STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. DISTRICT COURT

SIXTH DIVISION

Evelyn's Transportation Inc.	:	
	:	
v.	:	**A.A. No. 11 - 059**
	:	
State of Rhode Island	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the appellate panel of the Traffic Tribunal is AFFIRMED.

Entered as an Order of this Court at Providence on this 28th day of October, 2011.

By Order:

_____/s/_____
Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Evelyn's Transportation, Inc.	:	
	:	
	:	**A.A. No. 2011 – 0059**
v.	:	**(C.A. No. T09-0035)**
	:	**(09-001-0501156)**
	:	
State of Rhode Island	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Evelyn's Transportation, Inc. appeals from a Rhode Island Traffic Tribunal (RITT) appellate panel decision affirming a trial magistrate's verdict adjudicating the corporation guilty of two commercial motor vehicle violations. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9 and the applicable standard of review is found in subsection 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

The corporation was convicted of two violations of Gen. Laws 1956 § 31-23-1 — "Driving of Unsafe Vehicle - Disobedience of requirements - Inspections of motor carriers." Subdivision 31-23-1(b)(1) makes it a civil violation for the operator of a commercial motor vehicle to violate either (1) certain Rhode Island statutes or (2) certain federal regulations — specifically, the Federal Motor Carrier Safety Regulations (FMCSR).[1] Specifically, Evelyn's Transportation was cited because the driver of one of their vehicles failed to keep a logbook (49 C.F.R. § 395.8) and was not fluent in English (49 C.F.R. § 391.11).

The corporation argues that the trial magistrate committed error and exceeded his authority by "redrafting" § 31-23-1, interpolating into it the broader federal definition of the term "commercial motor vehicle" which brought the vehicle owned by Evelyn's Transportation Inc. within the ambit of the statute. This is certainly an alarming assertion. But, after a close examination of the trial magistrate's decision — and the opinion of the panel affirming it — I find that the trial magistrate did not act illegally or otherwise exceed his authority. As a result, I believe the decision of the panel affirming

1 The state statutes referenced in subsection 31-23-1(b) are those found in Chapters 23 and 24 of Title 31. The Federal Motor Carrier Safety Regulations (FMCSR) are contained in title 49 of the Code of Federal Regulations (CFR).

his decision is also correct and should be affirmed. I so recommend.

I. FACTS & TRAVEL OF THE CASE

A. THE INCIDENT & THE TRIAL.

The facts of the incident in which Evelyn's Transportation, Inc. was cited on January 11, 2009 for the safety violations enumerated above are sufficiently stated in the decision of the panel. The core of the incident was described as follows:

> At trial, Trooper Pendergast testified that on the date, at approximately 9:15 a.m., he observed a passenger van traveling northbound on Route 95 at a high rate of speed in what he described as snowy and icy conditions. (Tr. 3/5/09 at 12-13.) Trooper Pendergast initiated a traffic stop of the vehicle and made contact with the operator, Francisco Monteiro (Mr. Monteiro). (Tr. 3/5/09 at 13.) Trooper Pendergast then conducted a commercial vehicle inspection in accordance with § 31-23-1.[1] (Tr. 3/5/09 at 13.) in addition to traveling at 70 m.p.h. in a posted 50 m.p.h. zone, Trooper Pendergast determined that there was no logbook in the vehicle[2] and that Mr. Monteiro could not speak English.[3] (Tr. 3/5/09 at 14-15.) The speeding charge was dealt with separately, and this matter was heard in Court with regard to the logbook and the English-language violations. (Tr. 3/5/09 at 15-16.)

Decision of Panel, May 11, 2011, at 1-2 (Footnotes omitted).[2] Thus, the

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[2] Footnote 1 contained excerpts from § 31-23-1(b) and § 31-23-1(d); footnote 2 contained excerpts from 49 C.F.R. § 395.8(a) and § 395.8(k), wherein is found the driver-logbook requirement; and footnote 3 contained an excerpt from 49 C.F.R. § 391.11, wherein is found the requirement that drivers of commercial motor vehicles be able to speak English.

corporation was cited by Trooper Pendergast for two safety violations — (1) "No log book" and (2) "Driver Unable to Speak/Understand English." While the summons he issued referenced only § 31-23-1(b), Trooper Pendergast was clear in his testimony that the substantive mandates alleged to have been violated came from two sections of the FMCSR. See Trial Transcript, (3/5/09) at 14, 29-30 and see Summons No. 09-001-0501156, attached as Appendix 1.

Additional trial testimony supplied additional operative facts. Ms. Evelyn Gonzalez, the corporation's owner, testified that the van stopped by Trooper Pendergast could carry up to fifteen passengers and was used to transport passengers between Rhode Island and New York. Decision of Panel, May 11, 2011, at 2 citing Trial Transcript, (3/5/09) at 27-28. This testimony was significant because for state law purposes (specifically, Gen. Laws 1956 § 31-10.3-3) a vehicle must be designed to transport sixteen passengers in order to be deemed a "commercial motor vehicle." Trooper Pendergast responded that under Federal Motor Carrier Safety Regulations a vehicle that carries more than eight passengers is considered a "commercial motor vehicle." Decision of Panel, May 11, 2011, at 2 citing Trial Transcript, (3/5/09) at 29.

B. THE BENCH DECISION.

At the conclusion of the trial, Chief Magistrate Guglietta took the

matter under advisement. Decision of Panel, May 11, 2011, at 2 citing Trial Transcript, (3/5/09) at 30-31. The parties reconvened on April 1, 2009 and the Chief Magistrate rendered his bench decision. Factually, he found that the vehicle carried less than sixteen passengers and weighed less than ten thousand pounds. Trial Transcript, (4/1/09) at 10-13. At the outset of his bench decision, the trial magistrate enumerated the two issues he would address: (1) whether the corporation's vehicle was a "commercial motor vehicle" under § 31-23-1 and § 31-10.3-3 and (2) whether the penalty provision of § 31-23-1(b) only applied to carriers as defined in § 31-23-1. Trial Transcript, (4/1/09) at 7-8. He then engaged in extensive and intricate legal analysis, which I shall now endeavor to set out.

1. Application — Commercial Motor Vehicle.

Regarding the first issue, the trial magistrate began by finding that sections 31-23-1 and 31-10.3-3 must be read in conjunction. Trial Transcript, (4/1/09) at 15. Doing so, he concluded that under state law, the corporation's vehicle would not be considered a "commercial motor vehicle" and the violations could not be sustained. Trial Transcript, (4/1/09) at 18-20.

He then noted that the federal regulations have a broader definition of a "commercial motor vehicle" — including within its ambit vehicles that carry

eight or more passengers. Trial Transcript, (4/1/09) at 18-20. Thus, under the federal regulations, the vehicle in question would indeed be considered a commercial motor vehicle. But, while the trial magistrate noted that the state statute was enacted to supplement the purpose of the federal regulations, he concluded they could not be harmonized. Trial Transcript, (4/1/09) at 25-28. Instead, the trial magistrate determined that the preemption doctrine, grounded in the supremacy clause of the United States Constitution, required him to invoke the federal definition, he felt constrained to do so because there was a specific conflict between the two provisions — state and federal — and that otherwise the broader, stronger federal regulation would be frustrated. Trial Transcript, (4/1/09) at 29-36. The trial magistrate deemed this to be an example of "conflict preemption." Trial Transcript, (4/1/09) at 37.

2. Penalty Provision — Subsection 31-23-1(b)(2).

Next, the trial magistrate addressed the corporation's argument that the statute's penalty provision — subdivision 31-23-1(b)(2) — applies only to "carriers," which are defined to be operators of vehicles of ten thousand or more pounds or that carries hazardous materials. Trial Transcript, (4/1/09) at 51-53. The trial magistrate concluded this provision was therefore inapplicable and that the corporation would instead be subject to the general penalty

provision for Title 31 civil violations — Gen. Laws 1956 § 31-27-13(a). Trial Transcript, (4/1/09) at 53.

As a result, the trial judge sustained the violations and fined the corporation $250.00 on each count. Id.

C. THE APPELLATE PANEL'S DECISION.

Aggrieved by this decision, the appellant filed a timely appeal and sought review by the RITT appeals panel. On June 10, 2009, the appeal was heard by an appellate panel comprised of: Magistrate Alan Goulart (Chair), Judge Edward Parker, and Magistrate Noonan. In a decision dated May 11, 2011, the appeals panel affirmed the decision of the trial magistrate.

Before the appeals panel the corporation raised four points: (1) § 31-23-1 is invalid because it is preempted by federal law; (2) the trial magistrate re-drafted the statute by relying on the federal definition of "commercial motor vehicle"; (3) as construed, § 31-23-1 is void for vagueness and (4) it could not be punished under the statute because it is not a "carrier" as that term is defined in § 31-23-1(c). See Appellant's Memorandum of Law, May 14, 2009, passim. The panel's response to each of these arguments shall now be explained seriatim.

1. The Preemption Argument.

The panel held that, having deemed the statutory definition of "commercial motor vehicle" to be preempted by federal law, the magistrate correctly applied the remainder of the law, under the authority of the Title 31's severability provision — Gen. Laws 1956 § 31-1-32. (Decision of Panel, at 11). The panel buttressed this argument by citing United States Supreme Court precedent for the proposition that, when preemption is mandated under the Supremacy Clause, "state law is displaced only 'to the extent that it actually conflicts with federal law.' " Decision of Panel, at 12 quoting Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996). However, disagreeing with a comment of the trial magistrate, the panel held that the instant case was an instance of express, not conflict, preemption. Decision of Panel, at 13.

2. The "Re-Drafting" Allegation.

The appellate panel wholly rejected the argument that the trial magistrate "re-drafted" the statute. Decision of Panel, at 14-15. In the panel's view, he simply substituted a federal definition for the state definition — as he was required to do — and then applied the statute to the facts of the case. Decision of Panel, at 15.

3. The Void-For-Vagueness Argument.

The panel also found the corporation's third argument — that the statute as "re-drafted" was void for vagueness — to be without merit. The panel noted that the offense contained in § 31-23-1 is a civil violation, not a criminal charge. It therefore concluded that the void-for-vagueness doctrine was inapplicable. Decision of Panel, at 16-17.

4. The Penalty Argument.

Finally, the panel rejected the corporation's argument that because it was not shown to be a "carrier" it could not be penalized for conduct in violation of § 31-23-1. It approved the trial magistrate's finding that the corporation could be punished even though it was not a "carrier."

D. THE DISTRICT COURT FILING.

On May 26, 2011, Evelyn's Transportation, Inc. filed the instant complaint for judicial review in the Sixth Division District Court pursuant to Gen. Laws 1956 § 31-41.1-9. A conference with counsel for the corporation and the State was conducted by the undersigned on June 15, 2011.

The corporation has submitted the case to this Court relying on the memorandum it filed with the appellate panel on May 14, 2009; the State has relied on the decision of the panel.

II. STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which provides as follows:

> (d) Standard of review. The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the appeals panel's findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act (APA).

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[3] Thus, the Court will not substitute its judgment for that of the panel as to the weight of the evidence on questions

[3] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

of fact.[4] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[5]

III. APPLICABLE LAW

In the instant matter the Appellant was charged with violating § 31-23-1 of the Rhode Island General Laws which states in pertinent part:

> **31-23-1 Driving of unsafe vehicle — Disobedience of requirements — Inspections of motor carriers. –** (a) It is a civil violation for any person to drive or move, or for the owner, employer or employee to cause or knowingly permit to be driven or moved, on any highway any vehicle or combination of vehicles which is in such an unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with lamps and other equipment in proper condition and adjustment as required in this chapter or chapter 24 of this title, or for any person to do any act forbidden or fail to perform any act required under these chapters.
>
> (b)(1) For the purpose of reducing the number and severity of accidents, all commercial motor vehicles must meet applicable standards set forth in this chapter and chapter 24 of this title and in the federal motor carrier safety regulations (FMCSR) contained in 49 CFR Parts 387 and 390-399, and the Hazardous Materials Regulations in 49 CFR Parts 107 (subparts F and G only), 171-173, 177, 178 and 180, as amended except as may be determined by the administrator to be inapplicable to a state enforcement program, as amended and adopted by the U.S. Department of Transportation (U.S. DOT), Federal Motor Carrier Safety Administration, as may be amended from time to time. Part 391.11(b)(1) of FMCSR, 49 CFR 391.11(b)(1) shall not apply to

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[4] Cahoone v. Board of Review of the Dept. of Emp. Security, 104 R.I. 503, 246 A.2d 213 (1968).

[5] Id., at 506-507, 246 A.2d at 215.

> intrastate drivers of commercial motor vehicles except for drivers of school buses and vehicles placarded under 49 CFR Part 172, Subpart F. Rules and Regulations shall be promulgated by the director of the department of revenue for the administration and enforcement of motor carrier safety. The rules and regulations shall be promulgated to ensure uniformity in motor carrier safety enforcement activities and to increase the likelihood that safety defects, driver deficiencies, and unsafe carrier practices will be detected and corrected.
>
> (2) Any carrier convicted of violating the rules and regulations established pursuant to this subsection shall be fined as provided in § 31-41.1-4 for each offense.
>
> (c) For the purposes of this section, "carrier" is defined as any company or person who furthers their commercial or private enterprise by use of a vehicle that has a gross vehicle weight rating (GVWR) of ten thousand and one (10,001) or more pounds, or that transports hazardous material.
>
> (d) * * *

(Emphasis added) To my reading, subsection (b) creates two mandates: (1) a commercial motor vehicle must meet the standards enumerated in chapters 23 and 24 of Title 31; and, (2) a commercial motor vehicle must meet the standards enumerated in federal motor carrier safety regulations.

Specifically, appellant was charged in the summons with violating subdivision 31-23-1(b)(1) by failing to comply with two particular mandates of the FMCSR. The first was the failure to maintain a driver logbook:

> **395.8 Driver's record of duty status. —** (a) Except for a private motor carrier of passengers (nonbusiness), every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24 hour period using the methods prescribed in either paragraphs (a)(1) or (2) of this

section.

(1) Every driver who operates a commercial motor vehicle shall record his/her duty status, in duplicate, for each 24–hour period. The duty status time shall be recorded on a specified grid, as shown in paragraph (g) of this section. The grid and the requirements of paragraph (d) of this section may be combined with any company forms. The previously approved format of the Daily Log, Form MCS–59 or the Multi-day Log, MCS–139 and 139A, which meets the requirements of this section, may continue to be used.

(2) * * *

The second violation related to the driver's alleged inability to speak English:

§ 391.11 General qualifications of drivers. — (a) A person shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle. Except as provided in § 391.63, 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) Except as provided in subpart G of this part, a person is qualified to drive a motor vehicle if he/she--

(1) Is at least 21 years old;

(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;

IV. ISSUE

The issue before the Court is whether the decision of the appeals panel was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, was the appellant properly convicted of violating Gen. Laws 1956 §

31-23-1?

V. ANALYSIS

In Section I of this opinion, supra, I endeavored at some length to set forth the rationales by which the trial magistrate and the panel reached their decisions. But in my view we need not reach the lofty heights of Supremacy Clause analysis, enduring the rarified atmosphere present there, in order to resolve the instant case. To the contrary, I believe simple principles of statutory construction are more than adequate to decide all issues presented here. And so, in my consideration of the issues presented by the corporation, I shall keep to this safer, more modest, path.

A. THE VALIDITY OF THE CHARGES.

I believe we must commence our analysis by gaining an understanding of § 31-23-1(b). At the outset we must recognize that § 31-23-1 contains no substantive traffic safety provisions. It neither prescribes nor proscribes what the owner or operator of a commercial motor vehicle must do. Instead, it merely serves as a conduit for the prosecution of violations of certain other state rules and certain federal regulations.

From my reading I conclude subsection 31-23-1(b) creates two cognate civil offenses applicable to commercial motor vehicles: in the first, the violation

is predicated on a breach of a provision of state law; in the second, the violation is based on a breach of a federal regulation — specifically, a provision of the Federal Motor Carrier Safety Regulations (FMCSR), 49 C.F.R. 387, 390-99. The latter provision clearly makes it a state violation to violate the Federal Motor Carrier Safety Regulations (FMCSR). Put another way, the FMCSR is incorporated by reference into 31-23-1(b).

In the case at bar, the corporation was charged with two violations of § 31-23-1(b): the first referenced "No log book" and the second referenced "Driver Unable to Speak/Understand English." All agree these are references to the FMCSR.[6] And the corporation does not challenge the validity of these charges. It apparently accepts that a violation of these federal regulations may be penalized under Rhode Island law, prosecuted by Rhode Island police officers, and adjudicated by Rhode Island jurists. The corporation only objects to the trial magistrate's invocation of the FMCSR definition of "commercial motor vehicle."

In my view the General Assembly, by incorporating the FMCSR by reference into § 31-23-1(b), incorporated not only the substantive provisions

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[6] The driver-logbook mandate is found in 49 C.F.R. § 395.8 and the English fluency requirement is found in 49 C.F.R. § 391.11. In his testimony Trooper Pendergast made it expressly clear the charges he filed involved breaches of the FMCSR. Trial Transcript, (3/5/09) at 14, 29-30.

but the definitions included therein as well. They must be viewed as comprising parts of a cohesive whole. It has long been held that a definition included in a scheme of statutes or regulations governs the construction of those statutes and, indeed, are binding on courts construing such provisions. See 2A Sutherland, Statutes and Statutory Construction, (Singer, 6th edition, 2000 rev.) § 47:07 at 227 et seq. Moreover, § 31-23-1(b) expressly incorporates by reference 49 C.F.R. Part 390, in which the definition in question is found, at 49 C.F.R. § 390.5. Accordingly, I believe the federal definitions must govern the constriction of the substantive federal regulations.

Following this procedure I find no conflict in the federal and state provisions. Under § 31-23-1(b), Rhode Island's officers may charge violations of the FMCSR or certain state statutes, or both. The trial magistrate did not truly re-draft anything. At the end of the day he merely applied the definition of "commercial motor vehicle" found in 49 C.F.R. 390.5 to the substantive offenses found in 49 C.F.R. 391.11 and 49 C.F.R. 395.8. This, in my view, was perfectly permissible and sound.[7]

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[7] I believe the supremacy-clause issue would truly be presented if a trial judge or magistrate attempted to apply the broader federal (FMCSR) definition of "commercial motor vehicle" to a substantive violation created under state, not federal, law.

Because in the case at bar the federal definition is merely used to clarify

Neither is the statute void-for-vagueness. The provisions of the FMCSR are clear; the appellant corporation has been fully on notice regarding their mandates. It is also clear that § 31-23-1(b) allows Rhode Island officers to enforce the provisions of the FMCSR.

B. THE PENALTY PROVISION.

Evelyn's Transportation Inc. urges that it cannot be punished because the penalty provision is inapplicable to it because it is not a carrier — at least under state law. The provision in question is § 31-23-1(b)(2):

> (2) Any carrier convicted of violating the rules and regulations established pursuant to this subsection shall be fined as provided in § 31-41.1-4 for each offense.

(Emphasis added). The corporation argues that it is not subject to the penalties referenced because it is not a "carrier" — at least under state law.[8] Accordingly, it argues that since it cannot be punished the charges must be dismissed.[9]

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the scope of a federal regulation, the case relied on by appellant, State v. Cote, 286 Conn. 603, 945 A.2d 412 (2008) is inapposite. In Cote a criminal hazardous waste charge conviction was vacated because the judge inserted federal hazardous waste definitions into the state statute. The Connecticut Court, conceding that federal law governed whether a permit was required to engage in certain activities, emphasized that Connecticut law governed whether the defendant had engaged in proscribed conduct. Cote, 945 A.2d at 423. On the other hand, in the case at bar, the General Assembly decreed that the elements of the offense would be derived from the provisions of the FMCSR.

[8] Under subsection 31-23-1(c), quoted supra at 12, a "carrier" is defined as

The appellate panel agreed that since the corporation is not a carrier the penalties contained in § 31-41.1-4 do not pertain to appellant. But, affirming the reasoning of the trial magistrate, the panel held that in this circumstance the corporation could properly be subjected to Title 31's general penalty provision — Gen. Laws 1956 § 31-27-13(a).

But, § 31-23-1(b)(2) is also inapplicable to the instant charges because they do not arise under state rules, but federal regulations — the FMCSR. For this reason as well, I believe subdivision 31-23-1(b)(2) is inapplicable to those — like Evelyn's Transportation Inc. — who are cited under subdivision 31-23-

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a company operating a vehicle that weighs more than 10,000 pounds. The vehicle that was stopped by Trooper Pendergast does not meet this test.

[9] See State v. DelBonis, 862 A.2d 760, 768 (R.I. 2004) indicating that "[i]t is basic hornbook law 'that every criminal statute must provide for a penalty and that a conviction for a violation of a statute containing none cannot stand.'" citing [State v.] Tessier, 100 R.I. [210,] 211, 213 A.2d [at] 699 [1965]. Although the instant case involves civil violations, not criminal charges, they are penal in nature; I therefore believe this principle applies.

Nevertheless, I do not believe that the Supreme Court's holding in DelBonis is controlling here. In DelBonis the Supreme Court vacated a drunk driving conviction based on observations due to the lack of a prescribed penalty, even though the statute indicated that the penalty would be found within it. The instant case is distinguishable since, for both factual and legal reasons, the penalty cross-reference did not apply to Evelyn's Transportation. In this situation, I believe it was perfectly proper for the trial magistrate to apply the general penalty provision.

1(b)(1) for violations of the FMCSR. Accordingly, the trial magistrate was correct to apply the general penalty provision.

VI. CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel was made upon lawful procedure and was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 31-41.1-9.

Accordingly, I recommend that the decision of the appeals panel be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

October 28, 2011