

In a letter to the Secretary of Transportation, Federal Express Corporation asked DOT to develop further guidance on what constitutes "constructive knowledge" that a carrier is deemed to have of the presence of hazardous materials when the carrier accepts a shipment for transportation. Federal Express stated that carriers lack "essential criteria defining constructive knowledge of undeclared hazardous materials, that would allow the carriers to design and implement a viable system for training their employees, and for identifying and reporting discrepancies, without being subjected to second-guessing after a shipment has been transported."

In its letter, Federal Express referred to a formal interpretation published in the **Federal Register** on June 4, 1998, 63 FR 30411. In that interpretation, which was coordinated among all the DOT agencies to which enforcement authority has been delegated,<sup>2</sup> RSPA's Chief Counsel stated that:

a carrier knowingly violates the HMR when the carrier accepts or transports a hazardous material with actual or constructive knowledge that a package contains a hazardous material which has not been packaged, marked, labeled, and described on a shipping paper as required by the HMR. This means that a carrier may not ignore readily apparent facts that indicate that either (1) a shipment declared to contain a hazardous material is not properly packaged, marked, labeled, placarded, or described on a shipping paper, or (2) a shipment actually contains a hazardous material governed by the HMR despite the fact that it is not marked, labeled, placarded, or described on a shipping paper as containing a hazardous material.

\* \* \* \* \*

In the case of an undeclared or hidden shipment, all relevant facts must be considered to determine whether or not a reasonable person acting in the circumstances and exercising reasonable care would realize the presence of hazardous materials. In an enforcement proceeding, this is always a question of fact, to be determined by the fact-finder. Because innumerable fact patterns may exist, it is not practicable to set forth a list of specific criteria to govern whether or not the carrier has sufficient constructive knowledge of the presence of hazardous materials within an undeclared or

<sup>2</sup> Congress effectively adopted the Department's historic interpretation of the term "knowingly." 56 FR 8620.

<sup>2</sup> The Secretary of Transportation has delegated to five agencies within DOT the authority to bring civil penalty enforcement cases and assess civil penalties for violations of Federal hazardous material transportation law or the HMR: United States Coast Guard (USCG), Transportation Security Administration (TSA), Federal Railroad Administration (FRA), RSPA, Federal Motor Carrier Safety Administration (FMCSA). 1.46(u), 1.47(j)(1), 1.49(s)(1), 1.53(b)(1), 1.73(d)(1).

hidden shipment to find a knowing violation of the HMR.

Information concerning the contents of suspicious packages must be pursued to determine whether hazardous materials have been improperly offered. A carrier's employees who accept packages for transportation must be trained to recognize a "suspicious package," as part of their function-specific training as specified in 49 CFR 172.704(a)(2), because the legal standard remains the knowledge that a reasonable person acting in the circumstances and exercising reasonable care would have.<sup>3</sup> 63 FR at 30412.

In an interim response to Federal Express's attorney, the Secretary of Transportation advised that DOT's Director, Intermodal Hazardous Materials Programs (IHMP), located within the Office of the Associate Deputy Secretary and Director, Office of Intermodalism,<sup>4</sup> would be the focal point in developing possible guidance on "constructive knowledge." In conjunction with FAA (TSA), FMCSA, FRA, RSPA, and USCG, the Director of IHMP invites interested parties to attend a public meeting and to comment at that meeting or separately in writing on the indicia or readily apparent facts that would indicate the potential presence of hazardous materials to a reasonable person and the actions that a reasonable person should take in response to those indicia or readily apparent facts.

Logical topics for discussion at the public meeting and in written comments include:

1. The responsibilities of an offeror of a hazardous material to properly classify the material, package the material, mark and label packagings, outside containers, and overpacks, describe the material on a shipping paper, and provide placards to a carrier.

2. The responsibilities of a carrier when it accepts any shipment to review documentation that accompanies the shipment and inspect the packagings, outside containers, or overpacks to determine (a) whether a hazardous

<sup>3</sup> In its June 14, 1996 Advisory Guidance: Offering, Accepting, and Transporting Hazardous Materials, 61 FR 30444, 30446, RSPA urged persons "who engage in day-to-day transportation activities [to] make a concerted effort to ensure their own compliance, as well as that of others from whom they receive shipments" and reminded them to: (1) "Know Your Customer," (2) "Know the Packaging," (3) "Know/Verify the Proper Hazardous Material Description," (4) "Visually Inspect Shipments," (5) "Advise Your Customer of Possible Discrepancies," and (6) "Report Violations."

<sup>4</sup> The Secretary of Transportation has delegated to the Associate Deputy Secretary and Director, Office of Intermodalism, the authority under Federal hazardous material transportation law to act as the focal point for review of hazardous materials policies, monitor departmental hazardous materials activities, and address regulatory and programmatic cross-modal issues related to hazardous materials as warranted. 49 CFR 1.74.

material is present, and (b) when a hazardous material is present, whether it is properly packaged, marked, labeled, placarded, and described on a shipping paper.

3. When a reasonable person should have constructive knowledge of the potential presence of a hazardous material based on information that is readily apparent from: (a) Documentation that accompanies a shipment, (b) markings, labels, or placards on packagings, outside containers, or overpacks, and (c) the condition of the packagings, outside containers, or overpacks themselves.

4. Methods used to train personnel who prepare materials for shipment or accept shipments for transportation to recognize the potential presence of a hazardous material based on information that is readily apparent, including the use of checklists such as those required by Section 7;1.3 of the Technical Instructions for the Transport of Dangerous Goods of the International Civil Aviation Organization (ICAO).

Oral comments at the public meeting and separate written comments are not limited to the above topics and may include any suggestions for developing additional guidance as to when a reasonable person would be deemed to have constructive knowledge of the potential presence of hazardous material and the manner in which that material is classified, packaged, marked, labeled, placarded, and described on a shipping paper. A facilitator will chair the meeting to ensure that all topics are covered and persons heard. No formal transcript of this meeting is planned, but the meeting will be tape recorded for later use by DOT in its decision-making process.

Issued in Washington, DC on April 3, 2002.

**Jackie A. Goff,**

*Director, Intermodal Hazardous Materials Programs, Office of the Associate Deputy Secretary.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA-99-5748 (OMCS-99-5748), FMCSA-99-5473 (OMCS-99-5473), FMCSA-99-6156 (OMCS-99-6156), and FMCSA-99-6480]

### Qualification of Drivers; Exemption Applications; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of renewal of exemption; request for comments.

**SUMMARY:** This notice announces FMCSA's decision to renew the exemptions from the vision requirement in 49 CFR 391.41(b)(10) for 19 individuals.

**DATES:** This decision is effective April 14, 2002. Comments from interested persons should be submitted by May 9, 2002.

**ADDRESSES:** You can mail or deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. You can also submit comments as well as see the submissions of other commenters at <http://dms.dot.gov>. Please include the docket numbers that appear in the heading of this document. You can examine and copy this document and all comments received at the same Internet address or at the Dockets Management Facility from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you want to know that we received your comments, please include a self-addressed, stamped postcard or include a copy of the acknowledgement page that appears after you submit comments electronically.

**FOR FURTHER INFORMATION CONTACT:** For information about the vision exemptions in this notice, Ms. Sandra Zywockarte, Office of Bus and Truck Standards and Operations, (202) 366-2987; for information about legal issues related to this notice, Mr. Joseph Solomey, Office of the Chief Counsel, (202) 366-1374, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access and Filing**

You may see all comments online through the Document Management System (DMS) at: <http://dmses.dot.gov/submit>.

**Background**

Nineteen individuals have requested renewal of their exemptions from the vision requirement in 49 CFR 391.41(b)(10) which applies to drivers of commercial motor vehicles (CMVs) in interstate commerce. They are Mark K. Cheely, James D. Davis, James F. Durham, Glenn E. Gee, Robert N. Heaton, Laurent G. Jacques, Alfred G. Jeffus, Michael W. Jones, Jon G. Lima, Earl E. Martin, Clifford E. Masink,

Robert W. Nicks, Richard W. O'Neill, Tommy L. Ray, Jr., Andrew W. Schollett, Melvin B. Shumaker, Sammy D. Steinsultz, Edward J. Sullivan, and Steven L. Valley. Under 49 U.S.C. 31315 and 31136(e), FMCSA may renew an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." Accordingly, FMCSA has evaluated the 19 petitions for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

On April 14, 2000, the agency published a notice of final disposition announcing its decision to exempt 34 individuals, including 10 of these applicants for renewal, from the vision requirement in 49 CFR 391.41(b)(10) (65 FR 20251). The qualifications, experience, and medical condition of each applicant were stated and discussed in detail at 64 FR 68195 (December 6, 1999). Two comments were received, and their contents were carefully considered by the agency in reaching its final decision to grant the petitions (65 FR 20251). On January 3, 2000, the agency published a notice of final disposition announcing its decision to exempt 40 individuals, including 5 of these applicants for renewal, from the vision requirement in 49 CFR 391.41(b)(10) (65 FR 159). The qualifications, experience, and medical condition of each applicant were stated and discussed in detail at 64 FR 54948 (October 8, 1999). Two comments were received, and their contents were carefully considered by the agency in reaching its final decision to grant the petitions (65 FR 159). On December 13, 1999, the agency published a notice of final disposition announcing its decision to exempt one of these applicants for renewal, from the vision requirement in 49 CFR 391.41(b)(10) (64 FR 69586). The qualifications, experience, and medical condition of the applicant were stated and discussed in detail at 64 FR 27025 (May 18, 1999). Two comments were received, and their contents were carefully considered by the agency in reaching its final decision to grant the petition (64 FR 69586). On November 30, 1999, the agency published a notice of final disposition announcing its decision to exempt 33 individuals, including 3 of these applicants for renewal, from the vision requirement in 49 CFR 391.41(b)(10) (64 FR 66962). The qualifications, experience, and medical condition of each applicant were stated and discussed in detail at 64 FR 40404 (July 26, 1999). Three comments were

received, and their contents were carefully considered by the agency in reaching its final decision to grant the petitions (64 FR 66962). The agency determined that exempting the individuals from 49 CFR 391.41(b)(10) was likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption as long as the vision in each applicant's better eye continued to meet the standard specified in 49 CFR 391.41(b)(10). As a condition of the exemption, therefore, the agency imposed requirements on the individuals similar to the grandfathering provisions in 49 CFR 391.64(b) applied to drivers who participated in the agency's former vision waiver program.

These requirements are as follows: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that vision in the better eye meets the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official.

**Basis for Renewing Exemptions**

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than 2 years from its approval date and may be renewed upon application for additional 2-year periods. In accordance with 49 U.S.C. 31315 and 31136(e), each of the 19 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (65 FR 20251; 64 FR 68195; 65 FR 159; 64 FR 54948; 64 FR 69586; 64 FR 27025; 64 FR 66962; 64 FR 40404), and each has requested timely renewal of the exemption. These 19 applicants have submitted evidence showing that the vision in their better eye continues to meet the standard specified at 49 CFR 391.41(b)(10), and that the vision impairment is stable. In addition, a review of their records of safety while driving with their respective vision deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to

continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption for each renewal applicant.

#### Discussion of Comments

The Advocates for Highway and Auto Safety (AHAS) expresses continued opposition to FMCSA's procedures for renewing exemptions from the vision requirement in 49 CFR 391.41(b)(10). Specifically, AHAS objects to the agency's extension of the exemptions without any opportunity for public comment prior to the decision to renew and reliance on a summary statement of evidence to make its decision to extend the exemption of each driver.

The issues raised by AHAS were addressed at length in 66 FR 17994 (April 4, 2001). We will not address these points again here, but refer interested parties to that earlier discussion.

#### Conclusion

In accordance with 49 U.S.C. 31315 and 31136(e), FMCSA extends the exemptions from the vision requirement in 49 CFR 391.41(b)(10) granted to Mark K. Cheely, James D. Davis, James F. Durham, Glenn E. Gee, Robert N. Heaton, Laurent G. Jacques, Alfred G. Jeffus, Michael W. Jones, Jon G. Lima, Earl E. Martin, Clifford E. Masink, Robert W. Nicks, Richard W. O'Neill, Tommy L. Ray, Jr., Andrew W. Schollett, Melvin B. Shumaker, Sammy D. Steinsultz, Edward J. Sullivan, and Steven L. Valley, subject to the following conditions: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for 2 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions

of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e).

#### Request for Comments

FMCSA has evaluated the qualifications and driving performance of the 19 applicants here and extends their exemptions based on the evidence introduced. The agency will review any comments received concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31315 and 31136(e). While comments of this nature will be entertained at any time, FMCSA requests that interested parties with information concerning the safety records of these drivers submit comments by May 9, 2002. All comments will be considered and will be available for examination in the docket room at the above address. FMCSA will also continue to file in the docket relevant information which becomes available. Interested persons should continue to examine the docket for new material.

Issued on: April 4, 2002.

**Brian M. McLaughlin,**

*Associate Administrator for Policy and Program Development.*

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**BILLING CODE 4910-EX-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

#### North American Bus Industries; Notice of Granted Buy America Waivers

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of granted Buy America waivers.

**SUMMARY:** FTA granted North American Bus Industries (NABI) two Buy America waivers on March 19, 2002. The first waiver allows NABI to assemble its CompoBus outside the United States and the second allows it to count the composite chassis/frame as domestic for purposes of calculating the domestic component content of the vehicle. The final assembly waiver is predicated on public interest and the component waiver on the non-availability of the item domestically. Both of these waivers will apply to procurements for which solicitations are issued within two years of the date of the letter, March 19, 2002,

and to two contracts signed prior to the date of the letter, as noted below. This notice shall insure that the public is aware of these waivers.

**FOR FURTHER INFORMATION CONTACT:** Meghan G. Ludtke, FTA Office of Chief Counsel, Room 9316, (202) 366-1936 (telephone) or (202) 366-3809 (fax).

**SUPPLEMENTARY INFORMATION:** The above-referenced waivers follow:

March 19, 2002.

Mr. Andy Racz, President and CEO, North American Bus Industries, Inc., H-1165 Budapest, XVI UJSZASZ u., 45 Hungary.

Dear Mr. Racz:

This responds to your letter dated December 14, 2001, in which you request two Buy America waivers from the Federal Transit Administration (FTA) for North American Bus Industries' (NABI) CompoBus. The CompoBus is a light-weight, composite-structured vehicle with an integrated frame and chassis developed in line with FTA's Advanced Technology Bus program. You request (1) a public interest waiver of the final assembly requirements for a period of seven years and (2) a component waiver for the integrated body/chassis of the CompoBus, based on public interest or non-availability. For the reasons discussed below, we have determined that the grounds for such waivers exist for a two-year period.

#### Applicable Law

FTA's requirements concerning domestic preference for federally funded transit projects are set forth in 49 U.S.C. 5323(j). Section 5323(j)(2)(C) addresses the general requirements for the procurement of rolling stock. This section provides that all rolling stock procured with FTA funds must have a domestic content of at least 60 percent and must undergo final assembly in the U.S.

Under 49 U.S.C. 5323(j)(2)(A) and the implementing regulations, these requirements may be waived if their application "would be inconsistent with the public interest." 49 C.F.R. 661.7(b). The regulation also notes that "[i]n determining whether the conditions exist to grant this public interest waiver, the [FTA] will consider all appropriate factors on a case-by-case basis . . . ." Id. And 49 U.S.C. 5323(j)(2)(B) states that the Buy America requirements shall not apply if the item or items being procured are not produced in the U.S. in sufficient and reasonably available quantities or are not of a satisfactory quality. The implementing regulation also provides that public interest and non-availability waivers may be granted for a component of rolling stock, and in such cases, the component would be treated as domestic when calculating the overall component content of the vehicle. 49 C.F.R. 661.7(f)

#### Final Assembly Waiver Request

Your request for a final assembly waiver is for CompoBus models 40C-LFW and 45C-LFW. You detail a number of advantages offered by the CompoBus, including its lightweight frame/chassis, the fact that it has completed Altoona testing, the lack of rusting, the environmental advantages, and