

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**ACE DELIVERY & MOVING, INC.,
(U.S. DOT No. 571890)**

Respondent.

**Docket No. FMCSA-2010-0399¹
(Western Service Center)**

ORDER DENYING MOTION FOR FINAL ORDER

1. Background

On June 17, 2010, the Field Administrator for the Western Service Center, Federal Motor Carrier Safety Administration (FMCSA) (Claimant), issued a Notice of Claim (NOC) to Ace Delivery & Moving, Inc. (Respondent), proposing a civil penalty of \$11,100, based on the following violations: (1) one violation of 49 U.S.C. § 14915, failing to relinquish possession of a household goods shipment after the shipper offers to pay or pays at least 100 percent of a binding estimate, with a proposed civil penalty of \$10,000; and (2) one violation of 49 CFR 375.205(b), failing to have a written and signed agency agreement with its Prime Agent(s), with a proposed civil penalty of \$1,100.² These alleged violations were discovered during a June 3, 2010 compliance review. The first alleged violation pertained to a household goods shipment transported by Respondent for Jose Ortiz from Anchorage, Alaska to Delta Junction, Alaska on

¹ The prior case number was AK-2010-0005-US0718.

² See Attachment A to Field Administrator's Motion for Final Agency Order and Memorandum of Law (Motion for Final Order).

or about January 29, 2010.³ The second alleged violation involved a business relationship between Respondent and Cross Country Van Lines, LLC (CCVL).

On September 15, 2010, Respondent served its Reply to the NOC, which denied both alleged violations and requested a hearing.⁴ Respondent argued that, with respect to the first charge, the shipper contracted with a broker, which brokered the load to CCVL. Respondent received the shipment in Anchorage, Alaska for delivery to Delta Junction, Alaska. Respondent contended that Mr. Ortiz refused to pay it any money on delivery because he claimed he had already prepaid all transportation charges to CCVL. The gist of Respondent's defense to this charge is that it had no contractual relationship with the shipper, was not the primary carrier, and the shipper never offered to pay it any money. In response to the second charge, Respondent denied that CCVL was a prime agent.

Claimant served a Notice of Objection to Respondent's Request for Hearing on November 4, 2010 and a Motion for Final Order on April 19, 2011. In his Motion for Final Order, Claimant argued that: (1) there were no material facts in dispute warranting a hearing; (2) the evidence submitted in support of the motion established a *prima facie* case for each of the violations charged; and (3) the proposed civil penalty was calculated in accordance with applicable statutory requirements. Respondent did not reply to the Motion for Final Order.

2. Decision

A. Request for Hearing

Although Respondent alleged there were material facts in dispute, it did not reply to the

³ This transportation was the final leg of an interstate move originating in Phenix City, Alabama.

⁴ In his Notice of Objection to Respondent's Request for Hearing, Claimant noted that he had agreed to an extension of the deadline for replying to the NOC.

motion for final order, thus failing to meet its burden of establishing a material factual dispute by submitting evidence supporting this allegation.⁵ Once Claimant opposed its hearing request, Respondent was obligated to provide evidence to support its allegations that it complied with the regulations by submitting an affidavit or other appropriate evidence.⁶ Because it failed to do so, its reply must be treated as an unsubstantiated allegation insufficient to establish a material fact in dispute warranting an oral hearing. Therefore, Respondent's request for oral hearing is denied.

B. Motion for Final Order

A motion for final order is analogous to a motion for summary judgment. The moving party, therefore, bears the burden of clearly establishing that there is no genuine issue of material fact, and it is entitled to a judgment as a matter of law.⁷ All inferences must be drawn in favor of the non-moving party, Respondent in this case. Notwithstanding Respondent's failure to show any material facts in dispute, Claimant must establish a *prima facie* case; in other words, he must present evidence clearly establishing all essential elements of his claim.⁸ If Claimant makes a *prima facie* case and Respondent fails to produce evidence rebutting the *prima facie* case, the motion for final order will be granted.⁹

⁵ See *In the Matter of American Diversified Construction, Inc.*, Docket No. 90-TN-043-SA, 58 Fed. Reg. 16951, at 16952, Mar. 31, 1993 (Final Order, May 12, 1992).

⁶ *Id.*

⁷ See *In re Forsyth Milk Hauling Co., Inc.*, Docket No. R3-90-037, 58 Fed. Reg. 16916, at 16983, Mar. 31, 1993 (Order, Dec. 5, 1991).

⁸ *Id.*

⁹ *Id.*

C. The Violations

1. 49 U.S.C. § 14915

Under 49 U.S.C. § 14915(a)(1), whoever holds a household goods shipment hostage is liable to the United States for a civil penalty of not less than \$10,000 per violation. Although the statute does not specifically define the term “holding a household goods shipment hostage,” § 14915(a)(2) provides that each day a carrier is found to have failed to give up possession of household goods may constitute a separate violation. The statute, therefore, equates holding a household goods shipment hostage with the failure to give up possession of the shipment. Section 14915(c) defines “failure to give up possession of household goods” for purposes of § 14915 as:

[T]he knowing and willful failure, in violation of a contract, to deliver to, or unload at, the destination of a shipment of household goods that is subject to jurisdiction under subchapter I or III of chapter 135 of this title, for which charges have been estimated by the motor carrier providing transportation of such goods, and for which the shipper has tendered a payment described in clause (i), (ii), or (iii) of section 13707(b)(3)(A).

49 U.S.C. § 13707(b)(3)(A) states:

In general. - A carrier providing transportation of a shipment of household goods shall give up possession of the household goods being transported at the destination upon payment of -

- (i) 100 percent of the charges contained in a binding estimate provided by the carrier;
- (ii) not more than 110 percent of the charges contained in a nonbinding estimate provided by the carrier; or
- (iii) in the case of a partial delivery of the shipment, the prorated percentage of the charges calculated in accordance with subparagraph (B).

Claimant submitted the Declaration of FMCSA Division Programs Manager (DPM) Jeffery T. Ellett.¹⁰ DPM Ellett conducted the June 3, 2010 compliance review of Respondent. During this compliance review, DPM Ellett obtained copies of the relevant shipping documents.¹¹ He also obtained a signed statement from Mr. Ortiz.¹² Mr. Ortiz's version of the relevant events is as follows:

(1) In early November 2009, he contracted with a broker named Nationwide Relocation (Nationwide) to move his household goods from Phenix City, Alabama to Anchorage, Alaska.

(2) Nationwide arranged for CCVL to transport the shipment, and CCVL picked up Mr. Ortiz's household goods on December 3, 2009.¹³

(3) KAYA Associates, Mr. Ortiz's employer, paid CCVL \$6,018.42 on his behalf.¹⁴

(4) Mr. Ortiz was told by Nationwide that Respondent would pick up the shipment when it arrived in Anchorage and deliver it to his residence in Delta Junction, Alaska.

(5) Mr. Ortiz was later advised by Nationwide that his household goods had arrived in Anchorage in mid-January. He then spoke with Gaylord "Hank" Schaub, Respondent's

¹⁰ See Attachment D to Motion for Final Order.

¹¹ See Exhibit 5 to Motion for Final Order.

¹² *Id.*

¹³ The shipping documents show that CCVL transported the shipment to a railhead at South Kearney, New Jersey and that it was subsequently transported by rail and truck to the port of Tacoma, Washington and placed on a vessel for shipment to the port of Anchorage.

¹⁴ Part of this money may have been paid to the broker instead of CCVL. The documents in Exhibit 5 reflect that \$1,312 was paid to Moving Cost as a "Deposit/Booking Fee." Mr. Ortiz stated that he was expected to reimburse KAYA for his moving costs.

President, on January 25, 2010 to arrange for delivery.¹⁵

(6) Mr. Schaub told Mr. Ortiz that he would deliver the shipment “as soon as he worked some issues out with CCVL.”¹⁶

(7) Sammy Javareen of CCVL advised Mr. Ortiz around February 4, 2010 that his company was having financial difficulties, but that he was sending the necessary funds to Respondent to get Mr. Ortiz’s household goods delivered.

(8) As time progressed, Mr. Ortiz learned that CCVL had gone out of business.

(9) Nationwide contacted Mr. Ortiz on March 10, 2010, and told him they would pay Respondent to deliver his household goods if he released Nationwide from liability. Mr. Ortiz refused to sign a release.

(10) After further contact with Respondent established that Respondent would not deliver any items to his residence, Mr. Ortiz rented a U-Haul truck on March 29, 2010 and transported his household goods from Respondent’s warehouse to his residence in Delta Junction. He and his family had to sleep on air mattresses during the two months his household goods were in Respondent’s possession.

While there are some minor discrepancies between Mr. Ortiz’s Statement and the

¹⁵ Respondent picked up the shipment (which had been containerized) and transported it to its Anchorage facility.

¹⁶ Faxes from Mr. Schaub to Sammy of CCVL indicate that these “issues” concerned CCVL’s failure to pay Respondent for its services in spite of the fact that CCVL had been paid in full by the shipper’s employer. Exhibit 5 includes an invoice from Respondent in the amount of \$1,790. It is unclear whether this invoice was presented to CCVL (which is identified on the document as the shipper) or Mr. Ortiz (who is identified on the document as the consignee). Mr. Ortiz, however, did not state that Mr. Schaub asked him to pay \$1,790 as a condition for delivering the shipment.

shipping documents, the documents confirm Mr. Ortiz's signed statement in all major respects.¹⁷

Although the responsible course of action in the Ortiz case would have been for Respondent to deliver Mr. Ortiz's household goods regardless of whether it had been paid by CCVL, its conduct did not violate 49 U.S.C. § 14915. The legislative history underlying this provision indicates it was not intended to apply to interlining carriers who have no contact with the individual shipper and do not expect to receive any payment from the individual shipper. House Conference Report No. 109-203, in discussing this provision,¹⁸ stated:

“One of the most important parts of Subtitle B of Title IV is the new definition and penalties for the practice of holding household goods hostage. This situation arises when a household goods motor carrier informs the shipper that the charges for shipping or unloading the shipper's possessions have doubled, tripled, or even quadrupled, and the only way the carrier will unload the goods is upon payment of these higher charges. These actions, conducted primarily by ‘rogue movers,’ have gone largely unchecked in recent years. With the addition of civil penalties, Federal and State enforcement personnel have tremendous powers to prosecute these individuals.”¹⁹

Respondent neither contracted with Mr. Ortiz nor estimated the charges. It never received any payment from the shipper, nor was it entitled to such payment, since its contract was with CCVL, not the individual shipper. Accordingly, I conclude that Claimant has not, by a preponderance of the evidence, established that Respondent violated 49 U.S.C. § 14915.

¹⁷ For example, the binding estimate was prepared under the letterhead of a company named Moving Cost of Ft. Lauderdale, Florida, which is most likely a subsidiary of Nationwide. The amount of the binding estimate was \$4,981.57, not \$6,018.42. There is no dispute, however, that the shipping charges were paid in full to CCVL. Several shipping documents show the destination as Fort Greely, Alaska, although Mr. Ortiz's residence is in Delta Junction, Alaska.

¹⁸ Section 14915 was enacted into law as section 4210 of the Safe, Affordable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, P. L. 109-59 (Aug. 10, 2005).

¹⁹ H.R. Conf. Rpt. 109-203, at 1013.

2. 49 CFR 375.205(b)

Section 375.205(b) states: “If you have agents, you must have written agreements between you and your prime agents. You and your retained prime agent must sign the agreements.” Section 375.205(a)(1) defines prime agent as an entity that:

“...provides a transportation service for you or on your behalf, including the selling of, or arranging for, a transportation service. You permit or require the agent to provide services under the terms of an agreement or arrangement with you. A prime agent does not provide services on an emergency or temporary basis. A prime agent does not include a household goods broker or freight forwarder.”

In support of the charge that Respondent violated § 375.205(b), Claimant submitted: (1) shipping documents related to the transportation of household goods for Pamela Easley from Alexandria, Virginia to Anchorage, Alaska on May 25, 2010, where CCVL contracted with the shipper, Respondent picked up the shipment at Anchorage, and eventually delivered the shipment after the shipper signed a release with Nationwide similar to that requested of Mr. Ortiz;²⁰ (2) an Aged Receivable document indicating that CCVL owed Respondent over \$38,000 in connection with 31 shipments invoiced between August 31, 2009 and February 12, 2010;²¹ and (3) a Statement by DPM Ellett reporting an interview with Hank Shaub, Respondent’s President and General Manager.²² According to DPM Ellett, Mr. Shaub stated that Respondent had been doing business with CCVL for several years. Under this business arrangement, Respondent acted as an interline carrier, picking up containerized shipments at the port of

²⁰ See Exhibit 6 to Attachment D to the Motion for Final Order. As in the case of the Ortiz shipment, the shipper had made full payment to CCVL, who failed to pay Respondent. Under the terms of the release, Nationwide was to pay Respondent the amount it was owed by CCVL.

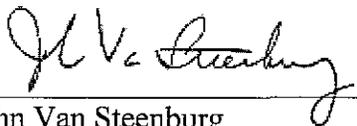
²¹ *Id.*

²² *Id.*

Anchorage and delivering them to the airport or directly to the final destination. Mr. Shaub admitted that there were no written Agency agreements between CCVL and Respondent.

Notwithstanding Claimant's evidence showing an ongoing business relationship between Respondent and CCVL over several years, such a relationship does not establish that CCVL was a prime agent of Respondent's under § 375.205. Based on the Ortiz and Easley shipments, and Mr. Shaub's statements as reported by DPM Ellett, Respondent can be more accurately characterized as an authorized motor carrier that interlined with CCVL to complete the movement of shipments between the continental United States and Alaska. Unlike a traditional household goods carrier agent, Respondent did not solicit business on behalf of CCVL (or *vice versa*), enter into contracts with shippers on behalf of CCVL, or provide moving estimates on behalf of CCVL (or *vice versa*).²³ While Respondent provided a transportation service for CCVL, it did so under its own operating authority and not as a household goods agent. I conclude, therefore, that Claimant did not establish by a preponderance of the evidence that Respondent violated 49 CFR 375.205(b). The Motion for Final Order, therefore, is denied with respect to both alleged violations.

It is So Ordered.



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/7/14

Date

²³ Moreover, transportation documents issued by Respondent in connection with the Ortiz and Easley shipments show CCVL as the shipper, not Mr. Ortiz or Ms. Easley.

CERTIFICATE OF SERVICE

This is to certify that on this 8 day of January, 2014, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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