

**UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.**

IN THE MATTER OF

**MORNING FIRST DELIVERY, INC.
(RESPONDENT)**

**DOCKET NO. FMCSA-2008-0090
(Federal Motor Carrier Safety Administration)**

**RESPONDENT'S MOTION TO COMPEL
THE FMCSA TO COMPLETE RESPONSES TO DISCOVERY**

Morning First Delivery Company (hereinafter "Respondent"), by and through its undersigned counsel hereby requests this court to direct the Federal Motor Carrier Safety Administration (hereinafter "FMCSA" or "Agency") to respond completely to each and every Interrogatory and to specific Production of Document Requests, which have been timely served upon the Field Administrator as follows (Attachment A):

- Production of Documents (First) served on August 4, 2008 by email and U.S. Postal Service,
- Second Production of Documents served on September 2, 2008 by email and U.S. Postal Service,
- First Set of Interrogatories served on October 16, 2008 by email and U.S. Postal Service, and
- Request for Admissions served on October 16, 2008 by email and U.S. Postal Service.

On December 17 and 18, 2008, some 30-days past the Court's October 2, 2008 Order, the FMCSA finally submitted its responses to Respondent's First and Second Production requests and First Set of Interrogatories. The Agency's responses were inadequate and incomplete, relying too heavily on "canned" legal responses to justify an Agency's non-

response (See Attachment B). This was disappointing, especially since the Agency was four weeks late in responding.

Based on information and belief, Respondent contends that the Field Administrator knowingly (or should have known) failed to turn over to Respondent written or electronic enforcement communications, studies, reports, federal register notices, enforcement guidelines, Title VI reports, training materials, instructional brochures and other relevant materials in this case. The Agency obviously failed to go beyond producing only materials contained in the enforcement file for Respondent. They ignored any request that would require headquarters' involvement.

The FMCSA's strategies and tactics employed in this case are highly prejudicial in that (1) it denies Respondent essential, relevant information to assess whether the FMCSA in fact complied with constitutional and statutory requirements and implementing regulations in its enforcement action, (2) whether the FMCSA fully complied with Presidential Executive Orders and DOJ/DOT guidelines with respect to limited English proficient individuals, (3) denies Respondent receipt of relevant and material information necessary for preparation of dispositive motions by January 16th, and (4) prohibits Respondent from effectively preparing for the February 19, 2008 hearing, if one is necessary.

Consequently, Respondent seeks from this court an Order compelling the Agency to fully and completely respond to specific Production Requests and Interrogatories identified below by a specific date. Respondent believes there is no need for this court to compel the Agency to respond to Admissions because pursuant to 49 CFR §386.44(a)(2), the Field Administrator's failure to respond to each Admission within 15 days after service of Respondent's request results in each admission being deemed admitted.

BACKGROUND:

On December 18, 2007, the North Carolina Division Administrator issued a Notice of Claim to Respondent for one violation of 49 CFR §391.11(b)(2) and 391.11(a)—requiring or permitting a driver that is unable to read and/or speak the English language to operate a commercial motor vehicle after being declared out-of-service and one violation of 49 CFR §382.115(a)—Failing to implement an alcohol and/or controlled substance

testing program. The Notice of Claim assessed a civil penalty against Respondent for \$12,130.00 for these alleged violations (See Attachment C).

On June 9, 2008, the FMCSA Assistant Administrator, pursuant to 49 CFR §386.54, appointed an Administrative Law Judge of the Department of Transportation to “preside over this matter and render a decision on all issues, including the civil penalty, if any to be imposed.” (Emphasis added).

ABOUT MORNING FIRST DELIVERY, INC.

Morning First Delivery (Respondent) is a regulated interstate motor carrier (DOT # 825292) and as such is subject to the DOT/FMCSA’s regulatory oversight. The Company’s principle place of business is in Greensboro, NC. At the time of the FMCSA compliance review (“CR”, October 25, 2007), Respondent had 7 power units and 10 drivers. Because of the GVWR of the Respondent’s power units (less than 26,001 pounds), drivers were not required to have a Commercial Driver’s License (CDL). However, during the CR, FMCSA’s investigator documented that two drivers in fact had their CDL.

Respondent provides transportation services of food products and supplies to Chinese restaurants predominately in the Southeast. Drivers are bilingual because of the need to communicate with Chinese restaurant owners and staff. Respondent has taken reasonable steps to ensure that its drivers can meet the English requirements in 49 CFR §391.11(b)(2), promulgated in 1970s.¹

Because of subjective, arbitrary, and uneven enforcement criteria and methods, the FMCSA and several of its grant recipients have caused Respondent and its drivers to suffer unnecessarily from discriminatory disparate impact beyond legitimate public need and purpose. The

¹ (a) A person shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle. ... a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless that person is qualified to drive a commercial motor vehicle.

(b) ... a person is qualified to drive a motor vehicle if he/she —

(b)(2) Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records;

discriminatory effect is rooted in “national origin” and/or from “limited English proficiency (LEP)” all in violation of Title VI and Title VII of the Civil Rights Act of 1964.

ISSUES IN THE CASE:

From Respondent’s perspective, the following issues are ripe for administrative judicial resolution in this case:

- Whether FMCSA’s regulation (49 CFR §391.11(b)(2) and corresponding enforcement policies, procedures, and practices have an improper national origin discriminatory impact upon Respondent and its drivers and other ethnic minorities who have limited English proficiency in violation of Title VI of the Civil Rights Act of 1964, 42 USC § 2000d.
- Whether the FMCSA has knowingly failed to fully comply with Executive Order 13166 and 13216, Department of Justice, and Department of Transportation’s rules and guidance concerning non-discrimination based on national origin and/or limited English proficiency, and thereby has denied Respondent, its drivers, and other ethnic minorities access or meaningful participation in transportation activities and programs of the Department/Agency.
- Whether FMCSA knowingly (or should of known) required or permitted its recipients of federal financial assistance (MCSAP States, CVSA, and others) to discriminate against Respondent, its drivers and other ethnic minorities based on national origin and/or limited English proficiency by failing to monitor and enforce Title VI requirements.
- Whether FMCSA and/or its recipients of federal financial assistance through their enforcement policies, criteria, and methods have substantively changed the legal and regulatory requirement of 49 CFR §391.11(b)(2) to a standard of English only fluency and by allowing a violation of 392.11(b)(2) to be an “out or service” item without completing APA notice and comment rulemaking in violation of 5 USC §553 and §706 and case law precedent.
- Whether FMCSA and/or its recipients of federal financial assistance through their enforcement policies, procedures, criteria, and methods

- are subjectively and arbitrarily enforcing 49 CFR §391.11(b)(2) against Respondent and its drivers and other ethnic minorities in a manner not precisely tailored to serve the public's legitimate highway safety interests.
- Whether FMCSA and/or its recipients of federal financial assistance are applying an arbitrary and/or capricious enforcement standard against Respondent, its drivers and other ethnic minorities that is discriminatory and more exclusive than the standard of enforcement employed under the FMCSA's Mexican Border Demonstration Program.
 - Whether the FMCSA erred by using its Uniform Fine Assessment Model (UFA) that was not promulgated through APA notice and comment rulemaking and whether the Agency correctly applied the UFA algorithm to determine civil penalties for alleged violations of 49 CFR §391.11(b)(2) and 391.11(a) and 382.115(a).
 - Whether FMCSA has met its burden of proof necessary to establish a violation of 49 CFR §391.11(b)(2) or 49 CFR §382.305 in light of the Agency's failure to timely respond to Respondent's Admissions, which are deemed admitted by operation of 49 CFR § 386.44(a)(2).

JUSTIFICATION FOR ORDER TO COMPEL

TITLE VI Compliance and Enforcement Requirements:

Section 601 of Title VI of the Civil Rights Act of 1964, 42 USC §2000d, provides that no person shall “on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Section 602 authorizes and directs Federal agencies that are empowered to extend Federal financial assistance to any program or activity “to effectuate the provisions of [section 601] * * * by issuing rules, regulations, or orders of general applicability.” 42 USC §2000d-1.

Department of Justice regulations promulgated pursuant to section 602 forbid recipients from “utilize[ing] criteria or methods of administration

which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as to individuals of a particular race, color, or national origin.” 28 CFR 42.104(b)(2). Further, the Supreme Court, in *Lau v. Nichols*, 414 U.S. 563 (1974), held that Title VI prohibits conduct that has a disproportionate effect on limited English proficiency (LEP) persons because such conduct constitutes national origin discrimination (*see also* 65 FR 50123, August 16, 2000).

On August 11, 2000, Executive Order 13166 was issued. “Improving Access to Services for Persons with Limited English Proficiency,” 65 FR 50121 (August 16, 2000). Under that order, every Federal agency that provides financial assistance to non-Federal entities must publish guidance on how their recipients can provide meaningful access to LEP persons and thus comply with Title VI regulations forbidding funding recipients from “restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program” or from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.” *See Cannon v. University of Chicago*, 441 U.S. 677, 704 & n. 36 (1979). Title VI is the model for Section 504 Of the Rehabilitation Act of 1973, 29 USC §794, and Title IX, and case law interpreting one statute is relied upon in interpretations of the other statutes. *United States Dep’t. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 n. 4 (1986).

The Department of Transportation (“DOT), of which the FMCSA is a part, has promulgated regulations to effectuate and enforce Title VI *See* 42 USC §2000d-1; 49 CFR Part 21 (DOT regulations); (49 CFR Part 303, FMCSA regulations). Without question, the FMCSA is subject to Title VI, including each of its recipients of federal funding. Respondent argues that the FMCSA has turned a blind eye towards its grant recipients’ compliance and enforcement of Title VI by failing to monitor and control its own enforcement and that of its grant recipients.

With respect to 49 CFR §391.11(b)(2), Respondent contends that the FMCSA has required or permitted federal and state enforcement inspectors to enforce subjective and arbitrary criteria and methods during completion of compliance reviews and during roadside inspections. This arbitrary enforcement has had a disparate effect on Respondent, its drivers, and other ethnic minorities engaged in interstate commerce, and is beyond serving a legitimate highway safety public interest.

For example, it is perplexing why the FMCSA has allowed the Commercial Vehicle Safety Alliance (CVSA)², a State enforcement association, to develop and enforce an English only proficiency standard promoted through use of federal funding and outside of rulemaking that is sideways with constitutional and statutory protected rights of Respondent, its drivers and other ethnic minorities engaged in interstate commerce by motor vehicle. *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F. 3d 1030 (D.C. Cir. 1999)(holding an Agency must use notice and comment rulemaking to change regulatory interpretations that have hardened into “Administrative common law”.)

Accordingly, the relevancy of Respondent’s discovery is evident. Put plainly, Respondent is entitled to obtain the requested documents, statistics, and information pertinent to FMCSA’s Title VI compliance, including compliance by its recipients receiving of federal motor carrier funding assistance. The FMCSA, as a federal agency, is held to a high public purpose and, consequently, it must be held accountable for its public actions or omissions in the public arena.

The Field Administrator improperly attempts to shield the FMCSA from release of any embarrassing or “telling” documents through “canned” legal responses to Respondent’s discovery. The FMCSA is not above the law and must be compelled to disclose information that shows compliance with the law.

² Commercial Vehicle Safety Alliance is an international safety organization representing highway safety enforcement agencies in the United states, Canada, and Mexico dedicated to reducing commercial motor vehicle involvement in highway crashes.

Compliance with E. O's., DOJ, DOT/LEP Guidance

On June 7, 1999, President Clinton signed Executive Order 13125 (and 13216) entitled “Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs. President Bush has extended the President’s Advisory Commission on Asian Americans and Pacific Islanders for several years.

On August 11, 2000, President Clinton signed Executive Order 13166 entitled “Improving Access to Services for Persons with Limited English Proficiency.” 65 FR 50121 (September 16 2000). On the same day, the Assistant Attorney General for Civil Rights issued a Policy Guidance document entitled “Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency (DOJ/LEP). 65 FR 50123 (September 16 2000).

Executive Oder 13166 requires Federal departments and agencies extending financial assistance to develop and make guidance available on how recipients should assess and address the needs of otherwise eligible LEP persons seeking access to the program and activities of recipients of federal financial assistance. DOJ/LEP guidance in turn provides general guidance on how recipients can ensure compliance with their Title VI obligation to “take reasonable steps to ensure ‘meaningful’ access to the information and services they provide.” DOJ/LEP 65 FR at 50124.

The Department of Transportation (DOT) published its initial guidance to recipients on January 21, 2001. On December 14, 2005, the DOT issued revised guidance that became effective immediately (70 FR 74087). In DOJ and DOT guidance documents, both Departments recognized that language for LEP individuals can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information provided by federally funded programs and activities 70 FR at 74089. The FMCSA has yet to turn over any documents that suggest that it complied with any of these obligations.

Following an American Civil Liberties Union legal challenge to an Advanced Notice of Proposed Rulemaking (ANPRM) published in 1997, proposing a change to 49 CFR §391.11(b)(2), the FMCSA withdrew its ANPRM on July 24, 2004 (68 FR 43889) stating that “the information

introduced in response to the advanced notice ‘does not establish that the current regulation requires an unnecessarily high level of English fluency that has resulted in a discriminatory impact or effect based upon national origin, color or ethnicity’.” 68 FR 43890. The FMCSA further determined that the regulation (49 CFR §391.11(b)(2)) “as written and properly enforced effectively balances issues of civil rights and highway safety.” *Id.*, (*see also* 70 FR 74089, December 14, 2005). Yes, a reasonable conclusion through notice and comment rulemaking. However, due to increased pressure from the Congress, the DOT Inspector General, border states, safety advocate groups and others over NAFTA and the Mexican Demonstration Program, the FMCSA has knowingly and improperly changed its enforcement scheme (that has been in place since the 1970s) for 49 CFR §391.11(b)(2) and is now enforcing to a significantly higher and substantively different English proficiency standard. The FMCSA has required or permitted the Commercial Vehicle Safety Alliance (CVSA) to enforce an English only standard under its North American Inspection criteria that has a discriminatory effect against Respondent, its drivers.

This sudden unexplained shift (absent APA Notice and Comment Rulemaking) has skewed the balance of civil rights to highway safety to the discriminatory side because of subjective, arbitrary, and heavy handed enforcement. The tipping point is the out-of-service placement of Respondent’s drivers, and other ethnic minority drivers, which has harsh disparate effect impacts contrary to national origin and limited English proficiency safeguards.

In light of the above, Respondent is entitled to have discovery documents from the FMCSA that proves its compliance with Title VI, Presidential Executive Orders, DOJ and DOT guidance materials as to LEP individuals such as Respondent and its drivers who choose to engage in interstate commerce by commercial motor vehicle.

Analysis of FMCSA’s Discovery Response to Date First Set of Interrogatories:

On October 16, 2008, Respondent served upon the Field Administrator its First Set of Interrogatories comprised of seven questions. The FMCSA Field Administrator chose not to answer any of the seven interrogatories. Rather, he objected to each interrogatory on the basis that “it seeks information not relevant to this claim, not reasonably calculated to

lead to the discovery of relevant information.” This strains credibility, especially in light of FMCSA’s statutory and regulatory duty not to discriminate and to prevent its recipients of federal funding from discriminating against Respondent, its drivers, and other ethnic minorities based on national origin and/or limited English proficiency.

Despite this statutory obligation, the Field Administrator treats this case myopically that is “did you (Respondent) do the crime or not”. Thus, the Agency attempts to shields itself from having to respond to any meaningful discovery or public disclosure of any kind, except to the narrow issue and release of the enforcement case file. However, the law and the public interest demands much more that is federal openness, public scrutiny, and federal official’s responsibility and accountability.

Put plainly, the Field Administrator initiated this enforcement action. On its face, it appears to be a simple cut and dry case, but it is far from that. Respondent asserts that it has been and is continuing to be unlawfully treated because of subjective “hot and cold” enforcement without any way anticipate or cure other than to hire English only speaking drivers. The law and regulations do not require this harsh outcome or forced hiring practice. As a result, Respondent is willing to fight this matter judicially until resolved to preserve its rights. Respondent believes it is entitled to legitimate responses to its discovery requests in light of Title VI statutory and regulatory compliance importance and therefore respectfully requests this court to grant its Motion to Compel as below requested.

First Request for Production of Documents

On August 4, 2008, Respondent served upon the Field Administrator its First Request for Production of Documents comprised of sixteen requests. Respondent seeks an order from this court compelling the Agency to fully and completely respond to the following:

Request #6, #12, #13: The Field Administrator’s response is insufficient. Surely, the Agency has developed training materials, instructional materials, and enforcement policies to ensure that federal and state grant roadside inspectors fairly, objectively, uniformly, and non-discriminatorily enforce 49 CFR § 391.11(b)(2) at the roadside and during compliance reviews, particularly with respect to limited English proficient interstate drivers operating in the United States. If the Agency has prepared none of these

documents other than the July 20, 2007 memorandum, Respondent would be satisfied with such an admission. Otherwise Respondent seeks an order to compel production.

Request #14 and #15: The Field Administrator objects contending these requests are overly broad, burdensome, and not relevant. Respondent contends that they are relevant because of the Department and Agency's continuing obligations under Title VI and implementing regulations. If the FMCSA has no policies, procedures information or documentation of Title VI monitoring, compliance, or enforcement, Respondent would be satisfied with such an admission. Otherwise Respondent seeks an order to compel production.

Request # 16: The Field Administrator again objects for the same grounds as stated above. Based on information and belief, the Agency or its contractors at the Volpe center capture this information in the normal course of business. Respondent asks only information pertinent to 391.11(b)(2) and for five years preceding the January 15, 2008 Notice of Claim. This is a reasonable request and is calculated to show the date and significance of English language enforcement before and after the FMCSA's July 20, 2007 policy memorandum and before and after release of CVSA's enforcement guidance concerning NAFTA. Therefore, Respondent seeks an order to compel production relevant disclosure.

Second Request for Production of Documents

On September 2, 2008, Respondent served upon the Field Administrator its Second Request for Production of Documents comprised of 22 requests. Respondent seeks an order from this court compelling the Agency to fully and completely respond to the following:

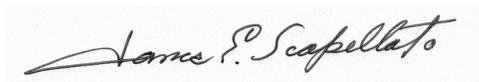
Request #1 through #11 and #14 through #22: The Field Administrator objects contending these requests are overly broad, burdensome, and not relevant. Respondent contends that they are relevant because of the Department/Agency's continuing obligations under Title VI and implementing regulations.

In sum, Respondent contends that the FMCSA has done very little, if anything with respect to Title VI compliance monitoring and enforcement, especially with regard to State grant recipients under the Motor Carrier

Safety Assistance Program. Because of the Agency's alleged unlawful action and/or omission with respect to Title VI, grant states are free to implement arbitrary and subjective roadside inspection program that results in a disparate effect against Respondent and its LEP drivers without recourse or assistance. Further, based on information and belief, Respondent believes there is no reliable study that proves that non-English speaking or limited English proficient drivers pose a greater highway safety risk than English speaking drivers. The FMCSA concluded as much in its withdraw notice of the ANPRM discussed above. Therefore, what is the compelling legitimate safety reason for heightened enforcement on Asian drivers that justifies the continuing discriminatory disparate impact on Respondent and its drivers?

Respondent is entitled to see documentation of the FMCSA's compliance with Title VI and that of its grant recipients because of the adverse affect it is being subject to. Several grant states put Respondent's driver out-of-service on one day and then turn around and pass them on another day. It is reasonable for Respondent to have disclosure of what documentation the Agency uses to single out Respondent, its drivers and others for enforcement of English fluency in absence of a rulemaking change to the current standard and the legitimate public safety interest that is being served by its discriminatory acts. Therefore, Respondent seeks an order to compel production.

Respectfully submitted this 30th day of December, 2008.



James E. Scapellato
Attorney for Respondent
Morning First Delivery, Inc.

CERTIFICATE OF SERVICE

FMCSA-2008-0090

This is to certify that on December 30, 2008, that the undersigned mailed a copy of Morning First Delivery's Opposition to Field Administrator's 386.44(b) Motion to Amend Admissions to the individuals listed below:

U.S. Department of Transportation
Docket Operations, M-30
West Building Ground Floor
Room W12-140
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

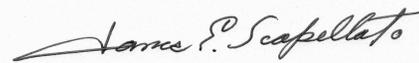
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Office of Hearings, M-20
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