revocation contrary to specific language in *49 U.S.C. § 521(b)(5)* and *49 C.F.R. § 386.72(b)(4)*) and FMCSA's own IHOOS Order dated April 1, 2014.

As a result, Respondent was denied administrative due process contrary to the specific language of the statute, regulation and FMCSA's own IHOOS Order and the APA.

If for no other reasons the April 1, 2014 IHOOS Order and this Notice of Revocation issued against DND must be rescinded as FMCSA has violated the U.S. Code, FMCSRs, its own IHOOS Order and the APA and denied Respondent due process as set forth in the U.S. Code, FMCSRs and the IHOOS Order dated April 1, 2014.

We find DND has been denied substantive due process as required by *49 U.S.C. § 521 (5) (A)*, *49 C.F.R. § 386.72(b) (4)*. **The review was NOT completed within ten (10) days of the issuance of this Order (IHOOS Order)** issued April 1, 2014 and the Notice of Revocation issued April 1, 2014 contrary to the statute, FMCSRs and FMCSA's own IHOOS Order.

We will rescind the April 1, 2014, IHOOS Order and the April 1, 2014 Notice of Revocation against DND.

XI. Brief Summary of Imminent Hazard Legal Standard

An IHOOS Order is appropriate "whenever it is determined that a violation of *49 U.S.C. 31502* or the *Motor Carrier Safety Act of 1986*, as amended, or a regulation issued under such section or Acts, or a combination of such violations, poses an imminent hazard to safety[.]" (See *49 C.F.R. § 386.72(b)(1)* (2011); see also, *49 U.S.C. § 521(b)(5)(A)* (2011)).

In a post-deprivation review of a FMCSA IHOOS Order, the Field Administrator has the

initial burden of proof³² to show that a hazard or hazards existed at the time of the IHOOS Order, and that such hazard(s) posed an imminent threat to public safety. (49 C.F.R. § 386.72(b) (1) (2011); see also, 49 U.S.C. § 521 (b) (5) (A) (2011)).

It is worth reiterating the analysis of the law relating to “imminent hazard” cases set for in *Two Dayes*³³.

In *Two Dayes*, the Judge found Respondents' case was one of first impression under the current definition of "imminent hazard." As a result, the Judge briefly outlined the changes in the imminent hazard legal standard and a review of prior IHOOS case law.

1) Imminent Hazard Legal Framework and the Aulenback Decision

Prior to 1998, the statute providing the authority to assess administrative civil penalties in motor carrier cases, 49 U.S.C. § 521, drew a sharp distinction between the following: a) recordkeeping violations, b) a serious pattern of safety violations, and c) a substantial health or safety violation which could reasonably lead to serious personal injury or death. (*Used Equipment Sales, Inc. v. DOT*, 54 F.3d 862, 864 (D.C. Cir. 1995) (quoting 49 U.S.C. § 521(b)(2)(A)). Record keeping violations were considered violations, but were assessed lower penalties.

This framework of drawing distinctions between types of violations for review of an IHOOS Order was used in 1997 in the decision of *Aulenback v. FHWA*, (103 F.3d 156 (D.C. Cir. 1997)). In *Aulenback*, the court assumed that the statutory distinctions between different types of safety violations were equally applicable to determining whether a violation

³² See *Two Dayes*, page 18 of 29, FN 14. “The Field Administrator has the burden of proof in enforcement cases. 49 C.F.R § 386.58(a); see also, “Order Appointing Administrative Law Judge” (Jan. 8, 2013) (“The proceeding shall be governed by subparts D and E of 49 CFR Part 386 of the Rules of Practice.”). A preponderance of the evidence standard applies. See. e.g., *In re Transervicios. Sa De CV*. Docket No. FMCSA-20 I 0-0043. Decision of Administrative Law Judge (Dec. 14, 2012).”

³³ Docket No. FMCSA-2013-0006, (Imminent Hazard OOS Order).

constituted an imminent hazard under 49 U.S.C. § 521(b) (5). (*Id.* at 167).

At the time of the 1997 *Aulenback* decision, the Federal Highway Administration ("FHWA")³⁴ used guidelines in an enforcement manual to assess potential imminent hazard situations. The manual provided certain threshold conditions for issuing an IHOOS order: 1) The carrier must have been the subject of two prior enforcement actions within the past 36 months; 2) The two prior enforcement actions were based upon non-recordkeeping violations (or falsification and destruction of records); and 3) A third enforcement action must contain violations in one or more critical areas. In addition, the evidence must clearly document the violations, and the recommended enforcement action must be approved by the agency's regional representative prior to issuance of the IHOOS order. (*Id.* at 166).

In analyzing the IHOOS statute and FHWA's manual approach, the *Aulenback* court found that, if the statutory distinctions between violations were applied in IHOOS orders, the FHWA's enforcement manual inappropriately "permit[ted] issuance of an out-of-service order on the basis of [record keeping] violations that do not amount to an imminent hazard." (*Id.* at 167). Ultimately, the *Aulenback* court found the imminent hazard issues moot, based on the parties' consent agreement. (*Id.* at 169).

2) 1998 Amendment of 49 U.S.C. 521(b)(2)(A)

In 1998, one year after the *Aulenback* decision, Congress amended 49 U.S.C. § 521(b) (2) (A) by passing the *Transportation Equity Act for the 21st Century*, (Pub. L. 105-178, § 4105 (1998)). This amendment removed the statutory distinctions between recordkeeping violations, a serious pattern of violations, and substantial health or safety violations which could

³⁴ Prior to the formation of FMCSA in 1999, the FHWA was responsible for transportation oversight and the issuance of IHOOS Orders.

reasonably lead to serious personal injury or death for finding violations subject to a civil penalty³⁵. (*Transportation Equity Act for the 21st Century*, Pub. L. 105-178, § 41 05(b) (1998)).

In essence, the FHWA was no longer limited by the statutory analysis in *Aulenback* that the type of violation was important in determining an imminent hazard. The FHWA was now able to consider any violation or combination of violations in issuing an IHOOS order. The only questions were whether the respondent committed a violation and whether that violation met the definition of imminent hazard.

3) 1984-1999 Definition of Imminent Hazard

From 1984 through 1999, an imminent hazard was defined as:

[A]ny condition of vehicle, employee, or commercial motor vehicle operations which is likely to result in serious injury or death if not discontinued immediately.

Motor Carrier Safety Act of 1984, Pub. L. 98-554, § 213(b) (1984), 49 U.S.C. § 521(b)(5)(B) (1994); see also, 49 C.F.R. § 386.72(b)(1) (emphasis added).

4) 1999 Amendment to Statutory Definition of Imminent Hazard

In 1999, Congress amended 49 U.S.C. § 521 (b)(5)(B) by changing the definition of "imminent hazard" to:

[A]ny condition of vehicle, employee, or commercial motor vehicle operations **which substantially increases the likelihood of** serious injury or death if not discontinued immediately [emphasis added].

Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, § 208 (1999) (codified at 49 U.S.C. § 521(b)(5)(B)); see also, 65 *Fed. Reg.* 58664 (Oct. 2, 2000) (codified at 49 C.F.R. § 386.72(b)(1) (2001)).

This 1999 amendment appears to have been partly a response to the 1997 *Aulenback* decision and a view that the earlier definition of imminent hazard, with its three-tiered approach

³⁵ Although the distinctions between types of violations were removed, recordkeeping violations still resulted in a lower civil penalty. 49 U.S.C. § 521 (b)(2)(8).

presented a difficult burden for federal regulators. (See *Oversight of the Office of Motor Carriers: Hearings Before the H. SubComm. On Ground Transportation of the Comm. On Transportation and Infrastructure*, 106th Cong. 521 (1999) (Comm. Questioning of Nancy E. McFadden, General Counsel, DOT)).³⁶

5) 2000 and 2008 Regulatory Amendments to Imminent Hazard Definition

The Oct. 2, 2000 amendment to 49 C.F.R. § 386.72(b)(1) provided for a definition of imminent hazard that mirrored the language of 49 U.S.C. § 521(b)(5)(B). This definition of imminent hazard remained in 49 C.F.R. 386.72(b)(1) until 2008. In 2008, section 386.72 was again amended to "include a specific reference to placing IEPs [hereinafter "Intermodal Equipment Providers"] OOS when they tender IME [hereinafter "Intermodal Equipment"] that poses an imminent hazard to safety ... " (73 Fed. Reg. 76794, 76809 (Dec. 17, 2008)). In addition to adding "intermodal equipment provider," the Final Rule inexplicably removed the term "employee." (*Id.* at 76819). The new definition, reorganized into 49 C.F.R. § 386.72(b)(3), currently reads:

[A]ny condition of vehicle, intermodal equipment, or commercial motor vehicle operations that substantially increases the likelihood of serious injury or death if not discontinued immediately. (See 49 C.F.R. § 386.72(b)(3) (2012)).

This definition of imminent hazard was used by the presiding judge in *Two Dayes*. The definition will also be used herein.

6) IHOOS Case law Since 1999

In 2008, U.S. Administrative Law Judge Isaac Benkin heard and decided the only IHOOS case to be litigated since the 1998 and 1999 congressional amendments. *In re Tornado Bus*

³⁶ Chairman Petri: "But wasn't there a recent court decision on this imminent hazard standard that impaired your ability to shut down dangerous motor carriers under this provision ...?"
Ms. McFadden: "Mr. Chairman, you are exactly right. Under current law, and as the courts are interpreting an imminent hazard, it is a difficult standard to use. We are hoping to fix it."

Company, Docket No. FMCSA-2008-0004, 2008 WL 1990835, “Decision of Administrative Law Judge” (Jan. 8, 2008). As stated in *Two Dayes*, unfortunately, the parties and Judge Benkin mistakenly utilized the pre-1999 definition of "imminent hazard." (*Id.* at 5). In addition, Judge Benkin also mistakenly relied heavily on *Aulenback's* statutory analysis as guidance in reviewing the facts and applying the law³⁷. (*Id.*)

There was no appeal from Judge Benkin's decision in *Tornado*. Since 2008, there had been no other IHOOS cases litigated until *Two Dayes*. As a result, *Two Dayes* is a case of first impression under the current legal framework and definition of "imminent hazard" is the controlling case.

Two Dayes was not appealed.

XII. Analysis of facts

FMCSA allegations:

On January 27, 2014, RV was driving for DND in DuPage County, Illinois on Interstate Highway 88 when RV's commercial motor vehicle struck two emergency vehicles (an Illinois State Police cruiser and an Illinois Toll Authority vehicle), both with activated emergency/warning lights, resulting in the death of a Toll Authority worker and life - threatening injuries to an Illinois State Police officer.

The vehicles struck by RV were stationary in the travel lanes of traffic³⁸.

³⁷ Judge Benkin also cited to *In re Dave Kistler & Grandson Trucking, Inc.*, “Order of Acting Chief Administrative Law Judge” (Apr. 21, 1999), which was also issued prior to the effective date of the amended definition. See *Motor Carrier Safety Improvement Act of 1999*, Pub. L. 106-159, § 107 (1 999) (effective date is date of passage, Dec. 9, 1999); *65 Fed. Reg. 58663, 58664* (Oct. 2, 2000) (revising definition in *49 C.F.R. § 386.72(b)* to match *49 U.S.C. § 521(b)(5)(B)*).

³⁸ Tr. p. 349, ll. 1 to p. 350, l. 23.

A. It states that Unit 5 was in front of Unit 4, attempting to tow Unit 4.

Q. And who was operating Unit 4?

A. You mean what individual or company operation, or what are we asking?

Q. Both. Why don't you tell me the driver -- strike that. It was a commercial motor vehicle, Unit 4, correct?

A. Yes.

XIII. Analysis of Evidence

The determination of whether an IHOOS Order is appropriate requires a three step analysis. We will apply the analysis set forth in *Two Dayes*. Each step is addressed below.

Step 1: Whether a respondent committed a violation(s) of a provision of 49 U.S.C. 31502 or the Motor Carrier Safety Act of 1984, as amended, or the Commercial Motor Vehicle Safety Act of 1986, as amended, or a regulation issued under such section or Acts.

YES

Based on the legal framework established by the 1998 amendment this can be any violation of the section, Acts or safety regulations - including recordkeeping. There is no requirement for the decisionmaker to determine whether certain types of violations could give rise to an imminent hazard, only that a respondent committed a violation or combination of violations.

FMCSA charged DND with the following violations:

GE #3³⁹: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

Q. It was a commercial motor vehicle just like DND was a commercial motor vehicle, correct?

A. Yes.

Q. It was operated by a commercial motor vehicle driver, just like the DND vehicle was operated by a commercial motor vehicle driver, correct?

A. Yes.

Q. It was operated by a company that falls under the regulatory jurisdiction of the FMCSA, correct?

A. Yes.

Q. Based upon your knowledge and experience as a motor carrier safety official, do well-inspected, well-maintained commercial motor vehicles break down in the traveled portion of interstate highways?

A. It's possible.

Q. Did you conduct any type of inquiry or investigation into whether or not Vehicle 4 was a properly inspected well-maintained vehicle?

A. Personally, I did not.

Q. Did anybody from the FMCSA conduct an investigation to determine whether or not Vehicle 4 was a properly inspected and properly maintained commercial motor vehicle?

A. It's my understanding that the company is under investigation.

Q. By who?

A. By FMCSA.

Q. Who at the FMCSA?

A. I believe the lead investigator is Jamie Brown.

Q. Do you know what the status of that investigation is?

A. I don't.

³⁹ "GE" refers to "Group Exhibit(s)" introduced by FMCSA.

On or about 10/03/13, DND used a driver, Umberto Ramirez, to drive a commercial Motor vehicle in interstate commerce from Chicago Heights, IL to Granite Falls, MN. The driver made a false report of duty activities on the record of duty status for that date.

GE #4: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/05/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Barronett, WI to Chicago, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #5: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/12/13, DND used a driver, Jerry Dame, to drive a commercial Motor vehicle in interstate commerce from Assumption, IL to Atwater, MN. The driver made a false report of duty activities on the record of duty status for that date.

GE #6: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/14/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Chicago, IL to Grand Island, NE. The driver made a false report of duty activities on the record of duty status for that date.

GE#7: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/15/13, DND used a driver, Umberto Ramirez, to drive a commercial Motor vehicle in interstate commerce from Adel, IA to Glenview, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #8: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/15/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Sergeant Bluff, IA to Chicago, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #9: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/16/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Woodstock, IL to Denver, CO. The driver made a false report of duty activities on the record of duty status for that date.

GE #10: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/17/13, DND used a driver, Umberto Ramirez, to drive a commercial Motor vehicle in interstate commerce from Cicero, IL to Saint Paul, MN. The driver made a false report of duty activities on the record of duty status for that date.

GE #11: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.
On or about 10/18/13, DND used a driver, Umberto Ramirez, to drive a commercial Motor vehicle in interstate commerce from Saint Paul, MN to Joliet, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #12: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.
On or about 10/18/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Lakewood, CO to Champaign, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #13: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.
On or about 10/20/13, DND used a driver, James Wilson, to drive a commercial Motor vehicle in interstate commerce from South Holland, IL to Fargo, ND. The driver made a false report of duty activities on the record of duty status for that date.

GE #14: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.
On or about 10/22/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Elgin, IL to Hutchinson, KS. The driver made a false report of duty activities on the record of duty status for that date.

GE #15: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.
On or about 10/24/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Lyons, KS to Northbrook, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #16: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.
On or about 10/28/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Franklin Park IL to Cheyenne, WY. The driver made a false report of duty activities on the record of duty status for that date.

GE #17: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.
On or about 11/01/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Louisville, KY to Itasca, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #18: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.
On or about 11/05/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Elk Grove Village, IL to Lincoln, NE.

The driver made a false report of duty activities on the record of duty status for that date.

GE #19: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/07/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from East Chicago, IN to Omaha, NE. The driver made a false report of duty activities on the record of duty status for that date.

GE #20: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/09/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Chicago, IL to Willmar, MN. The driver made a false report of duty activities on the record of duty status for that date.

GE #21: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/13/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Benton Harbor, MI to West Fargo, ND. The driver made a false report of duty activities on the record of duty status for that date.

GE #22: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/16/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Chicago, IL to Omaha, NE. The driver made a false report of duty activities on the record of duty status for that date.

GE #23: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/20/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Franklin Park IL to Falls City, NE. The driver made a false report of duty activities on the record of duty status for that date.

GE #24: Violation C.F.R. § 395.8(e) – False Reports of records of duty status to conceal hours-of-service violations.

On or about 10/09/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Chicago, IL to Blue Earth, MN. The driver made a false entries on his record of duty status on 10/9/13 and 10/10/13 to conceal violations of the 11 and 14 hour rules that occurred on 10/10/2013.

GE #25: Violation C.F.R. § 395.8(e) – False Reports of records of duty status to conceal hours-of-service violations.

On or about 10/28/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Bedford Park, IL to Benicia, CA. The driver made a false entries on his record of duty status on 10/28/2013 and 10/29/2013 to conceal violations of the 11 and 14 hour rules that occurred on

10/29/2013.

GE #26: Violation C.F.R. § 395.8(e) – False Reports of records of duty status to conceal hours-of-service violations.

On or about 01/05/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Franklin Park, IL to Falls City, NE. The driver made a false entries on his record of duty status on 01/05/14 to conceal violations of the 11 and 14 hour rules that occurred on 01/06/14.

Supporting documentation for the violations above was admitted over objection of the Respondent. Without reviewing each objection and/or each document in every exhibit group, we will address representative documentation by categories.

The court is aware that a fundamental right of due process is the opportunity for the Respondent to confront witnesses and test the truthfulness of evidence through cross examination of witnesses. None of the seven (7) drivers cited for violations were present in court to explain the inaccuracies of their Driver's Daily Logs and/or the disparities between Driver's Daily Log entries and other documentation. Many of the documents contained time/date stamps which the Administrator has relied on in the past for findings of violations.

Documents obtained from DND and retained in the normal course of business:

- Driver's Daily Log
- DND Equipment Statements
- Fuel Receipts
- Bills of Lading
- Carrier Confirmations
- Packing Lists
- Carrier Rate Confirmations
- Shipping Orders

These documents were as a rule obtained and maintained by DND in the normal course of business as required by FMCSRs. As such they were admitted and were given significant weight in the analysis of the facts of this case.

Documents from other sources

IPASS Account History Report – obtained from the Illinois Tollway Authority
Bills of Lading
Carrier Confirmations
Packing Lists
Carrier Rate Confirmations
Shipping Orders

These documents were admitted but given lesser weight even though they may have been in the possession of DND. The authors of the documents and drivers were not available in court to be examined by the Respondent.

IPASS Reports

The IPASS reports obtained for RV were obtained by Bunting from the Illinois State Police⁴⁰. The reports in evidence are hearsay. They are not under seal, they do not have certificates of authenticity; there was no evidence and/or testimony that the IPASS reports were kept by the ITA in the regular course of business. The reports are hearsay evidence obtained from a source not available for inquiry at the hearing. As a result we give the IPASS reports obtained for RV (GE#C-19, 20, 21, 22 and 23.) limited weight.

Bunting testified that he obtained other toll account histories from the Illinois Toll Authority (hereinafter “ITA”) at a later date⁴¹.

Bunting described the methodology used to obtain IPASS records which are a part of the exhibit file.

Q. What did you obtain?

A. The officials with I-PASS showed me what they had available as far as what their systems were capable of generating, and based off of the plate numbers that I have provided, they did some analysis on usage and they actually provided with the information on the transponders that had the greatest level of activity. (Tr. p. 403, l. 16 – 23.)

⁴⁰ Tr. p. 399, l. 15 to p. 400, l. 9.

⁴¹ Tr. p. 400, l. 10 to p. 401, l. 22.

Q. That was not my question. Okay?

Nobody from DND can show up at the Toll Authority and say, Give me an analysis of usage and let me know what transponders are being used in those?

A. That is correct, yes.

Q. Why was that important to you to know?

A. Because in order to make an accurate assessment of records of duty status, I wanted to make sure that I selected drivers who had ample usage to adequately review their route.

Q. So that is how you selected the seven drivers?

A. It was one factor.

Q. So you purposely targeted drivers that -- you purposely targeted the DND drivers that operate on the Illinois Tollway the most.

A. I listed my sample selection criteria in my Part C, and I identified three factors that I used to identify drivers for selection. I-PASS usage was one of those three factors.

Q. So you targeted -- your sampling was targeted towards the drivers that gave you the maximum opportunity to prove a false log, true?

A. No.

Q. Why isn't that true?

A. Because I just stated, I used three factors. I also used driver SMS scores, and I did not -- and in order for that to work, I only chose drivers that were above 50, which is consistent with our policy in CSA.

And, in addition, I looked at revenue, at the drivers that made the most money.

Q. And the reason that you did that was because you wanted to identify the drivers that were most likely to have hours of service violations, true?

A. I wanted to identify drivers that had the potential for violating the rules and a motive.

Q. Of the seven, how many did you target based upon tollway usage?

A. I used those three factors for all seven drivers.

Q. Okay. So all seven drivers were targeted based upon three factors designed to identify the drivers with the highest potential for hours of service violations?

A. Yes.

Q. And based upon that sampling criteria, you found six, six violations that is, true?

A. No. I found 54 false logs, I found six hours of service violations, and then I found ten additional nominal falsifications.

Q. So after engaging in a sampling procedure designed to identify the drivers with the highest potential for a 395 violation, you identified six occasions, just six occasions where the driver was in violation of the hours of service limitations, true?

A. Yes.

Q. The other ones you have no idea whether the drivers were in violation of the hours of service limitations, correct?

A. I was unable to prove that, yes.

(Tr. p. 404, l. 8 to p. 407, l. 10.)

Again, the documents are not under seal, they do not have a certificates of authenticity, there was no evidence and/or testimony that the IPASS reports were kept by the ITA in the normal course of business. The documents are hearsay evidence obtained from a source not available for inquiry at the hearing. While we believe Bunting testified truthfully, we give the IPASS records limited weight because:

- i. Testimony was the IPASS Account History Reports for all the individuals identified in were not obtained pursuant to subpoena;
- ii. The IPASS Account History Reports were not under seal;
- iii. The IPASS Account History Reports were not authenticated;
- iv. There was no foundation for the accuracy the IPASS Account History Reports;
- v. There was no testimony the IPASS Account History Reports were kept by the ITA in the normal course of business;
- vi. There was no testimony from an ITA or FMCSA official to substantiate that Bunting's search methodology would generate true and accurate records;
- vii. There was no testimony and/or evidence to show that Bunting had the requisite training and/or expertise to design methodology to obtain accurate records;
- viii. There was no testimony and/or evidence to substantiate that the methodology used by Bunting was an acceptable methodology in the course of FMCSA investigations;
- ix. The sample was a subset of drivers of DND. There was no testimony and/or evidence demonstrating how the extrapolation of that data to the entire universe of DND drivers would accurately reflect the behavior of DND with respect to allegations in the IHOOS Order.
- x. The testimony appears to indicate that the IPASS Account History Reports were generated for trial which is generally a reason for exclusion under the Federal Rules of Evidence (hereinafter "FRE").

In the Matter of Boss Trucking, Inc. (FMCSA 2008-0153) (hereinafter "Boss"),

Respondent argued IPASS Toll reports were not records maintained in the carrier's ordinary

course of business. The Assistant Administrator opined:

...since toll records could reasonably have been used to verify the drivers' logs, Petitioner was obligated to inquire of its owner-operator whether such records existed and, if they did exist, to maintain them... (*Id.* p. 5).

That case is distinguishable. *Boss* concerned obtaining records from drivers which already existed and maintaining them for six months. In this case we have a report of a subset of drivers, generated for purposes of trial; no testimony and/or evidence to substantiate the accuracy and/or acceptable of the methodology used; no evidence and/or testimony substantiating validity of the sampling technique used; no evidence and/or testimony whether the IPASS Account History Reports were maintained in the normal course of business, or generated for any other purpose than the course of the CR of DND. Bunting outlines his methodology in his CR stating:

...we obtained the list that confirmed the transponder numbers used in specific vehicles and the period of time the transponders were in use... we used a combination of DSMS, driver revenue (drivers with the highest pay for the months October, November and December 2013) and IPASS usage to make the HOS sample selection and provided a document request for 7 drivers... (CR page 7 of 8).

In short, there was no evidence of randomness or statistical reliability in the criteria used to generate the IPASS report which is the basis of the IHOSS Order.

Records of Oral Interviews

Records of Oral interviews, when admitted, were given no weight. The Interviewees were not available for cross-examination. The records of oral interviews are hearsay and the contents thereof were given no weight.

Conclusions with respect to whether respondent committed a violation(s) of a provision of 49 U.S.C. 31502 or the Motor Carrier Safety Act of 1984, as amended, or the Commercial Motor Vehicle Safety Act of 1986, as amended, or a regulation issued under such section or Acts.

GE #3: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.
On or about 10/03/13, DND used a driver, Umberto Ramirez, to drive a

commercial Motor vehicle in interstate commerce from Chicago Heights, IL to Granite Falls, MN. The driver made a false report of duty activities on the record of duty status for that date.

GE #4: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/05/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Barronett, WI to Chicago, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #5: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/12/13, DND used a driver, Jerry Dame, to drive a commercial Motor vehicle in interstate commerce from Assumption, IL to Atwater, MN. The driver made a false report of duty activities on the record of duty status for that date.

GE #6: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/14/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Chicago, IL to Grand Island, NE. The driver made a false report of duty activities on the record of duty status for that date.

GE#7: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/15/13, DND used a driver, Umberto Ramirez, to drive a commercial Motor vehicle in interstate commerce from Adel, IA to Glenview, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #8: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/15/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Sergeant Bluff, IA to Chicago, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #9: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/16/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Woodstock, IL to Denver, CO. The driver made a false report of duty activities on the record of duty status for that date.

GE #10: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/17/13, DND used a driver, Umberto Ramirez, to drive a commercial Motor vehicle in interstate commerce from Cicero, IL to Saint Paul, MN. The driver made a false report of duty activities on the record of duty status for that date.

GE #11: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/18/13, DND used a driver, Umberto Ramirez, to drive a commercial Motor vehicle in interstate commerce from Saint Paul, MN to Joliet, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #12: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/18/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Lakewood, CO to Champaign, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #13: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/20/13, DND used a driver, James Wilson, to drive a commercial Motor vehicle in interstate commerce from South Holland, IL to Fargo, ND. The driver made a false report of duty activities on the record of duty status for that date.

GE #14: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/22/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Elgin, IL to Hutchinson, KS. The driver made a false report of duty activities on the record of duty status for that date.

GE #15: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/24/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Lyons, KS to Northbrook, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #16: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 10/28/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Franklin Park IL to Cheyenne, WY. The driver made a false report of duty activities on the record of duty status for that date.

GE #17: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 11/01/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Louisville, KY to Itasca, IL. The driver made a false report of duty activities on the record of duty status for that date.

GE #18: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 11/05/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Elk Grove Village, IL to Lincoln, NE. The driver made a false report of duty activities on the record of duty status for

that date.

GE #19: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/07/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from East Chicago, IN to Omaha, NE. The driver made a false report of duty activities on the record of duty status for that date.

GE #20: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/09/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Chicago, IL to Willmar, MN. The driver made a false report of duty activities on the record of duty status for that date.

GE #21: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/13/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Benton Harbor, MI to West Fargo, ND. The driver made a false report of duty activities on the record of duty status for that date.

GE #22: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/16/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Chicago, IL to Omaha, NE. The driver made a false report of duty activities on the record of duty status for that date.

GE #23: Violation C.F.R. § 395.8(e) – False Reports of records of duty status.

On or about 01/20/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Franklin Park IL to Falls City, NE. The driver made a false report of duty activities on the record of duty status for that date.

Taking the totality of the evidence and testimony as a whole we find FMCSA established a *prima facie* case supporting the violations in GE # 3 through GE #23, inclusive. We find the individuals cited, committed one or more violations of provisions of 49 U.S.C. 31502, or the *Motor Carrier Safety Act of 1984*, as amended, or the *Commercial Motor Vehicle Safety Act of 1986*, as amended, or a regulation issued under such section or Acts with respect to the allegations in GE #3 to GE #23 inclusive⁴².

⁴² *In the Matter of Total Package Express, Inc.*, FMCSA 2006 – 25628; *M & J Logistics, Inc.*, FMCSA 2007 – 27639; *In the Matter of Boss Trucking, Inc.* FMCSA 2008-0153; *In the Matter of J Line, Inc.*, FMCSA 2008 –

GE #24: Violation C.F.R. § 395.8(e) – False Reports of records of duty status to conceal hours-of-service violations.

On or about 10/09/13, DND used a driver, Jermaine Cain, to drive a commercial Motor vehicle in interstate commerce from Chicago, IL to Blue Earth, MN. The driver made a false entries on his record of duty status on 10/9/13 and 10/10/13 to conceal violations of the 11 and 14 hour rules that occurred on 10/10/2013.

GE #25: Violation C.F.R. § 395.8(e) – False Reports of records of duty status to conceal hours-of-service violations.

On or about 10/28/13, DND used a driver, Kiril Kocevski, to drive a commercial Motor vehicle in interstate commerce from Bedford Park, IL to Benicia, CA. The driver made a false entries on his record of duty status on 10/28/2013 and 10/29/2013 to conceal violations of the 11 and 14 hour rules that occurred on 10/29/2013.

GE #26: Violation C.F.R. § 395.8(e) – False Reports of records of duty status to conceal hours-of-service violations.

On or about 01/05/14, DND used a driver, Renato Velasquez, to drive a commercial Motor vehicle in interstate commerce from Franklin Park, IL to Falls City, NE. The driver made a false entries on his record of duty status on 01/05/14 to conceal violations of the 11 and 14 hour rules that occurred on 01/06/14.

Taking the totality of the evidence and testimony as a whole we find FMCSA established a *prima facie* case supporting the violations of False Reports of records of duty status in GE #24, GE #25 and GE #26 and the individuals cited, committed one or more violations of provisions of 49 U.S.C. 31502, or the *Motor Carrier Safety Act of 1984*, as amended, or the *Commercial Motor Vehicle Safety Act of 1986*, as amended, or a regulation issued under such section or Acts with respect to the allegations of false reports of records of duty status in GE # 24, GE #25 and GE #26.

Taking the totality of the evidence and testimony as a whole we find FMCSA’s finding of “False Reports of records of duty status to conceal hours-of-service violations” is unsupported by the totality of the evidence and testimony in this case. FMCSA failed to establish a *prima facie* case that Respondent and/or the individual drivers cited committed one or more violations of

0187; *In the Matter of E H Transport, Inc.*, FMCSA 2009 – 0203; and *In the Matter of Stricklin Trucking Co., Inc.* FMCSA 2011-0127.

provisions of 49 U.S.C. 31502 or the *Motor Carrier Safety Act of 1984*, as amended, or the *Commercial Motor Vehicle Safety Act of 1986*, as amended, or a regulation issued under such section or Acts with respect to the allegations in GE #24, GE #15 and GE #26 inclusive, as to conceal hours-of-service violations.

FMCSA concluded there were false reports of records of duty status to conceal hours-of-service violations, but failed to meet its burden of proof to support the allegations. Jones and Bunting contradicted the allegations. While the records may be inaccurate (false in FMCSA terminology), testimony and/or evidence that the entries were made with an intent to conceal hours-of-service violations failed to meet its burden of proof to support the allegations. FMCSA's conclusions with respect to GE #24, GE #25 and GE #26 are unsupported by the totality of the evidence and testimony in this case.

Step 2: Whether the violation or combination of violations so proved, poses an imminent hazard to safety as defined in the statute and regulation.

NO

As discussed *supra*, an imminent hazard is defined as: "any condition of vehicle, intermodal equipment or commercial motor vehicle operations that substantially increases the likelihood of serious injury or death if not discontinued immediately." 49 C.F.R. § 386.72(b)(3). When interpreting a regulation words should be given their ordinary meaning. The pertinent words of the regulation are defined as⁴³:

Condition = A state of being.
(Merriam-Webster's Collegiate Dictionary 240 (10th ed. 2000))

Substantial = Considerable in quantity: significantly great.
(Id. at 1170)

In the imminent hazard definition, the word "substantially" is an adverb modifying the

⁴³ Two Dayes, p. 22, first full paragraph after "Step 2: Whether the violation or combination of violations so proved, poses an imminent hazard to safety as defined in the statute and regulation."

word "increases"; and Likelihood- Probability. *Id.* at 673⁴⁴.

Step Two of the analysis therefore requires a determination of whether a violation or combination of violations, found in Step One, creates a state of being of any vehicle, intermodal equipment, or commercial motor vehicle operation which increases - by a considerable quantity - the probability of serious injury or death if not discontinued immediately.

DND drivers for the most part were independent contractors⁴⁵. While DND maintained Drivers Daily Logs and other receipts and documents, FMCSA focused on the fact DND had not kept IPASS Account History Reports.

FMCSA alleged DND 'refused' to compare toll transaction information to its drivers' logs to monitor hours of service compliance. In reality DND was under the mistaken believe it could not ask for the information.

...the carrier could not ignore its safety responsibility by failing to ask its owner-operator drivers whether they had received toll receipts while driving on toll roads... by failing to request them from its owner-operator drivers to verify the records of duty status of its owner-operator drivers, CCI did not effectively monitor compliance with 49 C.F.R. 395.8(k)(1)⁴⁶

Failure to effectively monitor does not rise to the level of imminent hazard.

We discussed the weight given to the IPASS Account History Reports hereinabove.

FMCSA alleges the following in its IHOOS Order:

DND International does not have adequate safety management practices in place to ensure its drivers are preparing and submitting accurate records of duty status and that they comply with the hours of service driving limitations.

⁴⁴ *Id.*

⁴⁵ GE #27, Exhibit J – DND Contractor Operating Agreement with RV. See also Tr. p. 258, l. 12 to 19.

⁴⁶ *In the Matter of Boss Trucking, Inc.*, FMCSA 2008 – 01253, p. 5; citing *In the Matter of Commodity Carriers, Inc.*, FMCSA 2001 – 8676 (2004)

- a) While FMCSA characterized DND's SMP as inadequate, it offered no evidence or testimony of what the "ideal", "standard", "adequate", or "effective" SMP standard should be or include.
- b) Evidence and testimony established that DND used fuel data to confirm hours⁴⁷.
- c) Evidence and testimony established that DND Drivers signed an "Hours of Service Policy" outlining HOURS of Services Requirements as detailed in CFR 49, Part 395.5. Signed Hours of Service Policies for drivers Stanford Dean, James Wilson, Kiril Kocevski, Jermaine Cain, and Jerry Dame are included in the record. (GE #48; Tr. p. 221, l. 17 to p. 222, l. 22).
- d) Statements of how drivers were paid were included in the record⁴⁸.
- e) Illinois Tollway I-PASS transaction reports were the only supporting documents asked for by Bunting that was missing from DND's operations.⁴⁹
- f) Testimony was elicited that drivers' pay was deducted for motor vehicle violations.
- g) Testimony was elicited that drivers were rewarded for good driving.
- h) Testimony was elicited that driver contracts included language that drivers requiring drivers comply with regulations (e.g. GE #27, Ex. J., Section 23).
- i) The testimony of Jones and Bunting hereinabove contradicted this allegation.

Bunting testified that in his opinion DND provided access to all documents, records, individuals, vehicles, et al, requested during his investigation⁵⁰.

Jones testified about many ways DND's SMP was adequate (See testimony above).

⁴⁷ Tr. p. 222 , l. 1 to p. 223, l. 9.

⁴⁸ Tr. p. 255, ll. 17-24.

⁴⁹ Tr. p. 256, ll. 5-11.

⁵⁰ Tr. p. 242, l. 13 to p. 246, l. 21.

According to FMCSA's own witnesses - as set forth hereinbelow - all and/or portions of the January 27, 2014 accident are currently being investigated by the National Transportation Safety Board, Illinois State Police, Illinois State Police accident reconstructionist, and FMCSA, (Tr. p. 346, l. 9 to p. 347, l. 2.). To their knowledge none of investigations have been concluded.

Consequently, FMCSA's allegation that "DND International does not have adequate safety management practices in place to ensure its drivers are preparing and submitting accurate records of duty status and that they comply with the hours of service driving limitations" is unsupported by the totality of the evidence and testimony in this case.

DND International's drivers routinely falsify their records of duty status and exceed the hours of service limitations in the FMCSRs.

Respondent argued documents submitted into evidence to support the allegation that driver records are false were hearsay⁵¹. FMCSA argued Public Records are an exception to the hearsay rule (FRE 803(8)). While the court admitted the documents (GE# 39A – 39Y), we also ruled Respondent's objection would go to the weight given the exhibit. FRE 803(8) states;

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness (FRE 803):

- ...
- (8) *Public Records*. A record or statement of a public office if:
- (A) it sets out:
 - (i) The office's activities;
 - (ii) A matter observed while under a legal duty to report, but not including a criminal case, a matter observed by law-enforcement personnel; or
 - (iii) In a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
 - (B) Neither the course of the information nor other circumstances indicate a lack of trustworthiness.

FMCSA failed to lay an adequate foundation for the admission of GE# 39A – 39Y. We will not reverse our ruling. In the context of the totality of the evidence we will give GE #39 less weight than documents having a proper foundation.

⁵¹ Tr. p. 229, l. 1 to p. 232, l. 18.

We do not agree with FMCSA's position that GE #39 proves DND International's drivers routinely falsify their records of duty status and exceed the hours of service limitations. Bunting and Jones both testified DND had 49 driver positions at the time of his CR, yet only seven (7) drivers were in the sample he used in his CR.

There was no testimony and/or evidence that a sample of seven (7) of 49 drivers can be reliably extrapolated to represent the behavior of 42 other drivers. Only three (3) of DND's 49 drivers were charged with "False Reports of records of duty status to conceal hours-of-service violations". If true, only 6.1% of DND's drivers were charged with that violation; 93.9% of DND's were found to have no violation.

There is no testimony and/or evidence that the methodology to generate the IPASS reports used is acceptable, reliable and/or accurate.

The testimony of Jones and Bunting hereinabove contradicted this allegation.

According to FMCSA's own witnesses - as set forth hereinbelow - all and/or portions of the January 27, 2014 accident are currently being investigated by the National Transportation Safety Board, Illinois State Police, Illinois State Police accident reconstructionist, and FMCSA, (Tr. p. 346, l. 9 to p. 347, l. 2.). To their knowledge none of investigations have been concluded.

Consequently, FMCSA's allegation that "DND International's drivers routinely falsify their records of duty status and exceed the hours of service limitations in the FMCSRs" is unsupported by the totality of the evidence and testimony in this case.

DND International also does not have adequate safety management practices in place to prevent its drivers from operating their commercial motor vehicles in an unsafe manner.

As set forth above, many records were examined by Bunting in the course of his CR.

The only documents FMCSA continually refers to support its finding

...DND International, Inc.'s operations and continued operation of any commercial motor

vehicle, referred to herein as "commercial motor vehicles" and/or "vehicles", constitute an imminent hazard to public safety. This finding means that based upon your present state of unacceptable safety compliance, your operation of any commercial motor vehicle(s) poses an imminent hazard to public safety.

were the absence of IPASS Account History Reports which both parties concede were not kept in the normal course of business at the time of the incident. The IPASS Accounts which did exist were in the names of the individual drivers and DND contends it did not have the ability to access those personal records without the consent of the individual driver⁵².

According to FMCSA's own witnesses - as set forth hereinbelow - all and/or portions of the January 27, 2014 accident are currently being investigated by the National Transportation Safety Board, Illinois State Police, Illinois State Police accident reconstructionist, and FMCSA, (Tr. p. 346, l. 9 to p. 347, l. 2.). To their knowledge none of investigations have been concluded.

No evidence and/or testimony was presented of what the "ideal", "standard", "adequate", or "effective" SMP standard should be or include. The only documentation apparently relied to conclude the SMP was inadequate was the failure to maintain IPASS Account records and compare them to other documentation.

Jones testified the many ways DND's SMP was acceptable and/or adequate. (See Jones testimony above).

The testimony of Jones and Bunting hereinabove contradicted this allegation.

FMCSA's allegation that "DND International also does not have adequate safety management practices in place to prevent its drivers from operating their commercial motor vehicles in an unsafe manner" is unsupported by the totality of the evidence and testimony in this case.

DND International's failure to establish an effective driver hours of service safety management program, including an effective driver's records of duty status monitoring

⁵² Tr. 261, ll. 1 – 18. See discussion at FN 46.

system, was a key contributing factor to a recent catastrophic crash.

There was no evidence and/or testimony that any action of DND was a key contributing factor to a recent catastrophic crash, let alone failure to establish an effective driver hours of service SMP being a key contributing factor to a recent crash. There was no evidence and/or testimony that fatigue, speeding, reckless driving, improper lane change, seat belt violations, negligent driving or any other driver action/inaction and/or DND action or inaction was a contributing factor to the recent catastrophic crash. There were allegations but no evidence and/or testimony that DND International's failure to establish an effective driver hours of service safety management program, including an effective driver's records of duty status monitoring system, was a key contributing factor to a recent catastrophic crash.

There is no testimony that RV was anywhere but in the travel lane of traffic when confronted with 3 (three) vehicles stopped in the travel lanes of traffic.

There was no evidence that RV's vehicle drifted onto the shoulder or otherwise performed in a manner indicating that RV fell asleep or was not in control of the vehicle.

There was no evidence that failure to establish an effective driver hours of service safety management program contributed to a recent catastrophic crash.

There was testimony and evidence that other investigations by NTSB, ISP, ISP accident reconstructions and FMCSA have not concluded and no conclusions have been reached in the other investigations.

FMCSA presented no testimony and/or evidence to establish what an "ideal", "standard", "adequate", or "effective" driver hours of service safety management program should be or what procedures should be included. The parties agreed DND did not maintain IPASS Account History Reports at the time of the incident. Both FMCSA witnesses testified they knew at the

time DND was issued the IHOOS Order, DND was seeking to obtain Marlin Business Bank for 25 Omnitrac, MCP50, EOBR units for all of its trucks.

The testimony of Jones and Bunting hereinabove contradicted this allegation.

According to FMCSA's own witnesses - as set forth hereinbelow - all and/or portions of the January 27, 2014 accident are currently being investigated by the National Transportation Safety Board, Illinois State Police, Illinois State Police accident reconstructionist, and FMCSA, (Tr. p. 346, l. 9 to p. 347, l. 2.). To their knowledge none of investigations have been concluded.

Consequently, FMCSA's allegation that "DND International's failure to establish an effective driver hours of service safety management program, including an effective driver's records of duty status monitoring system, was a key contributing factor to a recent catastrophic crash" is unsupported by the totality of the evidence and testimony in this case.

Individually and cumulatively, these violations substantially increase the likelihood of serious injury or death to DND International drivers and the motoring public.

There was no evidence and/or testimony that individually and/or cumulatively any action of DND increased the likelihood of serious injury or death to DND Drivers and/or the motoring public. There was no evidence and/or testimony of any fatigue, recklessness, dangerous driving, negligent driving resulting from the failure to establish an effective driver hours-of-service SMP, nor that any other behavior of DND contributed to the crash. There is no testimony that RV was anywhere but in the travel lane of traffic when confronted on an interstate highway by three vehicles stopped in the travel lanes of traffic.

There was no evidence that RV's vehicle drifted onto the shoulder or otherwise performed in a manner indicating that RV fell asleep or was not in control of the vehicle.

There was no evidence that failure to establish an effective driver hours of service safety

management program increased the likelihood of serious injury or death to DND International drivers and the motoring public.

The testimony of Jones and Bunting hereinabove contradicted this allegation.

Again, according to FMCSA's own witnesses - as set forth hereinbelow - all and/or portions of the January 27, 2014 accident are currently being investigated by the National Transportation Safety Board, Illinois State Police, Illinois State Police accident reconstructionist, and FMCSA, (Tr. p. 346, l. 9 to p. 347, l. 2.). To their knowledge none of investigations have been concluded.

Bunting did not review all the records for all the drivers, but rather a subset of driver based on parameters he explained⁵³. FMCSA's conclusions were based on the audit of seven (7) of 49 drivers. There is no testimony and/or evidence to support the use, accuracy and/or reliability of that methodology to extrapolate the behavior of seven (7) drivers onto the behavior of 42 other drivers.

DND's Crash Basic elevated above threshold on February 21, 2014 (CR, p 1 of 8). DND was attempting to purchase EOBR units to install on all vehicles. All DND drivers were fully qualified. There were no identified maintenance issues. There were no identified drug alcohol problems. Bunting testified he was could not testify whether DND had any HOS violations after the accident because he had no information either way; was not provided information whether DND had implemented corrective actions that fully corrected the hours of service issues that were identified in the CR after the accident, even though he admitted it would have been important to have that information after the accident. (Tr. p. 453, l. 3 to p. 454, l. 3).

FMCSA's allegation that "Individually and cumulatively, these violations substantially increase the likelihood of serious injury or death to DND International drivers and the motoring

⁵³ Commencing Tr. p. 247, l. 4 to end of testimony.

public” is unsupported by the totality of the evidence and testimony in this case.

Analysis of FMCSA’s allegations:

Bunting testified the Illinois Tollway I-PASS transaction reports were the only supporting documents asked for by Bunting that was missing from DND's operations. The only testimony and/or evidence FMCSA identified for DND’s failure to establish an effective SMP was the lack of IPASS Transaction Reports..

At the time of the accident DND had 49 driver positions, yet the driver sample used as the basis for the CR contained only seven (7) drivers, those drivers having been selected based on criteria Bunting selected. There is no evidence and/or testimony that the sample size and/or technique were adequate. While the sample size and/or technique may be adequate for a civil penalty case, it does not support the allegations in this case and does not support a finding of imminent hazard.⁵⁴

We reiterate all the evidence of documents set forth hereinabove under the Step #2 analysis.

We find that the evidentiary facts, by a preponderance of the evidence standard, do not support a finding that the driving activities of RV, Jermaine Cain, Jerry Dame, Kiril Kocevski, Umberto Ramirez, James Wilson, collectively and/or individually, "substantially increased the likelihood of serious injury or death if not discontinued immediately."

We find that the evidentiary facts and testimony, by a preponderance of the evidence standard, do NOT support FMCSA findings and further find as follows:

FMCSA’s allegation that DND International does not have adequate safety management practices in place to ensure its drivers are preparing and submitting accurate records of

⁵⁴ See also “Audit Report, Office of the Inspector General, Actions Needed to Strengthen FMCSA’s Compliance, Safety, Accountability Program” March 5, 2014. Government Accountability Office “Report to Congressional Committees, Federal Motor Carrier Safety, Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers”, February 2014.

duty status and that they comply with the hours of service driving limitations, is unsupported by the totality of the evidence and testimony in this case.

FMCSA's allegation that DND International's drivers routinely falsify their records of duty status and exceed the hours of service limitations in the FMCSRs, is unsupported by the totality of the evidence and testimony in this case.

FMCSA's allegation that DND International also does not have adequate safety management practices in place to prevent its drivers from operating their commercial motor vehicles in an unsafe manner, is unsupported by the totality of the evidence and testimony in this case

FMCSA's allegation that DND International's failure to establish an effective driver hours of service safety management program, including an effective driver's records of duty status monitoring system, was a key contributing factor to a recent catastrophic crash, is unsupported by the totality of the evidence and testimony in this case.

FMCSA's allegation that Individually and cumulatively, these violations substantially increase the likelihood of serious injury or death to DND International drivers and the motoring public, is unsupported by the totality of the evidence and testimony in this case.

FMCSA's allegation that DND International, Inc.'s operations and continued operation of any commercial motor vehicle, referred to herein as "commercial motor vehicles" and/or "vehicles", constitute an imminent hazard to public safety and/or "substantially increase the likelihood of serious injury or death if not discontinued immediately" is unsupported by the totality of the evidence and testimony in this case.

We reiterate, the failure to comply with all of the requirements of the FMCSR- including recordkeeping - raises the likelihood of accidents and perhaps severe injury or death; that is why the FMCSRs are in place. Full compliance should be the goal.

However, an IHOOS Order should not be used to ensure regulatory compliance in lieu of other less severe enforcement actions. An IHOOS Order is appropriate only when a carrier falls to a level below full compliance which substantially increases the likelihood of severe injury or death if not immediately discontinued.

DND had a history of attempting to fully comply with the regulations. In 2011, DND was given a conditional rating which was upgraded after remedial action⁵⁵.

⁵⁵ Tr. p. 312, l. 16 to p. 315, l. 23.

When DND was subjected to the CR after the tragic events of January 27, 2014, it immediately undertook corrective remedial action. Concurrent with the exit interview on March 21, 2014, Bunting, was advised that DND was entering into a Lease to Purchase Agreement with Marlin Business Bank for 25 Omnitrac, MCP50, EOBR units, all warranted to be fully compliant with 49 C.F.R. 395.15⁵⁶. During cross-examination Bunting explained his knowledge of the units, confirmed that the units were intricately synced with the power unit, had to be installed and required driver and dispatcher training to be fully effective. Bunting also acknowledged he knew DND intended to purchase 25 units⁵⁷. Bunting testified on cross-examination:

I believe that implementing an EOBR system is an excellent first step with proper management practices in place and proper monitoring, oversight and training to determine compliance. (Tr. p. 342, ll. 6 – 10,)

Bunting testified:

Q. This crash is currently being investigated by the national transportation safety board, true?

A. Yes.

Q. And this crash or the national transportation safety board has not concluded their investigation yet, true?

A. Yes.

Q. And this crash is also being investigated by the Illinois State Police, true?

A. Yes.

Q. An the Illinois State Police have not concluded their investigation yet, true?

A. Yes.

Q. The accident reconstructionist employed by the Illinois State Police have not yet drawn any conclusions as to what caused this accident, true?

A. I am unaware of that.

(Tr. p. 346, l. 9 to p. 347, l. 2.)

Jones was also aware of DND's plan to implement an EOBR system.

⁵⁶ Tr. p. 316, l. 6 to p. 320, l. 10; p. 331, l. 19 to p. 338, l. 22.

⁵⁷ Id at ll. 18-22.

In addition to other ongoing investigations, Bunting testified that FMCSA was conducting further investigations with respect to other vehicles involved with the January 27, 2014, fatal crash (See also Tr. p. 347, l. 11 to p. 359, l. 11)

The conclusions with respect to DND's compliance with the FMCSRs was based on a sample of a subset of drivers of DND. While the witnesses admit DND employed on or about 49 drivers during the period of the CR, only seven (7) drivers were checked during the CR under Part B Violations. (GE #2; Tr. p. 361, l. 14 to p. 371, l. 2) (See also Jones testimony).

Bunting testified DND had a written hours of service policy which prohibited violations; DND deducted from settlement checks for known HOS violations; DND paid safety bonuses to drivers; DND paid, 32,500 in bonuses, collected over \$45,000 in penalties during Calendar Year 2013 based on driver performance during roadside inspections.⁵⁸

Finally, Bunting testified that in his ten year FMCSA career, having conducted over 200 CRs, this is the only CR which has resulted in an imminent hazard order, but concedes he did not make that recommendation. (Tr. p. 234, l. 1 to l. 25). Additionally, Bunting testified

Q. In the more than 200 compliance reviews that you have conducted in your career, approximately how many or what percentage have a similar violation rate for false logs?
A. I would say that I typically find falsification at a critical rate at around 30 percent of the companies that I would see. That's a rough estimate.

Q. And of those 30 percent, how many were declared to be an imminent hazard?
A. None.
(Tr. p. 261, l. 16 to p. 262, l. 2).

Conclusions

We find that as the date of the CR out briefing March 21, 2014 the combination of recordkeeping and program violations committed for the period covered in the Compliance Review dated March 21, 2014, of DND did not pose a condition of motor carrier operation which

⁵⁸ Tr. p. 371, l. 8 to p. 375, l. 6.

substantially increased the likelihood of serious injury or death.

We find that as the date of the IHOOS Order April 1, 2014 the combination of recordkeeping and program violations committed for the period covered in the Compliance Review dated March 21, 2014, of DND did not pose a condition of motor carrier operation which substantially increased the likelihood of serious injury or death.

We find the Field Administrator's allegation that the combination of violations committed by DND reached the level of an imminent hazard is unsupported by the totality of the evidence and testimony in this case

Step 3: Whether, in the event that violations have been proved, and those violations are deemed to pose an imminent hazard, the IHOOS Order is narrowly tailored to abate the hazard.

NO

Step three limits the breadth of an IHOOS determination: "[N]o restrictions shall be imposed on any vehicle, terminal or facility, employee, employer or intermodal equipment provider beyond that required to abate the hazard." 49 C.F.R. § 386.72(b)(2).

As previously stated, the failure to comply with all of the requirements of the FMCSR- including recordkeeping - raises the likelihood of accidents and perhaps severe injury or death; that is why the FMCSRs are in place. Full compliance should be the goal.

However, an IHOOS Order should not be used to ensure regulatory compliance in lieu of other less severe enforcement actions.

An IHOOS Order is appropriate only when a carrier falls to a level below full compliance which substantially increases the likelihood of severe injury or death if not immediately discontinued.

The statute and regulation provide that "no restrictions shall be imposed ... beyond that

required to abate the hazard." *49 C.F.R. § 386.72(b)(2); 49 U.S.C. § 521(b)(5)(A)*.

FMCSA has presented no evidence and/or testimony that the IHOOS Order was crafted to abate a hazard created by Driver Daily Log violations and/or failure to compare toll transaction information to its drivers' logs to monitor hours of service compliance.

Based on the foregoing discussion and analysis, the April 1, 2014, IHOOS Order issued against DND was NOT narrowly tailored to properly abate the hazard(s) posed. The IHOOS Order amounted to the 'death penalty' for DND, directing them to cease all operations and effectively putting DND completely out of business. In addition, the IHOOS Order was used to revoke DND's license with a Notice of Revocation. An IHOOS Order is an extreme remedy, which needs to be utilized only when the immediate discontinuation of an entire business is necessary to prevent serious injury or death.

FMCSA had evidence and testimony as of the date of the IHOOS Order that DND was ready to purchase and install EOBR equipment. No attempt was made in the IHOOS Order to allow for installation of the EOBR equipment and graduated return of DND equipment to service or otherwise tailor the IHOOS Order to DND's attempts to comply with FMCSA's recommendations concurrent and subsequent to the CR.

The Field Administrator's allegations are unsupported by the totality of the evidence and testimony in this case.

First, FMCSA has failed to establish by a preponderance of the testimony and evidence that DND's actions pose an imminent hazard.

Second, the restrictions imposed by the IHOOS order of April 1, 2014 against DND quoted above go well beyond restrictions necessary to abate any hazard created by a series of Driver Daily Log violations. DND was put out of business and had their license revoked.

Except for the lack of IPASS Account History Reports, FMCSA presented no evidence and/or testimony that the vehicles owned by DND and/or any other qualified individual or carrier, failed to comply with the FMCSRs. There was no evidence and/or testimony of failure to have and/or implement a Drug and Alcohol Program. There was no evidence and/or testimony of a pattern of safety violations (other than the six identified above). There was no evidence and/or testimony of a pattern of maintenance violations. There was no evidence and/or testimony that DND had violated any Out Of Service Orders.

The primary evidence and/or testimony used to support the allegations was the failure to maintain IPASS Account History Reports.

Based on the foregoing discussion and analysis, the April 1, 2014, IHOOS Order issued against DND was NOT narrowly tailored and did NOT properly abate any hazard posed.

The preponderance of the evidence standard does not support FMCSA's allegation DND was an Imminent Hazard.

We find the Field Administrator failed to prove that the combination of violations committed by DND reached the level of an imminent hazard.

After an extensive three (3) month investigation, the FMCSA's Investigator's findings, including the nature and extent of the regulatory violations discovered, DND's recordable accident rate, and DND's vehicle out-of-service rate, determined that DND's safety management controls may have merited a "Conditional" safety fitness rating. A "Conditional" safety fitness rating means " a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standards that could result in occurrences listed in 385.5(a)-(k)." 49 C.P.R.385.3. However, the FMCSA allows "Conditional" rated carriers to continue to operate in interstate commerce.

The relevant factors cited by the Field Administrator justifying the Imminent Hazard finding established nothing more than DND may have warranted a "Conditional" safety fitness rating.

XIV. Notice of Revocation

The Notice of Revocation states:

By Order dated and served April 1, 2014, the Secretary of the United States Department of Transportation (the Secretary) found that the commercial motor vehicle operations of DND INTERNATIONAL, INC (USDOT# 1434005), ("DND INTERNATIONAL") constitute an imminent hazard to public safety. 49 U.S.C. § 13905(£)(2) requires the Federal Motor Carrier Safety Administration (FMCSA) to revoke the operating authority registration of a motor carrier of property if the FMCSA finds that such carrier is or has been conducting unsafe operations which are an imminent hazard to public health or property. Additionally, in accordance with 49 U.S.C. § 31134(c)(1), the Secretary is required to suspend the USDOT number registration of a motor-carrier if the Secretary determines that the motor carrier's operating authority registration is subject to revocation as a result of such imminent hazard finding.

Accordingly, as a result of the issuance of the April 1, 2014 Imminent Hazard Out-of-Service Order, and pursuant to 49 U.S.C. § 13905(£)(2), DND INTERNATIONAL's Federal operating authority registration is revoked. Further, in accordance with 49 U.S.C. §. 31134(c)(1) DND INTERNATIONAL's USDOT number is suspended.

If FMCSA rescinds the Imminent Hazard Out-of-Service Order. DND INTERNATIONAL may reapply for operating authority registration as a property carrier in accordance with the provisions of 49 C.F.R. Part 365 by submitting form OP-I to the FMCSA.

DND INTERNATIONAL may apply to reactivate its USDOT number registration by submitting a Motor Carrier Identification Report, form MCS-150. The form may be obtained by calling FMCSA's technical support at 1'-800-832-5660 or via FMCSA's website (<http://safer.fmcsa.dot.gov>). At the time of application, FMCSA will assess whether DND INTERNATIONAL is fit, willing and able to operate safely and in compliance with all regulatory and statutory requirements. In accordance with 49 U.S.C. 13902(a)(4), FMCSA will withhold registration if it determines that the carrier, broker or freight forwarder does not meet, or is unable to meet, any of these requirements.

We find the Field Administrator's allegations in the IHOOS Order are unsupported by the totality of the evidence and testimony in this case and we will rescind the IHOOS Order.

We find the Field Administrator's allegations in the Notice of Revocation are

unsupported by the totality of the evidence and testimony in this case as set forth hereinabove and we will rescind the Notice of Revocation.

XV. FINDINGS OF FACTS AND CONCLUSIONS OF LAW:

Law

We find FMCSA made a *prima facie* case with respect to the violations as set forth hereinabove.

An agency decision must be based upon the relevant factors. *Marsh v. Or. Natural Res. Council*, 490 U.S. at 378. The relevant factors here are those that "substantially increase the likelihood of serious injury or death if not discontinued immediately." 49 C.F.R. §386.72(b). FMCSA alleged DND had a 25% hours of service violation rate and no effective means to control driver's hours or service. We found that and other allegations unsupported by the totality of the evidence and testimony in this case.

In *Two Dayes*, Mr. Melsopp, the Field Administrator's own witness, Mr. Melsopp explained that TD Trucking had violated an OOS order, and had also been involved in a fatal crash. In his opinion, these factors, combined with extreme noncompliance in recordkeeping, justified the issuance of an IHOOS Order against TD Trucking, and also against TD Transport. (5/8/13 TR 304:7-17.). He agreed, however, that poor recordkeeping in itself had never led to an imminent hazard order. (5/8/13 TR 306:6-10.)

There are no such allegations in this case.

Williamson Transport Co., Inc., (FMCSA-2004-17247, March 15, 2006) involved a fatal highway accident on August 7, 2003 in southern Virginia. The genesis of the proceeding was a multi-fatality highway accident. On August 7, 2003, a truck tractor/semi-trailer combination operated, according to the Virginia State Police, by a driver for Williamson Produce, Inc. d/b/a Williamson Trucking Co., of Wilson, NC ("Williamson Produce," "Produce," or "old

Produce”), was involved in a multiple vehicle crash in Emporia County, VA. The crash produced three fatalities as well as numerous Injuries. In that case, Claimant requested a penalty in the amount of \$35,700 against Respondent for violating *49 C.F.R. §§ 382.301(a), 382.305(b)(1), 382.503/382.605, 395.8(k)(1), and 396.7(a)*⁵⁹. There was no IHOOS Order in that case in spite of multiple fatalities.

Finally, FMCSA’s own witness testified:

Q. In the more than 200 compliance reviews that you have conducted in your career, approximately how many or what percentage have a similar violation rate for false logs?

A. I would say that I typically find falsification at a critical rate at around 30 percent of the companies that I would see. That's a rough estimate.

Q. And of those 30 percent, how many were declared to be an imminent hazard?

A. None.

(Tr. p. 261, l. 16 to p. 262, l. 2).

Findings of fact

After consideration and review of all the evidentiary facts, testimony and evidence herein, by a preponderance of the evidence standard, we make the following findings:

1. We find an administrative review, **must occur within 10 days of the issuance of the IHOOS Order** [emphasis added]. (*49 U.S.C. § 521(b)(5) and 49 C.F.R. § 386.72(b)(4)*)
2. We find the IHOOS Order issued against DND was dated April 1, 2014.
3. We find DND, Respondent, was entitled to a review completed by April 10, 2014.
4. We find the review was not completed within ten (10) days of the issuance of the IHOOS Order.
5. We find an administrative review of the IHOOS Order is contingent on the issuance of the IHOOS Order and must occur within ten (10) days of the issuance of the IHOOS Order and is NOT contingent on Respondent filing a Petition for review.

⁵⁹ The original decision of the ALJ was overturned on appeal. See “FINAL ORDER: DECISION ON REVIEW”, January 14, 2009, on the issue of the doctrine of “substantial continuity” and other issues.

6. We find Respondent herein was denied a review contrary to specific language in 49 U.S.C. § 521(b)(5) and 49 C.F.R. § 386.72(b)(4)) and FMCSA’s own IHOOS Order dated April 1, 2014 and the APA.
7. We find DND was denied substantive due process as required by 49 U.S.C. § 521 (5)(A), 49 C.F.R. § 386.72(b)(4), the IHOOS Order dated April 1, 2013 and the APA because the administrative review was not completed with 10 days of the issuance of the IHOOS Order.
8. We find FMCSA proved a *prima facie* case that respondent committed violations of provisions of 49 U.S.C. 31502 or the *Motor Carrier Safety Act of 1984*, as amended, or the *Commercial Motor Vehicle Safety Act of 1986*, as amended, or a regulation issued under such section or Acts as to the allegations in GE #3 through GE #23 inclusive⁶⁰.
9. We find FMCSA’s allegations that respondent committed violations of provisions of 49 U.S.C. 31502 or the *Motor Carrier Safety Act of 1984*, as amended, or the *Commercial Motor Vehicle Safety Act of 1986*, as amended, or a regulation issued under such section or Acts with respect to GE #24, GE #25 and GE #26, inclusive, as to the portion of the violation stating “**conceal hours-of-service violations**” are unsupported by the totality of the evidence and testimony in this case.
10. The allegation that DND International does not have adequate safety management practices in place to ensure its drivers are preparing and submitting accurate records of duty status and that they comply with the hours of service driving limitations, is unsupported by the totality of the evidence and testimony in this case.
11. The allegation that DND International’s drivers routinely falsify their records of duty status and exceed the hours of service limitations in the FMCSRs, is unsupported by the totality of the evidence and testimony in this case.
12. The allegation that DND International also does not have adequate safety management practices in place to prevent its drivers from operating their commercial motor vehicles in an unsafe manner, is unsupported by the totality of the evidence and testimony in this case.
13. The allegation that DND International’s failure to establish an effective driver hours of service safety management program, including an effective driver’s records of duty status monitoring system, was a key contributing factor to a recent

⁶⁰ *In the Matter of Total Package Express, Inc.*, FMCSA 2006 – 25628; *M & J Logistics, Inc.*, FMCSA 2007 – 27639; *In the Matter of Boss Trucking, Inc.* FMCSA 2008-0153; *In the Matter of J Line, Inc.*, FMCSA 2008 – 0187; *In the Matter of E H Transport, Inc.*, FMCSA 2009 – 0203; and *In the Matter of Stricklin Trucking Co., Inc.* FMCSA 2011-0127.

catastrophic crash, is unsupported by the totality of the evidence and testimony in this case.

14. The allegation that Individually and cumulatively, these violations substantially increase the likelihood of serious injury or death to DND International drivers and the motoring public, is unsupported by the totality of the evidence and testimony in this case.
15. The allegation that DND International, Inc.'s operations and continued operation of any commercial motor vehicle, referred to herein as "commercial motor vehicles" and/or "vehicles", constitute an imminent hazard to public safety and/or "substantially increase the likelihood of serious injury or death if not discontinued immediately" is unsupported by the totality of the evidence and testimony in this case
16. We find the Field Administrator failed to carry his burden of proof that as of April 1, 2014, DND's operations and continued operation of any commercial motor vehicle, referred to herein as "commercial motor vehicles" and/or "vehicles", constituted an imminent hazard to public safety.
17. We find the Field Administrator failed to carry his burden of proof that as of April 1, 2014, the commercial motor vehicle operations of DND constituted an imminent hazard to public safety.
18. We find the Field Administrator failed to carry his burden of proof under *49 U.S.C. § 13905(£)(2)* for requiring and/or allowing FMCSA to revoke the operating authority registration of DND.
19. We find the Field Administrator failed to carry his burden of proof in accordance with *49 U.S.C. § 31134(c)(l)*, for the Secretary to suspend the USDOT number registration of DND.

WHEREFORE, evidence and testimony having been heard and considered it be and is hereby **ORDERED** as follows:

- a. The "Imminent Hazard Operations Out of Service Order" dated April 1, 2014, against DND International, Inc., be and is hereby **RESCINDED**, effective with the issuance of this Decision; and

- b. The “Notice of Revocation of Operating Authority Registration and Suspension of US DOT Number” dated April 1, 2014, against DND International, Inc., be and is hereby RESCINDED, effective with the issuance of this Decision.



Richard C. Goodwin
U.S. Administrative Law Judge

Attachment – Service List

SERVICE LIST

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