BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of:	
BUILDERS FIRSTSOURCE-NORTHEAST GROUP, LLC,	**Docket No. FMCSA-2008-0048[1]** **(Eastern Service Center)**
Respondent.	

ORDER APPOINTING HEARING OFFICER

1. *Background*

On November 23, 2007, the New Jersey Division Administrator, Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) against Builders FirstSource-Northeast Group, LLC (Respondent) following a compliance review of Respondent conducted on October 3, 2007.[2] The NOC charged Respondent with four violations of 49 CFR 391.51(b)(2), failing to maintain inquiries into a driver's driving record in the driver's qualification file, and proposed a civil penalty of $2,840 ($710 per count).

Respondent replied to the NOC on December 20, 2007. It neither admitted nor denied the allegations in the NOC but requested an informal hearing to present documents that were not given to the FMCSA safety investigator who conducted the compliance review.[3]

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[1] The prior case number was NJ-2008-0002-US1080.

[2] Exhibit A to Motion to Enter Default Final Order for Failure to File Adequate Reply in Accordance with 49 CFR 386.14 (hereafter Motion for Default Order).

[3] Respondent erroneously referred to the FMCSA investigator, Gordon McCutcheon, as the Field Administrator.

On February 15, 2008, the Field Administrator for the FMCSA's Eastern Service Center (Claimant) served his Motion for Default Order, in which he argued that Respondent's reply to the NOC was equivalent to a failure to reply because it failed to admit or deny the NOC's allegations and did not provide any affirmative defenses. Consequently, Claimant contended that Respondent is deemed to have admitted the violations and was in default because it did not elect any of the options available to it under these circumstances: (1) paying the full amount of the civil penalty; or (2) seeking binding arbitration in accordance with the Agency's dispute resolution program.

On March 3, 2008, Respondent responded to the Motion for Default Order. Respondent admitted that the driver qualification files reviewed by Mr. McCutcheon did not contain the drivers' driving records (commonly known as MVRs). However, Respondent claimed that these records were maintained but were inadvertently omitted from the driver qualification files given to the investigator. According to Respondent, its former Operations Manager resigned shortly before the compliance review. Its new Operations Manager reorganized the driver qualification files in anticipation of the compliance review but neglected to include all necessary documents in the reorganized files. Respondent claimed that it obtains MVRs four times a year, more frequently than required by FMCSA regulations. It attached copies of MVRs for the four drivers cited in the NOC, all of which were dated between January 15, 2007 and January 3, 2008.[4]

2. *Decision*

Claimant correctly noted that Respondent, in its December 20, 2007 reply to the NOC, did not admit or deny the violations—it simply requested an informal hearing for the purpose of

[4] Respondent provided four MVRs for James Green, four MVRs for Kossi Gnakou, two MVRs for Juan Ramirez and four MVRs for Bradford Thompson. In all four cases, the MVRs were dated within one year of the violations cited in the NOC, which involved transportation occurring in July and August 2007.

presenting documents not given to the investigator at the time of the compliance review. Since it presumably had these documents on December 20, 2007, it should have denied the charges and offered its defense at that time. However, since the charges in the NOC involved the failure to maintain documents, Respondent's offer to present these documents should have put Claimant on notice that Respondent was, in effect, contesting the NOC. Under these circumstances, it may have been prudent for Claimant to contact Respondent to review the documents before filing its Motion for Default Order.

Notwithstanding Respondent's claim that it obtains MVRs four times a year and its submission of supporting documents, it cannot be determined from the record whether Respondent presented a meritorious defense in its March 2008 letter. Respondent was charged with violating 49 CFR 391.51(b)(2), which requires the driver qualification file to include a copy of the response by each State agency concerning a driver's driving record pursuant to § 391.23(a)(1). Section 391.23(a)(1) pertains to inquiries made at the time a driver is hired.[5] Respondent's defense appears to be directed at an unrelated requirement in § 391.25(a) that employers make and retain annual inquiries into the driving records of drivers they already employ. However, it is possible that the documents submitted by Respondent may present a meritorious defense to a § 391.51(b)(2) charge because the NOC did not indicate when either of these four drivers were hired.

Under § 386.16(b)(2), if a respondent requests an informal hearing, the Field Administrator must serve a notice of consent or objection with a basis to the request within 60 days of service of the respondent's reply. Failure to serve an objection within the time allotted

[5] The regulation requires new employers to inquire into the driver's driving record during the three years preceding the date of hire. Such an inquiry must be made of every State in which the driver has been licensed during that three-year period.

may result in the referral of the matter to hearing. Instead of serving a notice of consent or objection to Respondent's request for informal hearing, Claimant filed a Motion for Default Order. His filing of this motion did not extend the deadline for consenting or objecting to the hearing request, which has long since passed.[6] Thus, Claimant should have been on notice that the filing of his Motion for Default Order did not excuse him from serving his consent or objection to Respondent's hearing request on the date required by § 386.16(b)(2).

Even if Claimant's Motion for Default Order were to be considered an objection with basis, I am nonetheless granting the request for informal hearing, since an informal hearing would be useful in resolving the factual issues noted above. Accordingly, Claimant's Motion for Default Order is denied and Respondent's request for an informal hearing is granted.[7] In accordance with 49 CFR 386.16(b)(4)(i)(A), a hearing officer is hereby appointed to preside over this matter.[8] Within 45 days following the conclusion of the informal hearing, the hearing officer will prepare a written report to the Assistant Administrator containing findings of fact and a recommended disposition of the matter, in accordance with 49 CFR 386.61(b).

It Is So Ordered.

Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

7.23.10
Date

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[6] See 49 CFR 386.34(f) ("The pendency of a motion shall not affect any time limits set in these rules unless expressly ordered by the Assistant Administrator or administrative law judge.").

[7] On June 7, 2010, FMCSA published a Notice in the Federal Register stating that it was suspending the informal hearing option for enforcement actions initiated after publication of the Notice pending re-evaluation of the informal hearing procedure (75 FR 32242). The Notice stated that pending requests for informal hearings will still be considered and may be assigned to a hearing officer, as appropriate. *See* 75 FR 32243.

[8] A Notice assigning this matter to a specific hearing officer will be issued shortly.

Docket No. FMCSA-2008-0048

CERTIFICATE OF SERVICE

This is to certify that on this 26 day of July, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

George Reid, Director of Operations Builders FirstSource 5330 Spectrum Drive, Suite L Frederick, MD 21703	One Copy U.S. Mail
Anthony G. Lardieri, Esq. Trial Attorney Office of Chief Counsel (MC-CCE) Federal Motor Carrier Safety Administration 802 Cromwell Park Drive, Suite N Glen Burnie, MD 21061	One Copy U.S. Mail
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