

**BEFORE THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION  
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION**

**IN THE MATTER OF:**

**National Distribution Services, Inc.**

**Tankservices, LLC**

**Carl Johansson**

Docket Nos. PHMSA-2014-0116  
FMCSA-2014-0343

Emergency Order No.  
CA-2014-9002-EMRG

**DECISION ON PETITION FOR REVIEW OF EMERGENCY ORDER**

On September 3, 2014, National Distribution Services, Inc. (National) asked me to review the Emergency Restriction/Prohibition Order and Out-of-Service Order (Order) issued by the U.S. Department of Transportation (US DOT), Federal Motor Carrier Safety Administration (FMCSA) on August 14, 2014 and rescind it entirely or, alternatively, modify it to more specifically, as it relates to National and its contracted Administrative Manager Carl Johansson (“Johansson”), address the imminent hazard offered by FMCSA as a basis for its issuance.

**Background**

Based on a review of the record, below is a summary of facts that are undisputed. On May 6, 2014, a DOT MC 306 specification cargo tank motor vehicle (“CTMV” or “DOT specification tanks”) exploded while Sam Enciso (“Enciso”) and Danny Lopez-Velasquez (“Lopez-Velasquez”) were welding on the shell of the CTMV in a facility in Corona, California owned and operated by National.<sup>1</sup> The work was being performed in National’s Corona, California facility, and using equipment that belonged to National.<sup>2</sup> As a result of the explosion, Enciso died while Lopez-Velasquez sustained serious injuries.<sup>3</sup> FMCSA began an investigation of the explosion into the incident on May 7, 2014, and conducted an inspection of the facility in July 2014.<sup>4</sup> FMCSA determined that the CTMV had not been cleaned and purged prior to the welding as required by 49 C.F.R. § 180.413.<sup>5</sup> During the course of its investigation, FMCSA discovered that welded repairs had been performed on the shell and/or head of other DOT specification CTMVs.<sup>6</sup> FMCSA found welded repairs had been performed on at least 11<sup>7</sup> other

<sup>1</sup> FMCSA’s Resp. to Pet. For Review of Emergency Restriction/Prohibition Order and Out-of-Service Order (“Response”), Ex. 6, Corona Fire Department Report – May 6, 2014 incident at 2.

<sup>2</sup> FMCSA’s Resp., Ex. 13, Bruce Medina Decl at 3.

<sup>3</sup> FMCSA’s Resp., Ex. 6, Corona Fire Department Report – May 6, 2014 incident at 2.

<sup>4</sup> FMCSA’s Resp., Ex. B, Decl. of Donald Tomlinson at 1-2.

<sup>5</sup> FMCSA’s Resp., Ex. B, Decl. of Donald Tomlinson at 7.

<sup>6</sup> FMCSA’s Resp., Ex. B, Decl. of Donald Tomlinson at 15.

<sup>7</sup> While FMCSA’s investigator found that welded repairs had been conducted on eleven CTMVs, only seven were specifically listed in Appendix B of the Order.

DOT specification CTMVs used to transport hazardous materials that were not made in accordance with the requirements of 49 C.F.R. § 180.413.<sup>8</sup> The repairs were not certified by a Registered Inspector and National's repair facility did not hold a National Board Certificate of Authorization "R" stamp or a valid ASME Certificate of Authorization "U" stamp as required by 49 C.F.R. § 180.413.<sup>9</sup> FMCSA also found that 35 of the DOT specification CTMVs owned, leased, and/or operated by National, being used to transport hazardous materials on a daily basis, had not been properly inspected or tested as required by 49 C.F.R. § 180.407.<sup>10</sup> Additionally, during the investigation, the FMCSA investigator observed DOT specification CTMVs with evidence of dents, cuts, gouges, and corroded or abraded areas were observed for which no inspection and testing had been completed.<sup>11</sup>

As a result, FMCSA issued the aforementioned emergency order. In the August 14, 2014 Order, the Field Administrator for the US DOT, FMCSA found that due to "violations of the Federal Hazardous Materials law and/or the Hazardous Materials Regulations ("HMR"), an unsafe condition, or an unsafe practice is causing or otherwise constitutes an imminent hazard and immediately prohibited National, TankServices, LLC ("TankServices") and Johansson" from:

1. Filling and/or offering, and/or requiring, permitting or allowing any other person to fill and/or offer, any cargo tank or cargo tank vehicle owned, leased, and/or operated by or on behalf of National, specifically including, but not limited to, the cargo tanks listed in Appendices A and B of this Order, for the transportation of hazardous materials;

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<sup>8</sup> FMCSA's Resp., Ex. B, Decl. of Donald Tomlinson at 6, 15; 49 C.F.R. § 180.413 reads in relevant part:

§ 180.413 Repair, modification, stretching, rebarrelling, or mounting of specification cargo tanks.

(a) *General.* Any repair, modification, stretching, rebarrelling, or mounting of a cargo tank must be performed in conformance with the requirements of this section.

(1) Except as otherwise provided in this section, each repair, modification, stretching, or rebarrelling of a specification cargo tank must be performed by a repair facility holding a valid National Board Certificate of Authorization for use of the National Board "R" stamp and must be made in accordance with the edition of the National Board Inspection Code in effect at the time the work is performed.

(i) Repairs, modifications, stretchings, and rebarrellings performed on non-ASME stamped specification cargo tanks may be performed by:

(A) A cargo tank manufacturer holding a valid ASME Certificate of Authorization for the use of the ASME "U" stamp using the quality control procedures used to obtain the Certificate of Authorization; or

(B) A repair facility holding a valid National Board Certificate of Authorization for use of the National Board "R" stamp using the quality control procedures used to obtain the Certificate of Authorization.

(ii) A repair, modification, stretching, or rebarrelling of a non-ASME stamped cargo tank may be done without certification by an Authorized Inspector, completion of the R-1 form, or being stamped with the "R" stamp.

(2) Prior to each repair, modification, stretching, rebarrelling, or mounting, the cargo tank motor vehicle must be emptied of any hazardous material lading. In addition, cargo tank motor vehicles used to transport flammable or toxic lading must be sufficiently cleaned of residue and purged of vapors so any potential hazard is removed, including void spaces between double bulkheads, piping and vapor recovery systems.

(3) Each person performing a repair, modification, stretching, rebarrelling or mounting of a DOT specification cargo tank must be registered in accordance with subpart F of part 107 of this chapter.

<sup>9</sup> Order at 6; FMCSA's Resp., Ex. B, Decl. of Donald Tomlinson at 6.

<sup>10</sup> Order at 6; FMCSA's Resp., Ex. B, Decl. of Donald Tomlinson at 12-14; 49 C.F.R. § 180.407 Requirements for test and inspection of specification cargo tanks.

<sup>11</sup> FMCSA's Resp., Ex. B, Decl. of Donald Tomlinson at 12-14.

2. Transporting, and/or requiring, permitting or allowing any other person to transport, hazardous materials in any cargo tank or cargo tank motor vehicle owned, leased, and/or operated by or on behalf of National, specifically including, but not limited to, the cargo tanks listed in Appendices A and B of this Order;
3. Conducting any welded repair to any DOT specification cargo tank, specifically including, but not limited to, the cargo tanks listed in Appendices A and B of this Order;
4. Requiring, permitting, or allowing any other person to conduct any welded repair to any cargo tank or cargo tank motor vehicle unless such repair is conducted in accordance with 49 C.F.R. § 180.413; and
5. Conducting any inspection and/or testing on any cargo tank or cargo tank motor vehicle and/or permitting any person to conduct any inspection and/or testing on any cargo tank or cargo tank motor vehicle unless such person has current valid registration in accordance with 49 C.F.R. Part 107, and inspections and tests are conducted by a Registered Inspector familiar with DOT specification cargo tanks, trained and experienced in the use of the inspection and testing equipment needed, and has the training and experience required to meet the definition of “registered inspector” as set forth in 49 C.F.R. § 171.8.<sup>12</sup>

On August 20 and 21, 2014, National submitted documentation of successful completion of tests and inspections as required under 49 C.F.R. § 180.407(c) by a Registered Inspector for specific CTMVs. Accordingly, the Field Administrator partially rescinded the Order on August 22, 2014 to remove the five cited CTMVs from its scope.

In its September 3, 2014 Petition for Review of the Emergency Order (“Petition”), National asked me to consider whether FMCSA exceeded its statutory authority by issuing an overly broad emergency order when it not only prohibited unauthorized repairs to the CTMVs but also prohibited National from operating any of its CTMVs. National contended that “[t]he one true imminent hazard the Order attempt[ed] to prevent[] related to the repair of a CTMV that had not been properly cleaned and purged[]”<sup>13</sup> before repair and caused the fatality. National argued that the hazard was due to the unsafe acts of TankServices<sup>14</sup> and/or Power Petroleum<sup>15</sup> in conducting repairs without first verifying that the cargo tank was completely purged of all flammable product. National asserted that the Order should have been directed solely against TankServices because neither National nor Johansson owned, controlled, or supervised TankServices. National contended that even if FMCSA believes that the condition of certain specific CTMVs constitutes an imminent hazard, the Order is much too broad because it puts every CTMV leased or operated by National out-of-service, even though FMCSA only identified 42 CTMVs that may have been technically out-of-compliance with applicable regulations.

On September 8, 2014, FMCSA submitted a Response to National’s Petition (“Response”) and National submitted a Reply in Support of Its Petition for Review of

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<sup>12</sup> Order at 1-4.

<sup>13</sup> Petition at 10.

<sup>14</sup> TankServices inspects, tests, and/or repairs DOT specification cargo tanks. Order at 4.

<sup>15</sup> Power Petroleum is a contractor of National’s, and National claims that Power Petroleum was leasing the CTMV that exploded from National at the time of the explosion.

Emergency Order (“Reply”) on September 15, 2014. The merits of the arguments as to the validity and scope of the Emergency Order are addressed below.

## **Discussion**

### **I. Carl Johansson**

In its Petition, National argued that Johansson should not have been named as a party to the Order in his personal capacity because Carl Johansson is employed by an employee-staffing company and is contracted to National as its Administrative Manager. Both Johansson and National claimed that he had no ownership interest in National or TankServices and that at all times relevant to the FMCSA investigation, Johansson was acting in his capacity as a contracted Administrative Manager and should not have been named in his personal capacity in the Order.<sup>16</sup> Additionally, National stated that Johansson is not registered to inspect, test, or repair cargo tanks or CTMVs and had not engaged in such activities in the past nor did he plan to in the future. It further claims that he did not authorize or direct TankServices to conduct repairs on the CTMV at issue in the May 6, 2014 incident nor was he even present at the facility prior to or at the time the incident occurred.

In the Order, FMCSA concluded that the “repair work was directed by Carl Bradley Johansson for National Distribution Services, Inc.”<sup>17</sup> In its Response, FMCSA again alleged that Johansson manages and directs the transportation of hazardous materials in DOT specification cargo tanks by National and other motor carriers.

49 U.S.C. § 5102(9) defines “person” as including the definition of “person” in 1 U.S.C. § 1, to encompass all “individuals,” regardless of their involvement in the transportation of hazardous material, but the HMR in 49 C.F.R. § 171.1(b) limits the application to each “person who offers a hazardous material for transportation in commerce, causes a hazardous material to be transported in commerce, or transports a hazardous material in commerce and who performs or is responsible for performing a pre-transportation function....” While the statement of one of National’s employees, Juan Solis (“Solis”), assistant shop foreman, suggests that Johansson may have had a greater role in the management of National than Johansson claims in his sworn affidavit, there was no evidence provided by FMCSA that demonstrated that Johansson’s duties or responsibilities at National included shipments of hazardous materials or that Johansson owned or controlled National or its business. Therefore, because evidence was absent from the record of Johansson’s involvement in the transportation of hazardous materials as defined by the HMR, I find that Johansson should not have been named as a party in the Orders that were issued by FMCSA on August 14, 2014 and August 22, 2014.

### **II. National Distribution Services**

National, in its Petition, claimed that it was wrongly named as a party to the Order. National contended that Enciso and Lopez-Velasquez were employees of TankServices at the time of the accident and that the CTMV on which they were conducting repairs was owned but

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<sup>16</sup> National’s Petition, Ex. B, Affidavit of Carl Johansson at 4.

<sup>17</sup> Johansson is referred to as “Brad” or “Brad Johansson” in many of the signed statements provided as evidence.

not operated by National because it had been leased to Power Petroleum.<sup>18</sup> National conceded that it would be reasonable for FMCSA to prohibit TankServices from conducting unauthorized repairs but that the Agency overreached when it prohibited National and Johansson from filling, transporting, offering for transport, and/or conducting welded repairs to any tanks owned, leased or operated by National and inspecting/testing any other tanks. The crux of its argument was that there was no legal or operational relationship between National and TankServices, and no one associated with National controlled, directed or supervised the maintenance work conducted by TankServices.<sup>19</sup> National claimed that the only connection between the two companies was that TankServices utilized space in a facility that National rented to TankServices to perform its services for National and other entities, and that National did, in the past, utilize TankServices to perform maintenance and inspections on its equipment.

FMCSA responded that the evidence clearly demonstrates that “TankServices was a paycheck writing service to National and Johansson,”<sup>20</sup> and the unsafe and unauthorized repair work was being completed in National’s Corona facility shop, by National’s shop workers, using National’s welding equipment, and installing parts purchased by National. The paycheck for the week including May 6, 2014 for Lopez-Velasquez showed the welder being paid by National.<sup>21</sup>

Despite National’s contention that there was no legal or operational relationship between National and TankServices, the evidence contradicts its assertion that it had no influence or control over TankServices, the repair, or the workers performing such repairs. The repairs were made at National’s unauthorized facility.<sup>22</sup> Cameron Spicer (“Spicer”), the Regulatory Compliance Manager of National, stated that National’s facility was a repair facility for tractor trailers.<sup>23</sup> No evidence was submitted by National that supported its claim that there was a contractual agreement with TankServices to lease part of the facility or any equipment to it to perform such repairs. Instead, the record shows that Enciso and Lopez-Velasquez were, in fact, making repairs at National’s facility with National’s equipment. Bruce Medina himself stated that TankServices did not rent a bay on National’s property nor did it own any equipment that it used on TankServices’ property.<sup>24</sup>

Although National claimed otherwise, based on the documentation provided, it is evident that National played a more considerable role in the repair work done at its facility than it portrayed in its Petition. Spicer established in his statement that neither Medina nor anyone from TankServices ever came to National to direct or control the activities of Enciso or Lopez-

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<sup>18</sup> Despite National’s contention, FMCSA was unable to verify which CTMVs had been leased to Power Petroleum because the provided contract was missing the addendum that listed all leased units.

<sup>19</sup> National submitted as part of its Petition an affidavit by Carl Johansson in which he stated that “TankServices and National have no common ownership and no one associated with National, including myself, controls, directs or supervises the maintenance or repair work conducted by TankServices.”

<sup>20</sup> FMCSA’s Resp. at 7.

<sup>21</sup> Evidence was not provided as to who issued Enciso’s check during that week.

<sup>22</sup> FMSCA’s Resp., Ex. 5, Photographs of Nat’l Dist. Serv.; FMSCA’s Resp., Ex. 6, Corona Fire Department Report – May 6, 2014 incident at 2; FMSCA’s Resp., Ex. 7, Photographs – May 6, 2014 incident.

<sup>23</sup> FMSCA’s Resp., Ex. 6, Corona Fire Department Report – May 6, 2014 incident at 2.

<sup>24</sup> FMCSA’s Resp., Ex. 13, Jul. 21, 2014 Signed Statement of Jesus Bruce Medina at 3. Additionally, there was no evidence of a contract or financial agreement that showed that the facility had been leased to TankServices.

Velasquez.<sup>25</sup> The evidence also confirmed that National's employees were directing and controlling the repair work and the activities of Enciso and Lopez-Velasquez on the date of the fatal accident.

In terms of general supervision, Solis claimed that both Lopez-Velasquez and Enciso were supervised by Solis.<sup>26</sup> Solis, as National's assistant shop foreman, identified Henry Garcia ("Garcia") as his direct supervisor at National.<sup>27</sup> Solis provided in his signed statement that Garcia, directed Lopez-Velasquez and Enciso to perform welded repairs on DOT specification tanks.<sup>28</sup> Spicer confirmed that both Solis and Garcia worked for National.<sup>29</sup> Specifically, Solis stated that on the date of the accident, Garcia was on duty and approved of all of the welded repairs for cargo tank unit 678238 that were performed by Lopez-Velasquez and Enciso.<sup>30</sup> Further, Lopez-Velasquez provided in his statement that Garcia was actually his direct supervisor who directed him to weld on the shell and heads of DOT specification cargo tanks.<sup>31</sup> Additionally, both Medina and Patricia Medina, the owners of TankServices, confirmed that neither of them had any control or authority to direct the shop employees at National's facility.<sup>32</sup>

The most significant evidence that demonstrates the relationship between National and the repair work being done at the time of the accident is Lopez-Velasquez's paycheck.<sup>33</sup> His paycheck from the week of May 5, 2014 was issued by National Distribution. Moreover, his paycheck from the week prior of April 28, 2014 was also from National Distribution.<sup>34</sup> Although, evidence was not provided specifically about Enciso's paycheck, Patricia Medina stated that "National Distribution had paid money to his family."<sup>35</sup>

Because the evidence demonstrated National's role in directing and controlling the repair work being done on the CTMVs at its unauthorized facility, I find that National was a properly named party to the Orders it issued on August 14, 2014 and August 22, 2014.

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<sup>25</sup> FMCSA's Resp., Ex. 20, July 22, 2014 Signed Statement of Cameron Spicer at 3. Spicer confirmed that Bruce Medina did not direct the work of Enciso or Lopez-Velasquez and that Garcia worked for National.

<sup>26</sup> FMCSA's Resp., Ex. 9, Aug. 7, 2014 Signed Statement of Juan Solis at 1. National did not provide any employment documents for its employees with job descriptions or titles.

<sup>27</sup> FMCSA's Resp., Ex. 9, Aug. 7, 2014 Signed Statement of Juan Solis at 4. It is unclear as to what Garcia's title is at National because he refused to submit a signed statement as part of the investigation. Despite the fact that the Corona Fire Department Report refers to Garcia as being a part of TankServices, Solis confirms that Solis worked for Garcia directly.

<sup>28</sup> FMCSA's Resp., Ex. 9, Aug. 7, 2014 Signed Statement of Juan Solis at 2.

<sup>29</sup> FMCSA's Resp., Ex. 20, July 22, 2014 Signed Statement of Cameron Spicer at 3.

<sup>30</sup> FMCSA's Resp., Ex. 11, Receipt for Nat'l Dist. Serv., Inc.'s purchase of dome lid collars dated May 6, 2014.

<sup>31</sup> FMCSA's Resp. Ex. 8, Jul. 22, 2014 Signed Statement of Danny Lopez Velasquez at 2. This relationship was also evidenced by the Corona Fire Department's Report. FMCSA's Resp., Ex. 6, Corona Fire Department Report – May 6, 2014 incident at 5.

<sup>32</sup> FMCSA's Resp., Ex. 13, July 21, 2014 Signed Statement of Jesus Bruce Medina at 1, 4.; FMCSA's Resp., Ex. 19, Jul. 28, 2014 Signed Statement of Patricia Medina at 2.

<sup>33</sup> FMCSA's Resp., Ex. 23, Daniel Lopez Velasquez paycheck and paycheck stubs for weeks of April 28, 2014 to May 4, 2014 and May 5, 2014 to May 11, 2014.

<sup>34</sup> FMCSA's Resp., Ex. 23, Daniel Lopez Velasquez paycheck and paycheck stubs for weeks of April 28, 2014 to May 4, 2014 and May 5, 2014 to May 11, 2014.

<sup>35</sup> FMCSA's Resp., Ex. 19, Jul. 28, 2014 Signed Statement of Patricia Medina at 5.

### III. Imminent Hazard

Beyond the challenge to the parties named in the Order, National contended that the condition of the CTMVs does not constitute an imminent hazard as defined by 49 C.F.R. § 109.1, and thus did not warrant the issuance of an emergency order to abate such a hazard. It argued in its Petition that the evidence shows that each and every one of National's CTMVs had been tested and passed an independent inspection so the violations were mere recordkeeping violations which did not reach the level of an imminent hazard.<sup>36</sup> Additionally, National argued that the lack of inspection/testing or the exhibited signs of dents, cuts, gouges, or corrosion do not reach the level of an imminent hazard.<sup>37</sup> In other words, National claimed that FMCSA has demonstrated technical violations of the hazardous materials regulations, but argued that they do not even amount to out-of-service violations, let alone imminent hazards.<sup>38</sup>

FMCSA responded that these violations were not mere recordkeeping violations.<sup>39</sup> FMCSA presented an array of facts that were not comprehensively set forth in the initial Order but were set forth in the Response to demonstrate that there is an imminent hazard.<sup>40</sup> It appears from FMCSA's Order and Response that it concluded that the imminent hazard was created by a multitude of unsafe conditions, rather than just one specific violation. In summary, FMCSA asserted that 1) employees under the direction of National were conducting unauthorized welded repairs on the shell and head of DOT specification cargo tanks without any safety management protocols and practices in place to protect employees and the public, 2) DOT specification cargo tanks with unauthorized welded repairs are being used on an almost daily basis by National to transport hazardous materials, 3) as of August 14, 2014, 42 of 53 of National's DOT specification cargo tanks being used to transport hazardous materials were missing safety inspections and tests required by the HMR, without which the CTMVs could not legally be used to transport hazardous materials.<sup>41</sup> It concluded that based on *In the Matter of Lite Cylinder Company, Inc.*, it is presumed that any specification cargo tank, which is not authorized or otherwise prohibited from use in transportation of a hazardous material in commerce, presents a risk of death, serious illness, severe personal injury, or a substantial endangerment to health,

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<sup>36</sup> Under 49 C.F.R. § 180.407(a), any CTMV that is missing a required test or inspection "may not be filled and offered for transportation or transported until the test or inspection has been successfully completed."

<sup>37</sup> At points in its Petition and Reply, National seems to refer to the definition of "imminent hazard" under 49 C.F.R. § 386.72(a) and (b), FMCSA regulations which are not applicable in this case. The emergency order in this case relates to a finding of "imminent hazard" as defined in 49 C.F.R. § 171.8.

<sup>38</sup> In its Petition, National seems to be referring to the criteria for declaring a CTMV out-of-service under Federal Motor Carrier Safety Regulations, 49 C.F.R. Part 385. However, FMCSA's order was not issued pursuant to those regulations, it was issued as an emergency order pursuant to 49 C.F.R. § 109.17. Under § 109.17, a CTMV can be declared out-of-service through an emergency order if it is necessary to abate an imminent hazard and may be kept out-of-service until the specified conditions of the out-of-service order have been met. No other out-of-service criteria apply.

<sup>39</sup> A "mere recordkeeping violation" refers to a situation where the required inspection, testing, and certification were conducted properly, but where the records had not been properly maintained afterwards. In contrast, if the required inspection, testing, or certification were not conducted properly or never occurred, then it would not be a "mere recordkeeping violation."

<sup>40</sup> FMCSA's Response included 627 pages of uncited exhibits that were not previously attached to the Orders. Due to the volume of documents produced as part of the Response, leave was granted to National to file a Reply to FMCSA's Response. The exhibits were not cited to in either the Orders or the Response.

<sup>41</sup> Many of the specification cargo tanks had tests and inspections that had been expired for a year or more, but were being routinely operated to transport hazardous materials in violation of 49 C.F.R. § 180.413.

property, or the environment from a failure or rupture of the tank itself, or from the release of contents which are hazardous.<sup>42</sup>

*i. Was there an imminent hazard?*

49 C.F.R. § 109.1 defines “imminent hazard” as:

The existence of a condition relating to a hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury or endangerment.

Once the agency determines that there is an imminent hazard, it may issue an emergency order as described § 109.17 in relevant part:

**§ 109.17 Emergency Orders.**

(a) *Determination of imminent hazard.* When an Administrator determines that a violation of a provision of the Federal hazardous material transportation law, or a regulation or order prescribed under that law, or an unsafe condition or practice, constitutes or is causing an imminent hazard, as defined in § 109.1, the Administrator may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without advance notice or an opportunity for a hearing. The basis for any action taken under this section shall be set forth in writing which must—

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- (1) Describe the violation, condition, or practice that constitutes or is causing the imminent hazard;
- (2) Set forth the terms and conditions of the emergency order;
- (3) Be limited to the extent necessary to abate the imminent hazard; and,
- (4) Advise the recipient that, within 20 calendar days of the date the order is issued, recipient may request review; and that any request for a formal hearing in accordance with 5 U.S.C. 554 must set forth the material facts in dispute giving rise to the request for a hearing; and
- (5) Set forth the filing and service requirements contained in § 109.19(f), including the address of DOT Docket Operations and of all persons to be served with the petition for review.<sup>43</sup>

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<sup>42</sup> *In the Matter of Lite Cylinder Company, Inc.*, Docket No. PHMSA-2013-0123 (Decision on Petition for Review of Emergency Recall Order, July 1, 2013) (upholding the emergency order).

<sup>43</sup> Both parties repeatedly cite the case of *In the Matter of: Henry T. Daye DBA Two Dayes Transp.*, No. FMCSA-2013-0006, 2013 WL 2357800 (D.O.T. May 17, 2013), however this case deals with a different type of emergency order authority under 49 C.F.R. § 386.72(b)(3) and deals with a different definition of imminent hazard, 49 C.F.R. § 386.72(a). Prior orders issued under FMCSA’s regulations are not instructive for deciding the validity of a different type of emergency order, brought under different statutory and regulatory authority.

The evidence demonstrates that not only did National fail to hold a National Board Certificate of Authorization for the use of the “R” stamp or a valid ASME Certificate of Authorization “U” stamp as required by 49 C.F.R. § 180.413 but it was also allowing unauthorized repairs to be done at its facility at the direction of and by its employees.<sup>44</sup> The FMCSA investigator discovered at least 11 DOT specification cargo tanks for which welded repairs had not been made in accordance with § 180.413 because National did not have the proper certification required for the facility.<sup>45</sup>

In FMCSA’s Order, it identified 35 tanks that had not been inspected or tested as required by 49 C.F.R. § 180.407. The only person who appeared to be inspecting and testing National’s CTMVs was the owner of TankServices, Medina. Medina’s registration as an authorized inspector, which is required by 49 C.F.R. Part 107, had expired in November of 2013.<sup>46</sup> By National’s own admission in its Reply, Medina was testing and inspecting National’s CTMVs after he failed to renew his registration as a Registered Inspector in November of 2013.<sup>47</sup> National gave no indication that it was utilizing anyone other than Medina to conduct inspections. Therefore, National’s CTMVs were not merely missing records of the required inspections. Instead, the evidence indicates that the required inspections by a Registered Inspector never took place and any unauthorized repairs had not been inspected by a Registered Inspector.

In this case, not only were provisions of the HMR being violated, but National was also engaging in unsafe practices. As discussed in *In the Matter of Lite Cylinder Company, Inc.*, there is a presumption that a packaging which is not authorized for the transportation of a hazardous material in commerce presents a risk of “death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment from a rupture of the package itself or from the release of contents which are hazardous.”<sup>48</sup> Based upon the entirety of the evidence that welded repairs were being performed by National personnel at National’s unauthorized facility, that a fatal accident occurred while workers were performing unauthorized repairs in violation of § 180.413 at the direction of National, that the only person inspecting National’s CTMVs had an invalid registration, that FMCSA’s inspection revealed that a *vast majority* of the CTMVs were either overdue their periodic tests or had questionable repair work done, and that the CTMVs are used almost daily to transport hazardous materials, there was sufficient evidence to support the Field Administrator’s finding that there was an imminent hazard as defined by 49 C.F.R. § 109.1.

***ii. Was the Order narrowly tailored enough to abate such a hazard?***

The Petition also challenged, even if an emergency order was warranted, the extent of the prohibition against the use of the CTMVs owned or operated by National. National argued that the imminent hazard was not caused by the condition of the CTMV itself but by the unsafe

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<sup>44</sup> FMCSA’s Resp., Ex. B, Decl. of Donald Tomlinson at 6; FMCSA’s Resp., Ex. 9, Aug. 7, 2014 Signed Statement of Juan Solis at 2; FMCSA’s Resp. Ex. 8, Jul. 22, 2014 Signed Statement of Danny Lopez Velasquez at 2.

<sup>45</sup> FMCSA’s Resp., Ex. B, Decl. of Donald Tomlinson at 6, 15.

<sup>46</sup> FMCSA’s Resp., Ex. 13. July 21, 2014 Signed Statement of Jesus Bruce Medina at 1.

<sup>47</sup> National’s Reply at 3.

<sup>48</sup> *In the Matter of Lite Cylinder Company, Inc.* at 4.

repairs made to one specific unit by TankServices or Power Petroleum, and the failure to properly clean and purge the unit before the repair as required by the HMR. National further argued that even if the condition of some of its CTMVs constituted an imminent hazard, the Order was overbroad when it placed every CTMV leased or operated by National out-of-service. National contended that the Order should have at least been limited to the specific CTMVs that FMCSA identified as out-of-compliance. It claimed that FMCSA confirmed to National's counsel that it intentionally broadened the scope of the Order to encompass all of National's CTMVs because it did not trust that National was being forthcoming with its inventory of CTMVs.

FMCSA responded that employees under the direction of National and/or Johansson were conducting unauthorized welded repairs on the shell and head of DOT specification cargo tanks without any safety management protocols and practices in place. FMCSA claimed that National's daily use of improperly inspected cargo tanks with unauthorized welded repairs to transport highly flammable materials presented a risk of leak or rupture which could result in death, severe personal injury, or endangerment to health, property, or the environment.

49 C.F.R. § 109.17 requires that an emergency order be "limited to the extent necessary to abate the imminent hazard." Due to National's unauthorized repairs at its unauthorized facility and inspections of the CTMVs being performed by an individual without a valid registration, FMCSA was unable to determine whether the testing and inspections and any repairs that were done could actually ensure the safety of the CTMVs that are transporting hazardous materials on a daily basis. It was reasonable for FMCSA to presume that because 35 out of 53 identified CTMVs had not been properly inspected, then none of National's CTMVs had been properly inspected since November of 2013 because the only person inspecting National's CTMVs was Medina. The fact that its only inspector, who had performed numerous inspections on unauthorized welds, had an expired registration, along with the evidence that unauthorized repair welds performed at the direction of and by National's employees at National's unauthorized facility resulted in the death of Enciso and serious injuries to Lopez-Velasquez, provided FMCSA with a sufficient basis to include all of the cargo tanks owned, leased, and/or operated by or on behalf of National. The totality of the circumstances raised serious concerns regarding the integrity of the tanks owned, leased, and/or operated by National. Accordingly, the Order was not overly broad when it prohibited the filling, transporting, or operating of any of the tanks owned, leased, and/or operated on behalf of National for hazardous materials transportation and prohibited National from conducting any welded repair to any DOT specification cargo tank or from requiring, permitting or allowing any other person to conduct any welded repair to any cargo tank or cargo tank motor vehicle unless such repair was conducted in accordance with 49 C.F.R. §§ 180.407 and 180.413. Moreover, FMCSA has demonstrated that it will issue a partial rescission of the Order as to specific CTMVs as soon as National provides updated valid inspection reports for those as it did on August 22, 2014. FMCSA had limited the Order to the extent necessary to abate the imminent hazard.<sup>49</sup>

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<sup>49</sup> See FMCSA's Partial Rescission of Emergency Restriction/Prohibition Order and Out-of-Service Order, issued on August 22, 2014.

## Decision

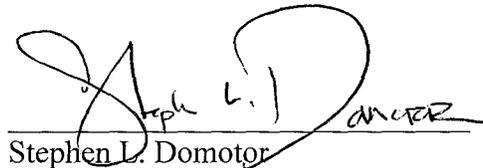
**Based upon all the information available in the record and upon the foregoing reasons, I find that:**

1. Johansson should not have been named as a party in the Orders that were issued by FMCSA on August 14, 2014 and August 22, 2014. The Orders are hereby modified to remove Johansson as a named party;
2. National was a properly named party to the Orders FMCSA issued on August 14, 2014 and August 22, 2014; and
3. The Orders were limited to the extent necessary to abate the imminent hazard.

## Final Administrative Action

This decision on National's petition for review constitutes PHMSA's final administrative action in this proceeding. 49 C.F.R. § 109.19(c)(2). A person adversely affected or aggrieved by this decision may petition for review of this decision in the United States Court of Appeals for the District of Columbia or in the United States Court of Appeals for the circuit in which the person resides or had its principal place of business, within 60 days after the date of this decision. 49 U.S.C. § 5127(a).

Dated: October 3, 2014



Stephen L. Domotor  
Chief Safety Officer

Pipeline and Hazardous Material Safety Administration (PHMSA)