BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION::

54070

In the Matter of:

LANGER TRANSPORT CORPORATION,

Respondent.

Docket No. FHWA-97-2377' -3
(Formerly Region 1)[2]

ORDER

This matter comes before me on a September 9, 1996, Motion For Final Order submitted by the Complainant, the Regional Director for Region 1 (Regional Director), seeking to assess the Respondent, Langer Transport Corporation (Langer),[3] a civil penalty of $16,280 for nine alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). This proceeding is governed by the Federal Highway Administration's Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings, 49 CFR 386 (Rules of Practice).

1. *Background*

FHWA conducted a Compliance Review of Langer on November 14, 1995 .[4] As a result, on January 16, 1996, the Regional Director issued a Notice of Claim alleging nine violations of 49 CFR 395.3(b), in that Langer required or permitted a driver to drive after

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[1] The previous docket number was NJ-95-096-056.

[2] The regional offices were abolished effective October 1, 1998.

[3] Although the Motion For Final Order referred to the Respondent as Langer Transportation Corp., the Notice of Claim and Respondent's letterhead use the name Langer Transport Corporation.

[4] Exhibit A to Motion For Final Order.

having been on duty more than 70 hours in 8 consecutive days. The Regional Director assessed a civil penalty of $860 for eight of the nine alleged violations, and a civil penalty of $9,400 for Count 6 because the driver was involved in a fatal accident during the time of the violation. The eight counts of $860 each were assessed as part of a serious pattern of safety violations; the maximum assessment permitted was $1,000 per violation with a $10,000 maximum for the pattern. The $9,400 civil penalty was assessed because the Regional Director viewed Count 6 as a substantial health or safety violation, with a maximum assessment of $10,000.[5]

By letter dated February 2, 1996, Langer requested a hearing without explanation and "[r]eserved the right to have the referenced violations and claim adjudicated before an Administrative Law Judge? By letter dated April 3, 1996, Langer confirmed its request for an oral hearing. It also contended that the facts concerning Count 6 were not accurate for the fine assessed because, at the time of the fatal accident, the driver was parked and was in a sleeper berth. Langer averred that, because the driver was not driving, he could not have been in violation of section 395.3(b) when the accident occurred.

In his Motion For Final Order, the Regional Director argued that, with regard to Count 6, the violation of driving after having been on duty for 70 hours in 8 days had occurred before the driver entered the sleeper berth. He further contended that at the time the driver entered the sleeper berth, and at the time he was already in violation of the hours of service requirements, he had parked on the side of the highway without posting warning devices. According to the

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[5] 49 U.S.C. § 521(b)(2)(A). This section was amended by the "Transportation Equity Act for the 21st Century," Pub. L. No. 105-178, § 4015 (1998), and the term "substantial health or safety violation" was removed.

[6] Exhibit A to Motion For Final Order.

Regional Director, an automobile subsequently collided with the parked vehicle resulting in a fatality. By letter dated September 17, 1996, Langer opposed the Motion For Final Order, restating the positions it had set forth in its earlier letters, and arguing that a Motion For Final Order, in essence a Motion For Summary Judgment, was inappropriate because there was a material issue of fact -- whether the driver was driving at the time of the accident.

2. Decision

Based upon the record before me, I find that this matter is ripe for decision on eight of the nine counts. I find that: (1) a hearing in this matter is not warranted; (2) by not objecting to the eight Counts of violating 49 CFR 395.3(b), Langer has admitted them; (3) the violation alleged in Count 6 had occurred before the driver entered the sleeping berth; and (4) briefs are necessary to determine whether the Count 6 violation was a substantial health or safety violation.

a. Request for Hearing

A hearing is not a matter of right.[7] The Rules of Practice limit the "opportunity for a hearing"[8] by requiring, at 49 CFR 386.14(b)(2), that a request for a hearing list all material facts believed to be in dispute. Although Langer argued that there was a material fact in dispute with regard to Count 6, there was none. Its position, that the driver was parked at the side of the

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[7] *In the Matter of Best Brands, Inc.*, Docket No. R5-96-673, Final Order, October 24, 1996, at 8, citing *Citizens for Allegan County, Inc. v. Federal Power Commission, 4* 14 F.2d 1125, 1128 (D.C. Cir., 1969): "[T]he right of opportunity of hearing does not require a procedure that will be empty of sound and show, signifying nothing."

[8] 49 U.S.C. §§ 521(b)(l)(A) and 521(b)(2)(A), which were amended by the "Transportation Equity Act for the 2 1 st Century," Pub. L. No. 105-l 78, § 4015 (1998); 49 CFR 386.11 (b)(l)(v).

road at the time of the accident, is not disputed by the Regional Director. The latter contended that the violation had already occurred by the time the driver entered the sleeper berth. This case may be decided on the written record. Accordingly, a hearing is not warranted.

b. The Motion For Final Order

This office has repeatedly held that a motion for final order, as correctly argued by Langer, is analogous to a motion for summary judgment. Therefore, the moving party bears the burden of clearly establishing that there is no genuine issue of material fact, and it is entitled to a judgment as a matter of law.[9] Nevertheless, all inferences must be drawn in favor of the non-moving party, Langer in this case.

All nine counts concerned violations of the 70-hour rule. Because Langer did not object to eight of the nine counts, they are deemed admitted. With regard to Count 6, Langer did not deny the charge that its driver had driven after having been on duty 70 hours in 8 consecutive days; its only objection was that the driver was not driving at the time of the accident. If the violation had occurred before the fatal accident, then it matters not whether the driver was driving at the time of the accident. Since Langer did not deny that the violation of the 70-hour rule had occurred before the driver entered the sleeper berth, I find that Langer has admitted the violation.

Nevertheless, even though the violation had occurred before the accident, the Regional Director did not demonstrate why the violation should be considered a substantial health or safety violation, with a $10,000 maximum civil penalty, instead of part of a serious pattern of

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[9] *E.g., In re Forsyth Milk Hauling* Co., *Inc.*, Docket No. R3-90-037, 58 Fed. Reg. 16983, March 31, 1993 (Order, December 5, 1991).

safety violations, with a $1,000 maximum civil penalty for each violation within the pattern. The statute that was in effect at the time of the violation stated that a substantial health or safety violation was a violation "which could reasonably lead to, or has resulted in, serious personal injury or death."[10] Although a fatal accident occurred, the question yet to be answered by the parties is whether it resulted from the violation.

While it could be argued that, were it not for the violation, the driver would not have been parked at the side of the highway, it could also be argued that the accident occurred because the driver had parked on the side of the highway without posting warning devices.[11] Yet, the Regional Director failed to charge Langer with having violated 49 CFR 392.22(b), which requires the placement of warning devices whenever a commercial motor vehicle is stopped on the shoulder of a highway for any cause other than necessary traffic stops." Accordingly, I am asking the parties to brief whether the Count 6 violation resulted in the fatal accident, rendering it a substantial health or safety violation.

c. The Civil Penalty Assessment

Langer did not object to the civil penalty assessment, which was based upon application of the Uniform Fine Assessment Model.[12] The Regional Director argued that the model

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[10] 49 U.S.C. § 521(b)(2)(A), *supra*, note 5.

[11] It is also possible, however, that the accident may have occurred even if the driver had placed the warning devices, as required. The State of Maryland Motor Vehicle Accident Report indicates that a witness had observed that a vehicle struck the parked truck at a high rate of speed after an abrupt lane change. (Exhibit I to Motion For Final Order.)

[12] Exhibit N to Motion For Final Order.

correctly applied all the statutory factors required to be weighed in assessing a civil penalty.[13]

Accordingly, *It Is Hereby Ordered That* the Motion For Final Order is granted with regard to Counts 1 through 5 and 7 through 9; Langer is directed to pay to the successor of the Regional Director,[14] within 30 days of the service date of this Order, $860 for each of these eight violations, for a total civil penalty of $6,880. With regard to Count 6, both parties shall serve briefs in accordance with this Order within 30 days of the service date of the Order; both parties may serve reply briefs within 20 days of the service date of the other party's brief.

J&j/z Anna Cirillo
Program Manager
Motor Carrier and Highway Safety

4/21/99
Date

[13] 49 U.S.C. § 521(b)(2)(C), redesignated as subparagraph (D) by Pub. L. No. 105-l 78, § 4015 (1998); 49 CFR 386.81.

[14] *Supra*, note 2.

Docket No. FHWA-97-2377

CERTIFICATE OF SERVICE

This is to certify that on this 21st day of April, 1999, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Robert Langer, Esq. General Counsel Langer Transport Corporation Box 305 Jersey City, New Jersey 07303-2305	One Copy U.S. Mail
Kenneth Dymond, Esq. Deputy Regional Counsel Federal Highway Administration Leo W. O'Brien Federal Building, Room 7 19 Albany, New York 12207-2398	One Copy U.S. Mail
Milt Schmidt Regional Director Office of Motor Carriers Federal Highway Administration Leo W. O'Brien Federal Building, Room 7 19 Albany, New York 12207-2398	One Copy U.S. Mail
Julie Anna Cirillo Program Manager Motor Carrier and Highway Safety Attention: Steven B. Farbman, Esq. Adjudications Counsel Federal Highway Administration HCC-4, Room 4213 400 7th Street, SW Washington, D.C. 20590	One Copy Personal Delivery
U.S. DOT Dockets U. S . Department of Transportation 400 Seventh St., S.W., Room PL-401 Washington D.C. 20590	Original Personal Delivery

Cheryl A Ashton