

Compliance *News*

Electronic Edition

& Commentary

Q&A

One of my drivers has an *intrastate* vision waiver. He is applying for a federal waiver, but it hasn't been finalized yet. Is it OK for him to be a team driver on an interstate run as long as he only drivers in our state?

Unfortunately, not. FMCSR 391.11(b)(4) requires a driver to be "physically qualified" in order to drive a commercial motor vehicle. Since the driver is not able to pass the vision portion of the physical exam and has to obtain a vision waiver, he or she isn't physically qualified for *interstate* driving until the federal waiver is granted.

The fact that the driver only drove during the in-state portion of the trip doesn't make the trip intrastate. The final destination of the load determines whether the trip is inter- or intra-state.

In this case, it was the *intent* at the beginning of the trip to deliver the load to an out-of-state destination. Therefore, the driver was driving *interstate* and was required to have the federal waiver.

To take it one step further, if the driver drove solo and dropped the trailer at the border where it was picked up by another driver to complete the trip, it would still be interstate since it was the *continuance* of a trip with an out-of-state destination.

For answers to your compliance questions, contact Standard & Best (503) 263-6162. Or logon to www.standardandbest.com



CASE STUDY: Supporting documents critical to outcome of audit appeal

National motor carrier ends 6-year's of appeals, denying allegations

■ Beginning with a 2001 compliance review (CR) in which the FMCSA alleged multiple hours of service violations, and continuing on through two subsequent CR's where additional violations were alleged, Swift Transportation brought the saga to a close in February this year.

In the end, whether Swift was guilty of the nearly two hundred alleged false logs or not may be a moot point. Appearing before an Administrative Law Judge in February, the Phoenix-based national carrier paid \$106,600 in fines, while maintaining its denial of allegations related to CR's, according to public records.

Reading like a Grisham best-

seller, the history of Swift's 6-year defense includes 177 official postings in the USDOT Document Management System and more than 2000 pages of documentation, evidence, arguments and counter arguments.

The case offers something for everyone to learn from—at the very least : When it comes to establishing guilt or innocence, supporting documents will play a crucial role.

Lessons learned

① FMCSR 395.8(k)(1) states, "Each motor carrier shall maintain ... **all supporting documents** for each driver it employs for a period of six months from the date of receipt." (Failure to do so is a critical violation.)

② The **quality of the information** presented in the supporting documents must be sufficient to clearly establish whether....(Continued page 2)

Certificate of insurance alone doesn't establish coverage

For the "Additional Insured", protection lies buried in the policy language

■ The costs of litigation for shippers, freight forwarders, contract carriers and other third parties for losses that they were not directly involved in have risen dramatically, causing many to examine their practices for establishing proof of coverage. Not infrequently these parties have relied on a certificate

of insurance where they were named as "Additional Insured" only to learn that they weren't covered.

Evidence of insurance is more complex than meets the eye and requires due diligence to verify coverage.

■ Standard language on the front page reads, "This certificate is issued as a matter of information only and confers no rights upon the (Continued on page 2)

Supporting Documents *(Continued)*

... the log is false or not. If the motor carrier later contends that fueling records don't always reflect the *real time* the event took place, for instance, they can't later represent that *those* are the documents they use to check logs.

③ The burden of proof is on the motor carrier to devise a **reliable system of verifying** the accuracy of logs. In a 1998 decision, the court ruled that "motor carriers ... have a duty to verify logs." Having the means to verify logs and failing to do so, according to this decision, is the same as having knowledge of, and permitting or requiring drivers to falsify logs.

④ Whatever form the motor carrier's "progressive discipline" policy takes, it must produce improvements in the carrier's safety performance. If the carrier terminates drivers who are in the practice of falsifying logs, for example, but the replacement drivers do the same as their predecessors until they are discovered, the carrier will be considered to be condoning the practice.

⑤ The motor carrier is responsible for correctness of information presented by the driver on the log. If a driver is careless in the spelling of similarly spelled city names and the misspelling results in a "false" log, the carrier is responsible to catching the mistake and making an appropriate correction.

Likewise, if the driver is in the habit of showing a location that is *close* to the actual location, but still an appreciable distance away—for example, showing Troutdale, OR as Portland—the driver will be held accountable for that difference, especially when the numbers begin to add up to significant mileage differences.

Summary. All in all, the Swift case is a stark reminder that it is in the motor carrier's best interest—and in keeping with their duty to promote effective safety management controls—to establish a system for verifying driver's logs that is reliable, workable, and one that they can live with on a daily basis.

—Source: DMS: Dockets 10674, 17248, 23631

Certificate of insurance *(Continued)*

... certificate holder." Further on it states that in the event of policy cancellation, the insurer will attempt to notify the additional insured of the change, but may not be able to in all instances.

■ The certificate goes on to state that when the certificate holder is an additional insured, the policy must be endorsed. The certificate without the appropriate endorsement *does not* provide coverage to the additionally insured.

Before accepting the certificate of insurance as proof of coverage, companies should always request a copy of the **endorsement** and review it carefully for any exclusions or language that weakens the protection that's required.

CASE STUDY: When a "highway" is not a highway

Drivers who hostile trailers between staging and loading areas on company property must have a CDL and comply with drug testing rules if the vehicles they operate require one, according to a USDOT order issued last month.

The matter arose out of a compliance review at a UPS terminal where the investigator cited the carrier for using non-CDL licensed drivers to operate CMV's in an area open to the public. The carrier was charged with violations of FMCSR Parts 382 and 383.

■ UPS argued that they were not in violation since the area where the drivers operated was not a "highway." [See 383.5, "Motor vehicle"] The FMCSA disallowed the defense, stating that since the location in question was "open to the public" [See FMCSR 390.5, "Highway"]—UPS customers dropped off and picked up parcels in the area where trailers were being moved—it met the definition of "highway."

"An area is either open to public travel or not open to public travel," said the Agency's counsel, and since the public could enter the property during regular business hours and after hours, it was a "highway."

- See DMS Docket 26144 for source materials.

Cost of noncompliance high for carriers failing to meet minimums.

According to public records, motor carriers continue to discover that the cost of noncompliance can be high. A sampling of notices posted in June reported:

➔ California, 2-truck operation fined \$2190 for failing to have D&A program, false logs, and no maintenance program.


➔ Midwestern, 300-truck operation fined \$54,600 for false logs in second audit in two years.

➔ Southeastern carrier fined \$53,620 for false logs and D&A violations

The penalty schedule can be found in Appendix B to Part 396 of the FMCSRs.

Stats

● In 2006, of 2,316,352 roadside inspections nationally, violation of **local laws** was the most frequent citation (24.19%). Logbooks not current ranked 3rd, speeding was 4th, and logbook form/manner was 5th. In **Oregon** for the same period there were 59,582 inspections, 71.61% having violations. In **Washington**, there were 116,011 inspections, 79.44% having violations. Indiana holds the distinction of the highest rate of violations—92.32%; **Alaska** had the lowest—45.82% of all fifty states; **North Dakota** had the lowest of the 48 contiguous states—48.48%.

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