

BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION

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IN THE MATTER OF:

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Docket No. FHWA-98-3578 -6

J.B. HUNT TRANSPORT, INC.

J.B. HUNT TRANSPORT, INC.'S SURREPLY AND MOTION TO DISMISS

Respondent, J.B. Hunt Transport, Inc. ("J.B. Hunt") files the following Surreply in response to the Federal Highway Administration's ("FHWA") reply to J.B. Hunt's response to the FHWA's Opposition to Request for Hearing and Motion for Final Order ("FHWA's Reply"). Based on the same grounds, J.B. Hunt also files this Motion to Dismiss.

Introduction

For the first time in this case, it appears that the FHWA is now arguing that J.B. Hunt is liable for failing to have adequate safety management controls in place,¹ failing to audit its drivers' logs,² being negligent in its response to its drivers' alleged log falsifications,³ and failing to require its drivers to observe the Federal Motor Carrier Safety Regulations ("FMCSRs").⁴ But the FHWA has no basis

¹The FHWA's Reply at page 8-9 ("J.B. Hunt has failed to effectively have in place a safety management oversight program and is not assuring the effective monitoring of its drivers' compliance with the FMCSRs.").

²The FHWA's Reply at page 8 ("J.B. Hunt had a duty to inquire into its own records. Having failed to make such an inquiry and take appropriate corrective action against the drivers involved, subjects the carrier to liability for the cited violations.").

³The FHWA's Reply at page 6 (suggestion that J.B. Hunt "knew or should have known" of the alleged violations, which suggests a negligence standard); page 7 ("knew or should have known"); page 15 ("[J.B. Hunt's] closing its eyes to the numerous violations").

⁴The FHWA's Reply at page 8 (The FHWA states that "[m]otor carriers have a duty to require drivers to observe the FMCSRs" and suggests that J.B. Hunt did not require its drivers to

for making these assumptions because at no time during the investigation of J.B. Hunt's drivers' records of duty status was there *any* inquiry into J.B. Hunt's safety management controls, J.B. Hunt's practices upon learning of drivers' violations, or J.B. Hunt's policy of requiring its drivers to observe the FMCSRs. The notice of claim, also, does not address these issues presumably because the investigation provided no basis for them. To show that J.B. Hunt knew or should have known of the alleged violations of its drivers is insufficient to confer liability. The FHWA must show that J.B. Hunt failed to take any action in the face of such knowledge. For those reasons, in addition to others discussed below, not only is this case not appropriate for final order at this point, but it should be dismissed.

Surreply

This case revolves almost exclusively around the FHWA's charge of liability against J.B. Hunt for its drivers' alleged falsifications of their logs in violation of section 395.8 of the FMCSRs.⁵ The notice of claim made against J.B. Hunt contains no charge of J.B. Hunt's independent wrongful acts in relation to drivers' alleged falsification of logs, and the FHWA has presented no evidence of such acts on the part of J.B. Hunt.⁶ It has not presented such evidence because it cannot. None exists,

observe the FMCSRs.).

⁵116 of the 122 charges made against J.B. Hunt are for its vicarious liability for its drivers' alleged violations of 49 C.F.R. § 395.8 (1997).

⁶In its most recent brief (FHWA's Reply, Opposition to the Motion to Stay Proceedings, and Motion for Official Notice), the FHWA also asserts that J.B. Hunt and its drivers are guilty of violations of section 395.3 (maximum driving time), but no such charges were contained in the notice of claim' so these references should be ignored as irrelevant. See FHWA's Reply at page 4 (reference to § 395.3), page 5 (reference to § 395.3), page 6 (baseless reference to J.B. Hunt's supposed "pressure placed upon company drivers by supervising dispatchers to exceed the mandated hours of service requirements" and additional reference to § 395.3), and page 8 (reference to *Riss & Co. v. U.S.*, a case involving excessive hours of service).

and the FHWA's investigator never sought or discovered any. J.B. Hunt continues to assert that liability based solely on its drivers' alleged falsifications without a showing of J.B. Hunt's independent wrongdoing (for example, failure to audit logs, failure to have a safety management system in place, failure to discipline drivers after erroneous logs are turned in) denies J.B. Hunt its due process rights and exceeds the FHWA's statutory authority.

The Standard Recited by the FHWA's Necessitates a Ruling for J.B. Hunt.

Under the standard recited by the FHWA for determining whether liability should be assessed against J.B. Hunt, J.B. Hunt cannot be found liable in this case. According to the FHWA, a motor carrier is liable for its drivers allegedly false logs only if

- ▶ it had the means by which to detect violations;'
- ▶ it failed to have in place safety management systems and thus "permit" hours of service violations;* or
- ▶ it failed in its duty to require drivers to observe the FMCSRs.⁹

In this case, the FHWA has failed to show that J.B. Hunt failed to detect the alleged violations. The FHWA also has failed to show that J.B. Hunt did not have in place a safety management system designed to prevent drivers' falsifications of logs. And the FHWA has failed to show that J.B. Hunt

⁸The FHWA's Reply at pages 6-7, *quoting* 62 Fed. Reg. 16369 at 16424. This interpretation, however, is inapplicable because it addresses section 395.3 regarding hours of service violations, which are not at issue in this case. For the sake of completeness, application of this interpretation will be addressed in this brief

⁸*Id.*

⁹The FHWA's Reply at pages 6-7, *quoting* 62 Fed. Reg. 16369 at 16426. It appears that the only proper factor to be considered in this case is that based on the interpretation of published at 62 Fed. Reg. 16426, which addresses the carrier's liability for accepting false documents if it does not require its drivers to observe the FMCSRs.

did not require its drivers to observe the FMCSRs.

The FHWA suggests that, under this standard, J.B. Hunt should be liable for its “constructive knowledge” of its drivers’ alleged log falsifications.” In other words, the FHWA argues that the mere fact that J.B. Hunt had in its possession logs that are inconsistent with on-board computer data is proof that there was no adequate safety management system and that J.B. Hunt did not require its drivers to observe the FMCSRs. The FHWA asserts that J.B. Hunt’s possession of logs that are inconsistent with on-board computer data is sufficient to **justify** issuance of a final order of liability in this case. To support a finding of liability, the FHWA must show that in addition to showing that J.B. Hunt’s drivers submitted false documents, J.B. Hunt also failed to fulfill its duty to require the drivers to observe the regulations. The standard of liability is one of negligence in allowing or failing to detect drivers’ submissions of false documents. Mere presence of allegedly false documents is not sufficient.¹¹ The FHWA must also show that J.B. Hunt did not require its drivers to observe the FMCSRs or that J.B. Hunt was negligent for allowing falsifications or failing to detect them. Neither of these elements has been shown to any degree.

It is clearly a denial of J.B. Hunt’s constitutional rights of due process to hold it liable for

¹⁰The FHWA’s Reply at page 7.

“*See Truckers United for Safety v. Federal Highway Administration*, ___ U.S. App. D.C. , No. 974382, decided April 3, 1998, page 6, fn. 1, interpreting the meaning of the Guidance provided in response to Question 21 located at 62 Fed. Reg. 16370 (1997). In that opinion, the Court stated:

[F]inally, although the answer for question 21 states that “[a] carrier is liable . . . for the actions of its drivers in submitting false documents,” it does not state that carriers will be *strictly* liable therefore. (cite omitted) Rather, it suggests that carriers will face liability only if they fail to fulfill their “duty to require drivers to observe the regulations]. (cite omitted) The standard of liability thus seems to be one for negligence in allowing or failing to detect drivers’ submissions of false documents.

mere knowledge without consideration of any action that J.B. Hunt undertook in response to the knowledge of its drivers' alleged log errors.¹²

Consistent with the negligence standard referred to repeatedly by the FHWA in its Reply, J.B. Hunt should be held responsible only if it had a duty to act and failed to do so. The FHWA cannot show that J.B. Hunt failed in its responsibilities, and the FHWA has no evidence of any such failure because it does not exist.

As recited by the FHWA, J.B. Hunt is obligated by section 390.11 to require its drivers to observe the FMCSRs. The FHWA, although it has the burden of proof in this matter, has failed to offer any evidence, only conjecture and unsubstantiated conclusions, that J.B. Hunt failed to require its drivers to observe the FMCSRs. The notice of claim contains no charges that J.B. Hunt failed to do so. Since there have been no charges of violation of section 390.11, it is unclear why the FHWA now asserts such a violation.

The FHWA also states that J.B. Hunt could be liable for failing to have in place management systems to prevent drivers' violations.¹³ This duty arises from the FMCSRs' provisions regarding the

¹²The FHWA cites *Used Equipment Sales v. Dept of Transp.* in support of its assertion that mere knowledge of drivers' alleged log falsifications alone is sufficient to impute liability to a motor carrier. 54 F.3d 862 (D.C. Cir., 1995). In *Used Equipment*, however, the motor carrier was found liable for dispatching drivers after it knew or should have known that their licenses had been suspended. In other words, *Used Equipment* stands for the proposition that motor carriers will be liable only if they fail to act in response to drivers' lack of qualifications, but *not* for the motor carrier's knowledge alone. The holding in *Used Equipment* only supports J.B. Hunt's position that it should not be held liable merely on the alleged basis that it knew of problems with drivers' logs. J.B. Hunt's liability should be determined only after a review of J.B. Hunt's response to those problems.

¹³The interpretation cited by the FHWA, however, addresses only section 395.3, hours of service violations, which is irrelevant in this case.

procedure for a compliance review.¹⁴ Compliance reviews are conducted for a variety of purposes including investigation of compliance with safety regulations? Under section 385.3(1), the purpose of compliance reviews is to determine whether the motor carrier meets the safety fitness standard. Under section 385.5, “[t]o meet the safety fitness standard, the motor carrier shall demonstrate that it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with: . . . (g) [t]he use of fatigued drivers. . . .”

Despite its implicit reference to this standard,¹⁶ however, the FHWA has failed to, and cannot, offer any evidence in support of its unfounded contention that J.B. Hunt does not have such management systems in place. As a result, there is absolutely no evidence that J.B. Hunt did not have such management systems in place. In fact, the FHWA, whose burden of proof it is, has not presented any evidence of J.B. Hunt’s supposedly inadequate management systems and has never even inquired into J.B. Hunt’s management systems. In addition, the notice of claim contains no charge that J.B. Hunt has inadequate safety management controls in place. All the FHWA has done is assume that since J.B. Hunt’s drivers allegedly turned in false logs, J.B. Hunt lacked adequate safety management controls. There is no basis for the assumption that false logs necessarily impugns a motor carrier’s safety management controls. “Adequate” does not mean “capable of preventing

¹⁴49 C.F.R. § 385.1, *et seq.*

¹⁵A compliance review is defined as “an on-site examination of motor carrier operations . . . , to determine whether a motor carrier meets the safety fitness standard. A compliance review may be conducted . . . to investigate potential violations of safety regulations by motor carriers.” 49 C.F.R. § 385.3(1).

¹⁶The FHWA Reply, page 1, 10, 11, 12, 15.

falsifications before they occur.” To support liability, the FHWA must provide direct evidence of the lack of an adequate system of safety management controls.

B. The Evidentiary Shortcomings of the FHWA’s Case Necessitate a Ruling in Favor of J.B. Hunt.

The FHWA still has not authenticated the evidence that it hopes the Associate Administrator will find as adequate basis for granting the Motion for Final Order. For example, no *admissible* evidence of the authenticity of the signatures on the allegedly false logs has been offered. No *admissible* evidence that the photocopies used by the FHWA are authentic duplications of the originals has been presented. And no evidence has been offered to prove the FHWA’s conclusion that the on-board computer records are records of regularly conducted business activities.” The FHWA’s statements that the records are authentic and subject to hearsay exceptions are not sufficient since they are not evidence and are merely argument of counsel.

Because the evidence offered by the FHWA is inadmissible, it should not be considered in support of its Motion for Final Order. The Motion, therefore, is without sufficient basis and should be denied.

Motion to Dismiss

J.B. Hunt incorporates the argument set forth in the above section “A” into this Motion to Dismiss and respectfully requests that the Associate Administrator dismiss this matter for failure to state a claim upon which liability can be based.

¹⁷The FHWA’s reference to other use of on-board computer records in other, unrelated investigations (non-judicial proceedings), page 12 of the Reply, are completely irrelevant in that the rules of evidence do not apply in audits, and use of on-board computer records in other instances cannot constitute a waiver of J.B. Hunt’s right to protection through the rules of evidence.

Respectfully submitted,



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Certificate of Service

I **certify** that on the 20th day of April, 1998, I mailed the original and designated number of copies of the foregoing document to the persons listed below:

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A handwritten signature in black ink, appearing to read "Ellen Ossenfort Martucci". The signature is written in a cursive style with a large, prominent "O" in the middle. A horizontal line is drawn below the signature.

Ellen Ossenfort Martucci