

BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION

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45825

IN THE MATTER OF:

SEVENTEEN MOTOR CARRIER CASES

Docket Nos. FHWA-97-2391,
2386, 2361, 2379, 2396, 2408,
2415, 2432, 2593, 2480, 2363,
2474, 2475, and 2539.
Docket Nos. FHWA-98-3578,
3805, and 4391.

ORDER APPOINTING ADMINISTRATIVE LAW JUDGES

The Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings (Rules of Practice) provide that I may assign a case for a hearing if I determine that there are material factual issues in dispute.¹ Material factual issues may involve the amount of the civil penalty assessed by the Regional Director, including whether or how the civil penalty assessment factors² were considered,³ and whether Respondent achieved compliance before the Regional Director assessed a civil penalty.⁴ I also have the authority to order a hearing on a question of law if it would enhance my ability to decide a dispute or would serve the interests of justice?

¹ 49 CFR 38616(b).

² 49 U.S.C. § 521(b)(2)(C); 49 U.S.C. § 5123(c).

³ *In the Matter of Prairie State Equipment, Inc. d.b.a. Petro Steel*, Docket No. FHWA-98-3303, Order Appointing Administrative Law Judge, June 29, 1998, at 3.

⁴ *In the Matter of Moore Transportation Services, Inc.*, Docket No. FHWA-97-2439, Final Order, at 15-16, May 22, 1997; *In the Matter of Englund Equipment Co., Inc.*, Docket No. FHWA-97-2534, Final Order, at 6, August 14, 1997; *In the Matter of Chincoteague Seafood, Inc.*, Docket No. FHWA-97-2385, Final Order, at 4.

⁵ *In the Matter of Empire Transport Co., Inc.*, Docket No. FHWA-97-2692 (formerly Docket No. R1-92-280), Order, October 21, 1994, at 3, citing In re Gunther's Leasing; Transport, Inc., 58 Fed. Reg. 16985, 16986 (FHWA 1993)(Order).

Accordingly, I have determined that the appointment of an Administrative Law Judge for each of the following 17 cases is warranted:

1. *In the Matter of Fraticelli Trucking Co., Inc.*, Docket No. FHWA-1997-2391.

The Regional Director cited 49 CFR 173.24(b), which concerns packaging requirements, in charging Respondent with using a cargo tank with a failed ring stiffener! Although Respondent did not request a hearing until September 16, 1994,⁷ there is not enough information in the record to resolve the issues in this matter. Respondent argues that the charge is incorrect because the crack was on the outrigger, not the stiffener.⁸ It further maintains that the crack across the outrigger did not present any danger of releasing the material.⁹ Respondent raises the possibility that the crack had occurred during the last trip, given that the tank had always been inspected by the assigned driver before departing on a trip.¹⁰ It also contends that the crack was immediately repaired once revealed.¹¹ Respondent concludes that these are mitigating circumstances that should apply either to excuse any breach of duty or to reduce any proposed penalty.¹² The Regional Director does not respond to the “outrigger” argument specifically; he

⁶ In its June 7, 1994, “Notice Of Intent To Submit Evidence” (Motion For Final Order, Exhibit 5, at 2), the Respondent submitted argument with regard to 49 CFR 173.24b(a)(2), which is a different section of the Hazardous Materials Regulations.

⁷ Motion For Final Order, Exhibit 11.

⁸ Motion For Final Order, Exhibit 5, at 3.

⁹ Motion For Final Order, Exhibit 7, at 1.

¹⁰ Motion For Final Order, Exhibit 7, at 2-3.

¹¹ Motion For Final Order, Exhibit 7, at 4.

¹² Motion For Final Order, Exhibit 7, at 3.

concludes that **photographs**¹³ clearly show a cracked ring stiffener,¹⁴ as the Notice of Claim states,” though he does not address Respondent’s point that it was not the ring stiffener that was cracked. Moreover, not only does the Regional Director further conclude without explanation that the cargo tank was in danger of **failing**,¹⁶ he does not respond to all of the issues in mitigation raised by Respondent.

2. In the Matter of Kuehne Chemical Company, Inc., Docket No. FHWA-1997-2386.

The issues to be resolved in this matter are whether: (1) FHWA has jurisdiction over intrastate shipments; (2) a Consent Agreement and Order entered into by the Regional Director and the Respondent limits the amount of the civil penalties that may be assessed; and (3) FHWA lacks a legal basis to assess civil penalties against Respondent for testing, inspection, or certification violations.¹⁷

3. In the Matter of Peter Pan Bus Lines, Inc., Docket No. FHWA-1997-2361.

One of the issues presented by this case is how the Uniform Fine Assessment model takes into account the statutory factors to be considered in assessing a civil penalty. I ask that the Judge assigned to this case include in the Recommended Decision a discussion of whether the

¹³ Motion For Final Order, Exhibit 12.

¹⁴ Motion For Final Order, at 4.

¹⁵ Motion For Final Order, at 5. I note, however, that the copy of the Notice of Claim and the copy of the Service List submitted by the Regional Director were unsigned. (Motion For Final Order, Exhibit 4.)

¹⁶ *Id.*

¹⁷ The legal-basis issue was presented via letter and not by motion, as required by 49 CFR 386.35.

model makes any adjustment to the civil penalty assessment if a respondent qualifies as a small entity under the Small Business Regulatory Enforcement Fairness Act of 1996.¹⁸

4. *In the Matter of Robin Express, Inc.*, Docket No. FHWA-1997-2379.¹⁹

The Regional Director believes that a hearing is justified on the count of operating a vehicle in a condition likely to cause an accident or breakdown.

5. *In the Matter of Abilene Motor Express, Inc.*, Docket No. FHWA-1997-2396.

This matter is vigorously contested by both parties. Questions of fact have been presented, and a hearing before an Administrative Law Judge is warranted.

6. *In the Matter of J.P. Mascaro & Sons, Inc. (a.k.a. Solid Waste Services, Inc.)*, Docket No. FHWA-1997-2408.

This matter presents a question of law concerning whether the definition of safety-sensitive function includes a driver who, after testing positive for controlled substances, was removed from driving duties but was permitted to ride in the truck. In addition, Respondent contests statements of its employees submitted by the Regional Director because those statements were not signed. Although the safety inspector declared that the employees had told him that the statements were true and correct and had instructed him to make handwritten

¹⁸ Pub. L. 104-121, § 223 (March 29, 1996).

¹⁹ There is a second case involving the same Respondent, Docket No. FHWA- 1997-2383. A hearing in that case is not warranted.

changes,²⁰ the statements do not confirm this.²¹

7. *In the Matter of R & R Express (KDK Transport, Inc. dba) and Ronald Reinerth, Docket No. FHWA-1997-2415.*

The Regional Director's argument that numerous filings in another docket concerning R & R Express, Docket FHWA-1997-2425, demonstrate that Ronald Reinerth was responsible for running the day-to-day operations of the company is not persuasive. Not only does the Regional Director fail to state where in the 103 submissions to Docket 1997-2425 the evidence lies, but he does not explain how the record for that docket, which concerned events in 1992 and 1993, could demonstrate how Mr. Reinerth was responsible for running the day-to-day operations of the company in 1995, when the event at issue in this case was alleged to have occurred.

8. *In the Matter of Virginia Hiway Express, Inc., Docket No. FHWA-1997-2432.*

The Regional Director's case for the substantial health or safety violation charge is based on a reconstructed log because the driver's log was unavailable. The Regional Director's argument that "Respondent's routine practice of permitting its drivers to conceal hours of service violations by drivers falsifying records of duty status is evidence that this is what happened with

²⁰ Motion For Final Order, Summary Judgment, And In Opposition To Request For A Hearing, at Appendix D.

²¹ I note that the statements are not contained in the exhibits as described in the Exhibit Abstracts to Appendix C. For example, Exhibits 3 and 8 indicate that the fourth document in each exhibit is the statement of Larry C. Grimm. It is not. The statement attributed to Mr. Grimm is contained in Appendix F.

respect to the violation cited in Count 1"²² does not persuade me to grant his Motion For Final Order.

9. *In the Matter of G.D. C. Inc., Docket No. FHWA-1998-4391.*

The Regional Director requests that this case be assigned to an Administrative Law Judge.

10. *In the Matter of Deanna Burke, Docket No. FHWA-1997-2593.*

In partial support of his charge that Respondent aided and abetted a motor carrier employee to violate the Federal Motor Carrier Safety Regulations (FMCSRs), the Regional Director submitted copies of photographs in an attempt to show that one driver had commercial drivers licenses issued under two different names.²³ The Regional Director argues that “[c]omparison of the two photographs clearly show it is the same individual.”²⁴ On the contrary, these copies are illegible. It does not help the decisionmaker to say, as the Regional Director does, that the original photographs are on file at the Alabama Division Office of Motor Carriers.²⁵

11. *In the Matter of D & J Transfer Company, Docket No. FHWA-1997-2480.*

The Regional Director did not submit Pennsylvania Turnpike receipts into evidence even though he argues that those receipts support the charges of false reports of records of duty status.

²² Motion For Final Order, In Opposition To A Hearing And For Summary Judgment, at the second and third pages of unpaginated document.

²³ Government Exhibit C, at 16-1 7.

²⁴ Government Exhibit C, at 4.

²⁵ Government Exhibit C, at 5.

12. *In the Matter of J.B. Hunt Transport, Inc.*, Docket No. FHWA-1998-3578.

Citing *Truckers United for Safety v. Federal Highway Administration*, 139 F.3d 934,937, n. 1 (D.C. Cir. 1998), Respondent argues that the Regional Director did not demonstrate that the Respondent: (1) failed to require its drivers to observe the FMCSRs; (2) was negligent for failing to detect drivers' submissions of false documents; or (3) did not have in place a management system to prevent drivers' violations. A hearing is necessary to resolve these issues.

I note, moreover, that the Regional Director offers no evidence or convincing argument concerning his civil penalty assessment of \$61,600. He says merely that the assessment is reasonable, implying that he could have assessed a higher amount. He provides no evidence or argument that he took into consideration the civil penalty assessment factors.²⁶ Furthermore, in referring only to substantial health and safety violations, which carry a maximum assessment for each violation of \$10,000, he implies that the alleged violations were those that could reasonably have led to, or had resulted in, serious personal injury or death.²⁷ Yet, he does not explain why violations of 49 CFR 395.8(e) or 396.9 would be substantial health or safety violations.²⁸

13. *In the Matter of National Brokers, Inc.*, Docket No. FHWA-1997-2363.

The Regional Director objects to Respondent's April 4, 1997, amended reply in which Respondent requested a hearing. The Regional Director reasons that the amended reply was

²⁶ 49 U.S.C. § 521 (b)(2)(C).

²⁷ See 49 U.S.C. § 521(b)(2)(A).

²⁸ Opposition To Request For Hearing And Motion For Final Order, at 29.

beyond the time allowed by the Rules of Practice for requesting a hearing. In making this argument, however, the Regional Director has hoisted himself on his own petard. The Regional Director treats Respondent's January 29, 1997, reply as an intent to submit evidence without oral hearing. The Rules of Practice, however, provide that if a notice of intent to submit evidence without oral hearing is filed, and Respondent contests the claim or the contents of the notice [of investigation], all evidence must be served in written form no later than the 40th day following service of the Claim Letter or Notice of Investigation.²⁹ Since the Notice of Investigation was served on December 30, 1996, the Regional Director was required to serve his evidence by February 10, 1997. He did not do so until April 16, 1997. Moreover, the Regional Director's evidence was not served in the form specified in 49 CFR 386.49, as required by § 386.14(c). Although an affidavit was submitted,³⁰ it did not identify each exhibit or give its source, as required by § 386.49(b).

I also note that the Regional Director gives short shrift to the civil penalty determination. He says merely that the assessment was arrived at by taking into account all statutorily required items, but he does not explain how the statutorily required items were considered.³¹ Finally, I note that the caption in the Opposition To Request For Hearing And Motion For Final Order (Motion For Final Order) reads in part: "In the Matter of: Mr. Bobby Hill, President[,] National Brokers, Inc." Based upon the arguments made in the Motion For Final Order, I assume that

²⁹ 49 CFR 386.14(c).

³⁰ Government Exhibit J.

³¹ Opposition To Request For Hearing And Motion For Final Order, at 8.

National Brokers, Inc., and not Mr. Bobby Hill, is the Respondent.

14. *In the Matter of Ozark Auto Transportation, Inc., Docket No. FHWA-1997-2474.*

The Regional Director argues that Respondent's reply to the Notice of Claim and Notice of Investigation is insufficient. The Regional Director, however, does not refer to any of his exhibits as containing the reply, and I was unable to find it. I cannot take the Regional Director's word that the reply was insufficient. Moreover, although the Respondent's "Reply To Motion For Final Order And Opposition To Request For Hearing," the Statement Of Marvin Creamer Regarding Statement Of Kendrake Lewis," and the "Certificate Of Service" were unsigned and undated, I am cognizant of the fact that Respondent was not represented by counsel. Although this Reply was improperly filed, it raises issues of fact warranting the assignment of this case to an Administrative Law Judge. In addition, the Regional Director has provided no analysis for his civil penalty assessment.³²

15. *In the Matter of Pennco, Inc., Docket No. FHWA-1997-2475.*

The written statement of R.L. Home, President of Respondent, although signed, merely acknowledges receipt of a copy of the document.³³ Moreover, the statements submitted by the Regional Director concern an inspector, cargo tank number, and date of inspection that are different from the inspector, cargo tank number, and date of inspection contained in the charge. The charge concerns a 1992 inspection of cargo tank # 205 by mechanic Jerry Heathington,³⁴

³² Motion For Final Order And Opposition For Request For Hearing, at 9.

³³ Government Exhibit D.

³⁴ Government Exhibit F, Document 2.

whereas the statements pertain to a 1994 inspection of cargo tank #203 by Edward Sanchez.³⁵

Concerning the charge that Respondent operated a motor vehicle in such condition as to likely cause an accident or a breakdown while transporting a placardable load of hazardous material,³⁶ Respondent argues that there was no practical way to inspect the vehicle to detect the condition. The National Transportation Safety Board report³⁷ concluded that requirements for ultrasonic inspection found at 49 CFR 180.407 were applicable only to unlined tanks, and the tank involved in the accident was a lined tank. “The investigation determined that ultrasonic inspection was not performed on the ring stiffeners on the cargo tank . . . nor was it required to be performed.”³⁸ This raises a question as to whether Respondent should have known about the condition of the tank, and -- at the very least -- a question as to the amount of the civil penalty assessed. Although the Regional Director argues that the main thrust of Respondent’s reply was that the civil penalty assessment was too high, the Regional Director does not explain how he arrived at the assessment.

16. *In the Matter of Western Liquid Express, Inc.*, Docket No. FHWA-1997-2539.

The Regional Director charges, in Count 13, that Respondent operated a vehicle on a public highway after the vehicle had been placed out of service. There is no evidence that the vehicle was driven on a public highway and not towed or hauled to a repair station. While the repair bill provides an odometer reading, there is no odometer reading on the vehicle inspection

³⁵ Government Exhibits D and E.

³⁶ Government Exhibit I.

³⁷ Government Exhibit J.

³⁸ Government Exhibit J, Hazardous Materials Factual Report, at 6.

report with which to compare it.³⁹

17. *In the Matter of Builders Transport, Inc.*, Docket No. FHWA-1998-3805.

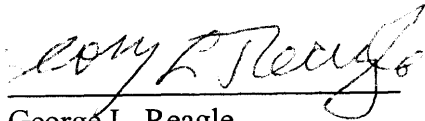
I ask the Judge to decide whether the proceeding to revoke Respondent's self-insurance authorization should be stayed pending Respondent's reorganization under Chapter 11 of the U.S. Bankruptcy Code. If the Judge determines that the revocation proceeding not be stayed, I request that the Judge decide whether the self-insurance authorization should be revoked.

Accordingly, *It Is Hereby Ordered That* the Regional Directors' Motions for Final Order in the first 16 cases listed above, and the Motion for Final Order submitted by the Director, Office of Motor Carrier Information Analysis in case number 17 listed above, are denied. In accordance with 49 CFR 386.54(a), I hereby appoint an Administrative Law Judge, to be designated by the Chief Administrative Law Judge of the Department of Transportation, to be the presiding Judge and to make a Recommended Decision concerning all the issues in each of these 17 cases. I ask that the Chief Judge assign as the first two cases: (1) *In the Matter of Peter Pan Bus Lines, Inc.*, Docket 1997-236 1, because all Regional Directors are using the Uniform Fine Assessment model to determine civil penalty assessments under 49 U.S.C. § 521(b)(2)(C); and (2) *In the Matter of J.B. Hunt Transport, Inc.*, Docket 1998-3578, because of the importance of the issues in that case with regard to the safety enforcement function of the Federal Highway Administration. All proceedings shall be governed by Subparts D and E of 49 CFR Part 386⁴⁰

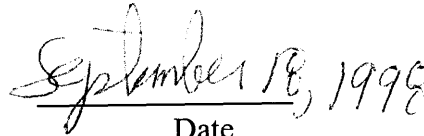
³⁹ Government Exhibit Number 13, Documents 1 and 2.

⁴⁰ On May 11, 1998, I issued an Order noting that 49 CFR Part 386 would govern *In the Matter of Builders Transport, Inc.*, Docket No. FHWA-1998-3805. (Order Granting Extension of Time, n2).

and all orders issued by the Administrative Law Judges.



George L. Reagle
Associate Administrator for Motor Carriers



Date

**Docket Nos. FHWA-1997-2391, 2386, 2361, 2379,
2396, 2408, 2415, 2432, 2593, 2480, 2363, 2474,
2475, and 2539.**

Docket Nos. FHWA-1998-3578, 3805, and 4391.

CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of September, 1998, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Mr. Edward Fraticelli, Jr. Fraticelli Trucking Co., Inc. Firm Delivery Ponce, Puerto Rico 0073 1 ⁴¹	One Copy U.S. Mail
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Kurt D. Olender, Esq. Attorney for Kuehne Chemical Company, Inc. Lindabury, McCormack & Estabrook 53 Cardinal Drive P.O. Box 2369 Westfield, New Jersey 0709 1 -2369 ⁴²	One Copy U.S. Mail
---	-----------------------

Jeremy Kahn, Esq. Counsel for Peter Pan Bus Lines, Inc. Kahn and Kahn 1730 Rhode Island Ave., N.W. Suite 810 Washington, D.C. 20036 ⁴³	One Copy U.S. Mail
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Robert Nazarro, President Robin Express, Inc. P.O. Box 1039 Pine Bush, New York 12566 ⁴⁴	One Copy U.S. Mail
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⁴¹ Docket 1997-239 1.

⁴² Docket 1997-2386.

⁴³ Docket 1997-2361.

⁴⁴ Docket 1997-2379.

Docket Nos. FHWA-1997-2391, 2386, 2361, 2379, 2396, 2408, 2415, 2432, 2593, 2480, 2363, 2474, 2475, and 2539.

Docket Nos. FHWA-1998-3578, 3805, and 4391.

<p>Kenneth Dymond, Esq. Deputy Regional Counsel Federal Highway Administration Leo W. O'Brien Federal Building, Room 719 Clinton Avenue and North Pearl Street Albany, New York 12207-2398⁴⁵</p>	<p>One Copy U.S. Mail</p>
---	-------------------------------

<p>Sheila D. O'Sullivan, Esq. Assistant Regional Counsel Federal Highway Administration Leo W. O'Brien Federal Building, Room 719 Clinton Avenue and North Pearl Street Albany, New York 12207-2398⁴⁶</p>	<p>One Copy U.S. Mail</p>
--	-------------------------------

<p>Milt Schmidt Regional Director Office of Motor Carriers Federal Highway Administration Leo W. O'Brien Federal Building, Room 719 Clinton Avenue and North Pearl Street Albany, New York 12207-2398⁴⁷</p>	<p>One Copy U.S. Mail</p>
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<p>Abilene Motor Express, Inc. P.O. Box 24930 Richmond, VA 23234⁴⁸</p>	<p>One Copy U.S. Mail</p>
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⁴⁵ Docket 1997-2379.

⁴⁶ Dockets 1997-2391, 2386, and 2361.

⁴⁷ Dockets 1997-2391, 2386, 2361, and 2379.

⁴⁸ Docket 1997-2396.

Docket Nos. FHWA-1997-2391, 2386, 2361, 2379, 2396, 2408, 2415, 2432, 2593, 2480, 2363, 2474, 2475, and 2539.

Docket Nos. FHWA-1998-3578, 3805, and 4391.

<p>Lewis H. Clementson, Esq. Counsel for Abilene Motor Express, Inc. 542 Glenpark Lane Midlothian, VA 23113⁴⁹</p>	<p>One Copy U.S. Mail</p>
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<p>Albert A. DeGennaro, Esq. Attorney for J.P. Mascaro & Sons, Inc. 320 Godshall Drive Harleysville, PA 19438⁵⁰</p>	<p>One Copy U.S. Mail</p>
--	-------------------------------

<p>John A. Pillar, Esq. Attorney for R & R Express (KDK Transport, Inc., dba) and Ronald Reinerth Pillar, Mulroy & Ferber, P.C. 1106 Frick Building Pittsburgh, PA 15219⁵¹</p>	<p>One Copy U.S. Mail</p>
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<p>William D. Harris, General Manager Virginia Hiway Express, Inc. 7734 White Pine Road Richmond, VA 23237⁵²</p>	<p>One Copy U.S. Mail</p>
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<p>Mr. Gerald D. Cooper, President G.D.C., Inc. Lorton, VA 22199⁵³</p>	<p>One Copy U.S. Mail</p>
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⁴⁹ Docket 1997-2396.

⁵⁰ Docket 1997-2408.

⁵¹ Docket 1997-2415.

⁵² Docket 1997-2432.

⁵³ Docket 1998-439 1.

Docket Nos. FHWA-1997-2391, 2386, 2361, 2379, 2396, 2408, 2415, 2432, 2593, 2480, 2363, 2474, 2475, and 2539.

Docket Nos. FHWA-1998-3578, 3805, and 4391.

<p>Kathleen S. Molinar, Esq. Assistant Regional Counsel Federal Highway Administration 10 South Howard Street Suite 4000 Baltimore, Maryland 21201⁵⁴</p>	<p>One Copy U.S. Mail</p>
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<p>Ms. Rachel E. Vass Motor Carrier Docket Clerk Federal Highway Administration 10 South Howard Street Suite 4000 Baltimore, Maryland 21201⁵⁵</p>	<p>One Copy U.S. Mail</p>
--	-------------------------------

<p>Ms. Deanna Burke 160 County Road 132 Jemison, AL 35085⁵⁶</p>	<p>One Copy U.S. Mail</p>
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<p>Sherman B. Powell, Jr., Esq. Attorney for Deanna Burke 247 East Moulton Street Decatur, AL 35601⁵⁷</p>	<p>One Copy U.S. Mail</p>
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<p>Alla Shaw, Esq. Assistant Regional Counsel Federal Highway Administration 61 Forsyth Street, Suite 1726T Atlanta, GA 30303-3104⁵⁸</p>	<p>One Copy U.S. Mail</p>
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⁵⁴ Dockets 1997-2396, 2408, 2415, 2432, and 1998-4391.

⁵⁵ Dockets 1997-2396, 2408, 2415, 2432, and 1998-4391.

⁵⁶ Docket 1997-2593.

⁵⁷ Docket 1997-2593.

⁵⁸ Docket 1997-2593.

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Docket Nos. FHWA-1998-3578, 3805, and 4391.

D & J Transfer Company	One Copy
P.O. Box 455	U.S. Mail
Sherburne, MN 55432-5964 ⁵⁹	

Robert D. Gisvold, Esq.	One Copy
Attorney for D & J Transfer Company	U.S. Mail
Kalina, Wills, Woods, Gisvold & Clark, P.L.L.P.	
94 1 Hillwind Road Northeast	
Suite 200	
Minneapolis, Minnesota 55432-5964 ⁶⁰	

Peter W. Snyder, Esq.	One Copy
Assistant Regional Counsel	U.S. Mail
Federal Highway Administration	
19900 Governors Highway	
Olympia Fields, IL 6046 1 ⁶¹	

Doug Sawin	One Copy
Regional Director	U.S. Mail
Office of Motor Carriers	
Federal Highway Administration	
19900 Governors Highway	
Olympia Fields, IL 6046 1 ⁶²	

J.B. Hunt Transport, Inc.	One Copy
P.O. Box 130	U.S. Mail
Lowell, Arkansas 72745 ⁶³	

⁵⁹ Docket 1997-2480.

⁶⁰ Docket 1997-2480.

⁶¹ Docket 1997-2480.

⁶² Docket 1997-2480.

⁶³ Docket 1998-3578.

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Docket Nos. FHWA-1998-3578, 3805, and 4391.

Ellen Ossenfort Martucci, Esq. Attorney for Respondent Mills Presby and Associates, L.L.P. 59 10 N. Central Expressway, Suite 900 Dallas, Texas 7520 1 ⁶⁴	One Copy U.S. Mail
Mr. Bobby Hill, President National Brokers, Inc. P.O. Box 3055 Memphis, Tennessee 38 1 73 ⁶⁵	One Copy U.S. Mail
C. Brian Williams, Esq. Attorney for National Brokers, Inc. P.O. Box 89 Marion, AR 72364 ⁶⁶	One Copy U.S. Mail
Marvin Creamer, President Ozark Auto Transportation, Inc. 210 Main Street West Fork, Arkansas 72774 ⁶⁷	One Copy U.S. Mail
Mr. Ron Home Pennco, Inc. P.O. Box 130 Bellville, TX 774 1 8 ⁶⁸	One Copy U.S. Mail

⁶⁴ Docket 1998-3578.

⁶⁵ Docket 1997-2363.

⁶⁶ Docket 1997-2363.

⁶⁷ Docket 1997-2474.

⁶⁸ Docket 1997-2475.

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Bob J. Spann, Esq. Attorney for Pennco, Inc. Bob J. Spann & Associates Suite 900 Wilson Plaza East 545 Upper North Broadway Corpus Christi, Texas 78476 ⁶⁹	One Copy U.S. Mail
--	-----------------------

Charlene Sanders Bassel, Esq. Regional Counsel Federal Highway Administration 8 19 Taylor Street, Room 8A00 P.O. Box 902003 Fort Worth, Texas 76102 ⁷⁰	One Copy U.S. Mail
--	-----------------------

Lorraine A. Godbolt, Esq. Assistant Regional Counsel Federal Highway Administration 819 Taylor Street, Room 8A00 P.O. Box 902003 Fort Worth, Texas ⁷¹	One Copy U.S. Mail
---	-----------------------

Docket Clerk Federal Highway Administration 8 19 Taylor Street, Room 8A00 P.O. Box 902003 Fort Worth, Texas 76102 ⁷²	One Copy U.S. Mail
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⁶⁹ Docket 1997-2475.

⁷⁰ Dockets 1998-3578, 1997-2363, 2474, and 2475.

⁷¹ Dockets 1998-3578, 1997-2363, 2474, and 2475.

⁷² Dockets 1998-3578, 1997-2363, 2474, and 2475.

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Docket Nos. FHWA-1998-3578, 3805, and 4391.

Western Liquid Express, Inc.
3931 N.W. 44th Terrace
 Topeka, KS 661 18⁷³

One Copy
 U.S. Mail

Helen H. Mountford, Esq.
 Regional Counsel
 Federal Highway Administration
 P.O. Box 419715
 Kansas City, Missouri 64141 ⁷⁴

One Copy
 U.S. Mail

James F. Moriarty, Esq.
 Rhett D. Workman, Esq.
 Attorneys for Builders Transport, Inc.
 1400 Sixteenth Street, N.W.
 Washington, D.C. 20036⁷⁵

One Copy Each
 U.S. Mail

Stanley M. Braverman, Esq.
 Attorney for the Director
 400 Virginia Avenue, S. W.
 Suite 600
 Washington, D. C. 20024⁷⁶

One Copy
 U.S. Mail

⁷³ Docket 1997-2539.

⁷⁴ Docket 1997-2539.

⁷⁵ Docket 1998-3805.

⁷⁶ Docket 1998-3805.

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Docket Nos. FHWA-1998-3578, 3805, and 4391.

The Honorable Roy J. Maurer
Chief Administrative Law Judge
Office of Hearings (M-20)
U.S. Department of Transportation
400 7th Street, S.W., Room 5411
Washington, D.C. 20590⁷⁷

One Copy
Personal Delivery

Mr. George L. Reagle
Associate Administrator for Motor Carriers
Attention: Steven B. Farbman, Esq.
Adjudications Counsel
Federal Highway Administration
HCC-4, Room 4213
400 7th Street, SW
Washington, D.C. 20590⁷⁸

One Copy
Personal Delivery

U.S. DOT Dockets
U.S. Department of Transportation
400 Seventh St., S.W., Room PL-401
Washington D.C. 20590⁷⁹

Original
Personal Delivery



⁷⁷ All dockets.

⁷⁸ All dockets.

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