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January 5, 2009

Assistant Administrator
U.S. DOT Dockets
400 7th Street, S.W.
Room PI-401
Washington, D.C. 20590

**Re: Midwest Crane and Rigging, Inc.
Case No. KS-2008-0086-USO0750**

To Whom it May Concern:

Enclosed please find Midwest Crane & Rigging, LLC's Amended Response to Notice of Claim in the above captioned matter. I ask that you please return file stamped copies to my office in the self-addressed, postage pre-paid envelope enclosed. Should you have any questions, please do not hesitate to contact me.

Sincerely,

HOLBROOK & OSBORN, P.A.

By: Kurt S. Brack

KSB:acI
Enclosures

ARGUMENTS AND AUTHORITIES

Midwest Crane & Rigging, L.L.C. was formed on June 16, 2008. (Exhibit A) The violations for which the Department seeks to assess a fine occurred on February 18, 2008 and March 19, 2008, respectively. Logically, a business entity that has not come into existence cannot violate the Department's regulations. The Department should immediately withdraw its Notice of Claim.

The Department's jurisdiction extends to cover private motor carriers, which are defined as "a person who provides transportation of property or passengers, by commercial motor vehicle, and is not a for-hire motor carrier." 49 C.F.R. § 390.5. A commercial motor vehicle, in turn, is defined as "any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle --

1. Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater; or
2. Is designed or used to transport more than 8 passengers (including the driver) for compensation; or
3. Is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or
4. Is used in transporting material found by the Secretary of Transportation to be hazardous under 49 U.S.C. § 5103 and transported in a quantity requiring placarding under regulations prescribed by the Secretary under 49 C.F.R., Subtitle B, Chapter I, Subchapter C."

Midwest Crane is not a private motor carrier and its vehicles are not "commercial motor vehicles" because they do not transport passengers or property. Accordingly, the Department has no authority to proceed against Midwest Crane in this matter and the Notice of Claim should be

dismissed.

Midwest Crane solely uses its vehicles on job sites and does not transport goods or materials from job site to job site. Further, Midwest Crane does not transport passengers in its vehicles. According to the plain language used in the regulation, the vehicle itself must be used to transport persons or property to meet the definition of a “commercial motor vehicle.” Logically, the vehicle itself cannot be considered “property.” Midwest Crane’s vehicles are not used for the purpose of transporting themselves. To interpret the regulation in a manner to define the vehicle itself as “property” would have the effect of inserting a meaning that Congress could not have intended.

CONCLUSION

The business entity against whom this Notice of Claim and Civil Penalty are brought, Midwest Crane & Rigging, L.L.C. was not in existence at the time of the alleged violations. Further, it is not a “private motor carrier” subject to the Department’s regulations. Finally, the alleged violations are exaggerated and the accompanying fines are excessive.

Midwest Crane & Rigging, L.L.C. respectfully asks the Department to dismiss this Notice of Claim and retract the civil penalty.

Respectfully Submitted

HOLBROOK & OSBORN, P.A.

By:



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ATTORNEYS FOR MIDWEST CRANE &
RIGGING, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been mailed,

postage prepaid, this 5th day of January 2009, to:

Max Strathman
Division Administrator
US Department of Transportation
Federal Motor Carrier Safety Administration
1303 S.W. First American Place
Topeka, KS 66604

U.S. Department of Transportation
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FMCSA Docket Clerk
Midwestern Service Center
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Kurt S. Brack