



U.S. Department
Of Transportation
Federal Motor Carrier
Safety Administration

Memorandum

CONFIDENTIAL

Subject: **WSC Draft Guidance**
Evidence Collection - Reincarnating Carriers

Date: March 22, 2005

From: Nancy Jackson, Trial Attorney
Through: David Martin, Field Administrator
Kent Fleming, Director, Western Service Center

To: WSC Division Administrators

NOTICE

This memorandum constitutes a privileged Attorney-Client communication and contains Attorney Work Product prepared in anticipation of litigation. This Memorandum is confidential and intended only for use by the designated recipients.

This memorandum is intended to provide initial guidance to WSC Divisions on the investigation and documentation of cases involving reincarnating/morphing carriers. It is anticipated this guidance will change as our knowledge in this area increases.

Background

In reviewing the history of actions involving out of service orders for Unsat carriers and carriers ordered to cease operations for failure to pay civil penalties, it has become clear a significant number of these carriers are reincarnating or morphing into new business entities, and continuing to operate. Various WSC Divisions have expressed concern regarding the increasing number of these situations, and requested assistance in investigating these cases, and potentially enforcing the out of service orders against the “new” carrier entity.

Legal Issues

In essence we will be asking to disregard a corporate or business entity created under statute, and hold a second company liable for the acts of the predecessor. This type of legal action is normally not favored under the law, and is only available in specific circumstances.

In general, most federal courts have held that law applied in these situations is governed by law of the state where the corporation does business and where the violations occurred. The test for determining whether one entity is really the alter ego or continuation of a prior corporation and should be held accountable for the actions and violations of the prior corporation varies among the states, as does the test for determining whether the new corporation was created for a fraudulent purpose. Courts may disregard the corporate entity in order to prevent fraud or unfairness, or where recognizing the corporate entity would present an obstacle to the protection of private rights, or where it is necessary to prevent purveyors of fraud and injustice from hiding behind the corporate form of organization.

The traditional rule of successor liability holds that a corporation which acquires the assets of another corporation will not be held responsible for the predecessor company's liabilities unless: (1) there is an express or implied assumption of liability; (2) the transaction amounts to a consolidation or merger; (3) the acquiring company is a mere continuation of the predecessor; or (4) the transaction was lacking in good faith or for a fraudulent purpose. Some States, have expanded "mere continuation" to include the "substantial continuity" or "continuity of enterprises" doctrine which attaches liability to the successor company if it: (a) retains the same employees; (b) retains the same supervisory personnel; (c) retains the same production facilities in the same location; (d) continues producing the same products; (e) retains the same name; (f) maintains continuity of assets and general business operations; and (g) holds itself out to the public as a continuation of the previous corporation.

This issue has been reviewed in a prior FMCSA case; two other cases involving similar issues are currently pending. In the one decided case, the Assistant Administrator, applying the above-discussed criteria found substantial continuity between the current Allometrics and the Louisiana corporation that previously operated under that name. The factors specifically reviewed and found important in this case included 1) the corporate principal transferred the assets and personnel of the old company to the new company, which he continues to run as President; 2) the new company operated out of the same Louisiana location as the old company, using the same name and carrying on the same commercial activities; 3) although the new company held itself out to DOT as a different entity, the public would clearly have viewed the new company as a continuation of the previous corporation. The Assistant Administrator held "to permit [the company] to escape liability under these circumstances would exalt form over substance and would frustrate the effective enforcement of the hazardous materials regulations by encouraging companies to avoid their legal obligations through cosmetic corporate changes." In the Matter of Allometrics, Inc., Docket No. FHWA-1997-2488-7 (Final Order, March 10, 2003).

Guidance

In most cases we will be arguing that the second company is a mere continuation of the predecessor, and that the second company was created for the fraudulent purpose of avoiding the liabilities of the predecessor, including FMCSA OOS orders. In some cases, we may be able to assert liability against individuals. The strong presumption under the law is against holding the successor company liable. Because it is presumed that a second corporation acquiring the assets of a previous corporation is not responsible for the debts or actions of the previous corporation,

as the party seeking to “pierce the corporate veil”, we will have the burden to establish that the second company is essentially an alter ego of the individual officer(s) or another business entity. Determinations are highly fact specific, and cases involving reincarnating carriers are extremely resource intensive, both for the investigators and the service center.

In general, at a minimum, we must document two essential areas of evidence:

1. Continuity of ownership and control. The predecessor company and the new company are owned and/or controlled by the same individuals. There is case law in some states indicating, in some cases, we may have an argument where the new company has shareholders and/or officers which are close relatives of the owners or officers of the predecessor company where the relative is essentially an officer in “name only”, and the corporation remains under the same ownership and control.
2. Continuity of assets and business practices. The successor company acquired all or nearly all of the assets of the predecessor, and that the successor company did not pay adequate consideration, i.e. the fair market price, for the assets. Assets include tangibles such as trucks, equipment, property, location and buildings as well as intangibles such as customers, routes, etc. The more similarities the new company has of the predecessor, the stronger the argument becomes. It is essential to attempt to document the transfer of assets and what payment or consideration was given to acquire the assets.

It is also important if we can show that the individuals have disregarded the formalities of the corporate entity, and the corporation is essentially a shell or an alter ego of the individual(s) or another business entity.

Attached to this memorandum is a worksheet to assist the Divisions in investigating and documenting these cases. It is not anticipated that any investigation can answer all of the questions or provide all of the documents discussed, and no worksheet can encompass all of the situations and circumstances which will be encountered. The worksheet is intended only as a roadmap for an investigation. The more information we have, and the more connections we can demonstrate, the stronger our argument becomes.

Investigations and Enforcement Cases

Investigations and enforcement conducted on reincarnating carriers, like any other investigation, should be conducted in accordance with the FMCSA FOTM and all applicable policies and authorities. The information discussed in this memorandum is in addition to the requirements for documenting violations of the FMCSRs. At this time, no additional statutory or regulatory authorities exist for these cases.

In all cases where enforcement is sought, a FOTM-approved penalty assessment worksheet or UFA must be prepared for each violation cited in the Notice of Claim. Recent decisions indicate the Assistant Administrator is taking a much closer look at penalty calculations, and the specific factors used by the Field Administrator in determining the assessed penalty. Penalties

assessments for all violations must consider the nine statutory factors under 49 U.S.C. 521. OOS violations cannot automatically be assessed a maximum statutory penalty. Where the Division believes penalties outside of the recommended range are appropriate, there must be documentation submitted supporting the assessed penalty, the justification for going outside of the range, and clear consideration of the nine statutory factors.

Contact with the Service Center

In all cases where the Division believes a carrier is a reincarnation of an unfit or OOS carrier and wants to pursue enforcement action or enforcement of the OOS against the second carrier, the WSC requests the Division contact the WSC Trial Attorney as early in the investigation as possible, and continue contact throughout the investigation. We will attempt to assist your investigators in determining what information and evidence to collect, and other potential sources of information during the ongoing investigation. Additionally, the attorneys have access to databases which may be able to assist your investigators in finding individuals and companies, and corporate identities and records.

Before any Notice of Claim is issued, the Division should forward the case, and the evidence, to the WSC Trial Attorney for review. It is essential the Attorneys have an opportunity to review the evidence and determine the sufficiency of the case with regard to the issues of successor liability. Additionally, the attorneys will need to make determinations regarding the specifics of charging. If maximum penalties are being sought, the Notice of Claim should be reviewed by the WSC and signed by the Field Administrator.

Identify Carriers: ***We are attempting to show the two business entities are owned and controlled by the same individual(s). Continuity of ownership and control are critical elements of proof.

Carrier 1:

Name:

Address:

Business Owner(s) / Officers(s):

Who signed corporate documents?

Carrier 2:

Name:

Address:

Business Owner(s) / Officer(s):

Describe any relationship between the business owner(s) and/or directors of Carrier 1 and Carrier 2: (i.e. spouse, parent, child, sibling, etc.):

Describe any role and/or position owner(s), directors, and/or managers of Carrier 1 have with Carrier 2:

Who is signing corporate documents?

Information to attach (for each carrier entity)

- Corporate / Business filings with the Secretary of State (articles of incorporation, fictitious business name statements, amendments, reports, etc.)
- List of Corporate / Business Owners (if corporation – shareholders)
- List of Corporate / Business Officers / Managers / Partners
- List of Employees with Job Titles

History and Timeline: ***We are attempting to document that the new corporation was created to avoid the liability of an out-of-service action, poor enforcement history, or some other liability.

Carrier 1

List any previous business entities:

Date Carrier 1 ceased operation:

List prior compliance reviews and ratings: (by date)

List prior unsat out of service orders: (by date)

List prior failure to pay orders to cease interstate operation: (by date)

Carrier 2

Date of incorporation / establishment of business entity:

New Entrant Date:

Interview with business owner / director:

When was carrier 2 established?

Why was carrier 2 established?

What persons were involved in the establishment of carrier 2?

Information to attach

- Copies of prior CR reports for Carrier 1
- Copies of prior CR or SA reports for Carrier 2
- Copies of prior unsat out of service orders with documentation of service for Carrier 1
- Copies of prior failure to pay orders to cease interstate operation with documentation of service for Carrier 1
- Copies of requests for upgrade of safety rating based on corrective action for Carrier 1
- Copies of application for authority for Carrier 1 with form of payment (if available)
- Copies of MCS 150 for Carrier 1
- Copies of application for authority for Carrier 2 with form of payment (if available)
- Copies of MCS-150 for Carrier 2

Assets: ***We are attempting to show the new corporation acquired the assets of the predecessor corporation without paying adequate (or any) compensation. Lack of fair market compensation is a critical element of proof.

Carrier 1

Identify assets owned / leased (vehicles, office equipment, etc.):

If assets were leased, how was the lease terminated?

Are there corporate records showing the lease / sale / return of assets upon ceasing operation:

Were depreciations taken on the assets on tax returns?

Was a bankruptcy filed?

Carrier 2

Are there any formal agreements and/or contracts between Carrier 1 and Carrier 2?

Identify assets owned / leased (vehicles, office equipment, etc.)

How were the assets acquired? Were they acquired from Carrier 1?

Are there any documents showing purchase or any lease agreements for the assets ?

Identify (and copy) any compensation or payment given in order to acquire the assets

Are depreciations for the assets of Carrier 1 being taken on tax returns for Carrier 2?

What name / USDOT number are displayed on trucks / trailers?

Are any vehicles still displaying name/USDOT number of Carrier 1?

Did Carrier 1 transfer its customer base to Carrier 2? Did Carrier 2 pay or compensate Carrier 1 for the customer base?

Potential information to gather and attach

- List of drivers for Carrier 1
- List of drivers for Carrier 2
- List of vehicles and copies of vehicle registrations for Carrier 1
- List of vehicles and copies of vehicle registrations for Carrier 2
- Copies of applications / documents filed with the State for vehicle registration
- Copies of vehicle purchase and/or lease agreements for Carrier 1
- Copies of vehicle purchase and/or lease agreements for Carrier 2
- Latest tax return for Carrier 1 (showing assets and depreciation)
- First and latest tax returns for Carrier 2 (showing assets and depreciation)
- Correspondence with owners of equipment leased by Carrier 1 or Carrier 2
- Copies of equipment purchase and/or lease agreements for Carrier 1
- Copies of equipment purchase and/ lease agreements for Carrier 2
- Copies of any records or documents showing payment for the assets acquired by Carrier 2
- Copies of any formal agreements and/or contracts between Carrier 1 and Carrier 2

Business Practices: ***We are attempting to document that the new corporation is simply a mere continuation of the predecessor. The more similarities, the stronger the argument.

Carrier 1

Telephone numbers:

Phone book listings and advertising (are these numbers now answered by, or transferred to, Carrier 2):

Primary business contact for customers / shippers:

Primary contact for regulatory officials:

Primary individual responsible for safety and compliance with FMCSRs:

Where are Carrier 1's records (required by FMCSRs) maintained?

Who has access to those records?

Have those records been transferred to Carrier 2?

Does Carrier 2 have access to those records?

**Did Carrier 1 continue to pay bills / payroll after ceasing operations?
And / or after Carrier 2 began operations?**

**Did Carrier 1 continue to pay employees (payroll) after the employees
began working for Carrier 2?**

Carrier 2

Telephone numbers:

How is telephone answered:

Phone book listings and advertising (are they still advertising as Carrier 1):

Primary business contact for customers / shippers:

Primary contact for regulatory officials:

Primary individual responsible for safety and compliance with FMCSRs:

Individual with authority to sign corporate documents:

How are employees being paid?

Individual(s) with authority to pay accounts and/or payroll:

**Do company records / documents from Carrier 2 show signatures from
company officials from Carrier 1:**

Is the new company using any documents of the predecessor as documentation of compliance with the FMCSRs (employee drug/alcohol testing, DQ files, dvir, records of duty status, training records, etc.):

Is the consortium used the same as the predecessor?

What information / documents have been provided to the consortium:

Is Carrier 1 still showing as obligated party on bills for services used by Carrier 2 (comdata, telephone bill, utilities, etc.)?

Has Carrier 2 paid any bills for services provided to Carrier 1?

Does Carrier 2 paperwork (logs, invoices, trip sheets, etc.) show Carrier 1?

Is Carrier 2 regulated by any other government agencies (Federal, State, Local)?

Are other government agencies still showing Carrier 1 as the operating entity?

Potential information to gather and attach

- Copies of telephone book listings and/or advertising (trade magazines, specialty publications)
- List of Employees and Job Titles / Responsibilities for Carrier 1 (particularly noting managers, supervisors, employees responsible for safety management / compliance, and employees in safety sensitive positions) (payroll records if applicable)
- List of Employees and Job Titles / Responsibilities for Carrier 2 (particularly noting managers, supervisors, employees responsible for safety management / compliance, and employees in safety sensitive positions) (payroll records if applicable)
- Copy of telephone book listing and/or advertising (trade magazines, specialty publications)

- Consortium random driver pool list for Carrier 1
- Consortium random driver pool list for Carrier 2
- Copies of correspondence to the consortium
- Copies of any records of Carrier 1 used by Carrier 2 to demonstrate compliance with the FMCSRs
- Copies of office bills for Carrier 2 (telephone, utilities, etc.) showing Carrier 1 as the obligated party
- Comdata reports
- Files / Permits / Licenses / Applications from other government agencies

Shippers / Customers
<p>Carrier 1</p> <p>Were customers given any type of notice when Carrier 1 ceased operation?</p> <p>Are there invoices for Carrier 1 showing transportation services by Carrier 2?</p> <p>Are there invoices for Carrier 2 showing transportation services by Carrier 1?</p>
<p>Carrier 2</p> <p>Is Carrier 2 providing transportation services to the same customers as Carrier 1?</p> <p>Did the customers receive any type of notification that transportation services would be provided by Carrier 2?</p> <p>Is Carrier 2 fulfilling contract obligations for transportation services for Carrier 1?</p> <p>Did Carrier 2 establish new contracts with shippers?</p>

Who is actually providing transportation?

Who are customers paying?

Have payments been received for transportation services provided by Carrier 1

Potential information to gather and attach

- Copies of any written notice or correspondence with customers/shippers related to Carrier 1 ceasing operations and/or Carrier 2 assuming operations
- Copies of any contracts being serviced by Carrier 2 signed by Carrier 1 and/or pre-dating the existence of Carrier 2
- Copies of any payments made to Carrier 1 after it ceased operation and/or for services performed by Carrier 2
- Copies of trip packets for invoices for Carrier 1 where the transportation was completed by Carrier 2
- Copies of trip packets for invoices for Carrier 2 where the transportation was completed by Carrier 1

Insurance

Carrier 1

Identify insurance provider and dates of coverage

Obtain list of vehicles and/or equipment insured

Carrier 2

Identify insurance provider and dates of coverage

Obtain list of vehicles and/or equipment insured

Obtain copies of insurance certificates and/or policies

Potential information to gather and attach (for each carrier)

- Copies of insured vehicles / equipment
- Copies of insurance certificates and/or policies

Corporate Formalities and Records: ***We are attempting to document that individuals have disregarded the formalities and role of the corporation, and that the corporation is merely a shell or alter ego for the individuals or another business entity.

Carrier 1

- Are there copies of minutes of corporate meetings?**
- Has the carrier filed any documents dissolving the corporation with the State?**
- Are there copies of any reports to shareholders?**
- Are there records showing the corporation paying debts of the individual officers?**
- Are there records showing individual officers personally paying (or becoming indebted for) the obligations or debts of the corporation?**

Carrier 2

- Are there copies of minutes of corporate meetings?**
- Are there documents showing the acquisition of assts?**
- Are there documents showing the capitalization of the corporation?**
- Are there copies of any reports to shareholders**
- Are there records showing the corporation paying debts of the individual officers?**
- Are there records showing individual officers personally paying (or becoming indebted for) the obligations or debts of the corporation?**

Potential information to gather and attach

- Copies of corporate meetings for Carrier 1
- Copies of corporate meetings for Carrier 2
- Copies of documents filed with the Secretary of State for Carrier 1
- Copies of documents filed with the Secretary of State for Carrier 2
- Copies of shareholder reports for Carrier 1
- Copies of shareholder reports for Carrier 2

List of Questions to Consider

1. When was the new company created? How is the timing of the new company related to the predecessor company violations, OOS orders, and/or safestat scores?

Company Information

2. Are the shareholders of the new company the same as the predecessor company? If the shareholders of the new company are not the same, what is the relationship of the new company's shareholders to those of the predecessor company?
3. Are the officers of the new company the same as the predecessor company? If the officers of the new company are not the same, what is the relationship of the new company's directors / managers to the predecessor company? Do former company officials have a management or consulting position in the new company? Do any records for the new company show the signature of company officers of the old company? Who signed filings made with the Secretary of State?
4. Is the predecessor company still in business? When did it cease operation? Were documents filed with the Secretary of State dissolving the corporation? Do the corporate minutes reflect the dissolution?

Business Practices

5. Is the new company operating out of the same location as the predecessor company?
6. Who owns the location of the operation? Is the location a business or residential property?
7. If the carrier leases the location from a third party, who's name is on the lease? Was a new lease written for the new company? Did the new or predecessor company make any notification to the property owner regarding the change in lessee? Is the lease in the name of an individual? What was the role of the individual in the predecessor company? What is the role of the individual in the new company?
8. If the predecessor owns the location, is there a lease for the new company to use the property?
9. Does the second company have a similar business name as the predecessor company?
10. Does the second company use the same telephone number(s) as the predecessor? Is the telephone number for the predecessor still active? If called, does the second carrier answer? Are the calls routed to the second carrier?

11. How did the predecessor advertise? Telephone book? Specialty or trade publications? How does the second carrier advertise? Have new advertisements been purchased?
12. Are the employees of the new company the same individuals as the predecessor company? Are the employees in the same or similar positions? Is the person responsible for safety and FMCSR compliance in the new company the same as the prior company? Is the person managing the new company the same as the predecessor? Are the managers and supervisors in the same positions with essentially the same job functions?
13. Does the new company use the same accounts as the predecessor? Comdata accounts? Bank accounts? Checking accounts? Fast Pass / Toll accounts? Utility accounts? Telephone accounts? Have new accounts been opened? Have the numbers been transferred to the new company? Are the accounts still showing the name of the predecessor? Is the new company paying for bills showing the predecessor as the obligor? Has the new company paid for services which were provided to the predecessor (i.e. before the new company was established)?
14. Are the bank accounts in the name of the corporation or an individual? Were assets transferred from the predecessor accounts into the new company's accounts? Who has signatory authority on the accounts for the new company? Are these the same individuals having authority in the predecessor company?
15. Is the new company servicing the same customers / shippers as the predecessor? How is payment made by the shippers? Has the new company received payment for transportation made by the predecessor? Has the new company provided transportation for contracts or agreements made with the predecessor?
16. What is the understanding of the customer as to who is providing transportation services?
17. What is the understanding of employees regarding the new company? Were any changes made when the new company "took over"? Who is paying salaries? Was there a change in supervision or management? What is their understanding of why the predecessor ceased operation and the new company was established?
18. Are the carriers regulated by any other government agencies (Federal, State, Local)? Have they filed new applications or changed their identity with these agencies? Do other agencies show Carrier 1 as the active operating entity? Many Federal, State and Local agencies require permits and/or licenses, which entity is showing on those documents?

Compliance with the FMCSRs

19. Is the new company using any of the documentation of the predecessor to demonstrate compliance with the FMCSRs (inspections, DQ files, dvirs, records of duty status, drug/alcohol testing)? Were records, including driver files, transferred to the new company? Were new files / records created? Do the files show documents from the predecessor? Is the new company maintaining files for the predecessor? Where are the files / documents required to be maintained (even after ceasing operation) of the predecessor? Are they being maintained at the offices of the second carrier? Does the new company have access to the records of the predecessor?
20. Did the new company comply with the requirements of drug/alcohol testing for its drivers when the new company was established? Are they using documentation from the predecessor?
21. Are the employees responsible for FMCSR compliance in the second company the same as the predecessor?

Business Assets

22. Is the new company using the same equipment (vehicles, office equipment, etc.) as the predecessor? How did the new company acquire the equipment? Did the new company acquire the assets directly from the predecessor? What kind of payment was made by the new company for the assets? Are there any records showing a sale and/or lease of the assets to the new company?
23. Is the new company using the same vehicles as the predecessor? Have new registrations been filed with the State? When were registrations filed?
24. If assets are leased, has the owner of the assets been contacted? What is the owner's understanding of who is leasing its equipment/vehicles? If the owner knows about the change of ownership, what is the owner's understanding of the business practices of the predecessor and the new company? What is the owner's understanding of the reasons for the creation of the new company?

Insurance

25. Is the second company insuring the same assets as the predecessor? Using the same insurance company? Who is listed on the insurance policy? Is the new insurance a continuation of the previous insurance, or were new policies written? Compare the dates of the policies with the timeline?