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**BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION**

IN **THE MATTER** OF :
:
J & M Towing, Inc. :
:
 Respondent. :

FHWA-94-5808 -1
DOCKET No. **R1-92-365**

FINAL ORDER

This matter comes before me on a motion *for a* final order by the Regional Director for Region One and a request for an administrative hearing by Respondent **J & M** Towing, Inc. This proceeding is governed by the procedures in 49 C.F.R. **Part 386.**

On June 3, 1992, the Regional Director issued a notice of claim for \$4,200 alleging three counts of **49 C.F.R. § 391.45**-- using a driver without a medical examination at \$500 each; **one** count of 49 C.F.R. **§ 391.51** -- failing to have a complete driver qualification file at \$300 each; one count of 49 C.F.R. **§ 391.103** -- failing to require a drug test for each new driver hired at \$500 each; two counts of 49 C.F.R. **§ 391.105** -- failing to have a biennial drug test for each driver at \$500 each; and three counts of 49 C.F.R. **§ 395.8** -- failing to make and submit a record of duty **status** at \$300 each.

After receiving the notice of claim, Respondent replied in a timely manner stating that it does little interstate travel and was **unaware** that the Federal **Motor** Carrier Safety Regulations (**FMCSR**) applied to it. Evidently, Respondent thereafter talked by phone to the Office of Motor Carriers and requested an administrative hearing. **In** Respondent's second letter **dated June**

22, 1992, it again-states **it was not aware it was subject to the FMCSRs and** that the fine is excessive.

The **Regional** Director filed a motion for a final order on July 13, 1992, stating there is no material issue in dispute. Documents submitted with the motion indicate that **J & M Towing** was the subject of a prior safety review on September 27, 1990.


A motion for a final order is analogous to a motion for summary judgement. **See Forsyth Milk Hauling co.**, 58 Fed. Req. 16983 (FHWA 1993) (Order). Accordingly, the moving party must establish that there is no material factual issue in dispute. While in this case the Regional Director did not submit any documentary evidence of the violations charged in the **notice** of claim, the Regional Director points to **J & M Towing's** failure to deny the charges; its admission that it did not know the regulations applied to its operation; and its statement that **it** had corrected the cited violations.

Respondent has failed to respond to the Regional **Director's** motion. Based on the record before me, **I** find that the **Regional** Director has established a **prima facie** case that **J & M Towing** has failed to rebut. Moreover, while **J & M Towing** has argued that it believes **the assessed** penalty is excessive, it has failed to produce any evidence or **argument** to support that claim. Accordingly, **based** on the record before me I find the assessed total penalty of \$4,200 in this case to be reasonably intended to induce Respondent to comply with applicable **Federal Safety** regulations.

ACCORDINGLY, IT IS HEREBY ORDERED THAT, the Regional Director's motion for final order is granted and Respondent **J & M Towing, Inc.**, is ordered to pay to the Regional Director, within 30 days of the date of this order, the sum of \$4,200 for the 10 violations of the **FMCSRs** set forth in the June 3, 1992, notice of claim. Pursuant to 49 **C.F.R. §** 386.64, any petition for reconsideration must be submitted within 20 days of the date this Order is issued.

DATE: JUN 16 1994

Jun 16 1994


George L. Reagle
Associate Administrator

1/13/99
BD