

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**MTZ TOURS, INC.,  
(USDOT No. 814065)**

**Respondent**

**Docket No. FMCSA-2013-0343<sup>1</sup>  
(Eastern Service Center)**

**FINAL ORDER OF DEFAULT**

**1. Background**

On June 5, 2013, the Massachusetts Division Administrator, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim (NOC) against MTZ Tours, Inc. (Respondent), proposing a civil penalty of \$28,390.<sup>2</sup> The NOC, which was based on a compliance review completed on May 9, 2013, alleged: (1) one violation of 49 CFR 383.37(a), knowingly allowing, requiring, permitting, or authorizing an employee with a suspended, revoked or canceled commercial driver's license, or who is disqualified, from operating a commercial motor vehicle, with a proposed civil penalty of \$400; (2) one violation of 49 CFR 385.13(a), operating a commercial motor vehicle after the effective date of an "unsatisfactory" safety rating, with a proposed civil penalty of \$400; (3) one violation of 49 CFR 386.83(a)(1), operating a commercial motor vehicle in interstate commerce during a period when the operator has been prohibited from operating for failure to pay a civil penalty, with a proposed civil penalty of \$400; (4) one violation of 49 CFR 390.35/396.11(b), fraudulently or intentionally making a false driver vehicle inspection report, with a proposed civil penalty of \$400; (5) one

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<sup>1</sup> The prior case number was MA-2013-0078-US1265.

<sup>2</sup> See Exhibit A to Motion for Default Final Order and Memorandum in Support of Motion for Final Order (MFO).

violation of 49 CFR 391.51(b)(2), failing to maintain inquiries into a driver's driving record in the driver's qualification file, with a proposed civil penalty of \$910; (6) one violation of 49 CFR 392.9a(a)(1), operating without the required operating authority, with a proposed civil penalty of \$25,000; and (7) one violation of 49 CFR 395.8(e), false reports of records of duty status, with a proposed civil penalty of \$880.

On or about July 10, 2013, Respondent served a reply to the NOC requesting that the matter be submitted to binding arbitration.<sup>3</sup> After Claimant consented to arbitration, I granted Respondent's request and referred this matter to binding arbitration by Order dated October 7, 2013. In an e-mail to Claimant's Counsel dated October 25, 2013, Respondent withdrew its request for binding arbitration without providing any explanation.<sup>4</sup>

On November 4, 2013, Claimant submitted a Motion for Default Final Order and Memorandum in Support of Motion for Final Order. Claimant argued by withdrawing its request for binding arbitration, Respondent failed to participate in the binding arbitration process when it was required to do so, and that its failure to participate amounts to a default. Accordingly, Claimant sought entry of a Final Agency Order imposing the civil penalty proposed in the NOC.

## **2. Decision**

Respondent's failure to deny the alleged violations and its request for arbitration in its July 10, 2013 reply to the NOC established Respondent's liability for the violations alleged in the Notice of Claim, and it did not recant these admissions when it subsequently withdrew its

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<sup>3</sup> See Exhibit B to MFO. Such a request is contingent upon an admission of liability that the violations occurred. See 49 CFR 386.14(b)(3). Although Respondent did not expressly admit that the violations occurred, its failure to deny them constituted an admission of liability. See 49 CFR 386.14(d)(1)(i).

<sup>4</sup> See Exhibit D to MFO.

request for binding arbitration.<sup>5</sup> Respondent's failure to participate in the binding arbitration process when it was required to do so amounts to a failure to defend these proceedings and a default.<sup>6</sup> It is therefore appropriate to enter a default judgment finding Respondent liable for each of the violations alleged in the NOC.

The default does not, however, establish liability for damages.<sup>7</sup> Because the Agency is required by statute to consider certain factors in determining the amount of civil penalties for violations of the Federal Motor Carrier Safety Regulations (FMCSRs), the proposed civil penalty is not considered a sum certain.<sup>8</sup> Claimant, therefore, is required to explain how he determined the civil penalty.<sup>9</sup>

In support of the civil penalty, Claimant submitted the Uniform Fine Assessment (UFA) Worksheet identifying the UFA proposed penalty for six of the seven alleged violations.<sup>10</sup> The UFA algorithm considers the statutory penalty factors set forth in 49 U.S.C. § 521(b)(2)(D) for

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<sup>5</sup> See *In the Matter of Black Warrior Trucking Co.*, FMCSA-2009-0230, Final Order, Mar. 11, 2013.

<sup>6</sup> See *Darryl E. Lackey dba Two and a Half Men Movers*, FMCSA-2011-0370, Final Order of Default, Nov. 1, 2012.

<sup>7</sup> See *In the Matter of Darryl E. Lackey dba Two and a Half Men Movers*, FMCSA-2011-0370, Final Order of Default, Nov. 1, 2012, at 4.

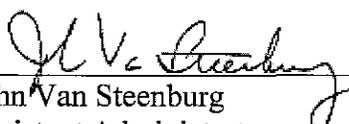
<sup>8</sup> See 49 U.S.C. § 521.

<sup>9</sup> This case is distinguishable from cases where a respondent's failure to timely submit a reply to the NOC results in the issuance of a Notice of Default and Final Agency Order (NDFAO) by the Field Administrator under 49 CFR 386.14(c)(1) and the NOC, including the penalty proposed therein, becomes the Final Agency Order in the proceeding. See *In the Matter of Eastern Foods, Inc.*, Docket No. FMCSA-2009-0308, Final Order of Default, Dec. 5, 2013.

<sup>10</sup> See Exhibit E to MFO. The UFA did not include the 49 CFR 392.9a(a)(1) violation, because that violation is subject to the penalty provisions of 49 U.S.C. § 14901(a), not 49 U.S.C. § 521(b)(2)(D).

violations of the FMCSRs. The UFA algorithm is presumed to properly consider the statutory penalty factors.<sup>11</sup> Moreover, the penalty proposed for violating 49 CFR 392.9a(a)(1) was the minimum statutory penalty of \$25,000 for transporting passengers without the required operating authority, as established by 49 U.S.C. § 14901(a). Accordingly, Claimant provided a reasonable basis for the proposed penalty.

THEREFORE, It Is Ordered That Respondent is declared to be in default and a final order is hereby entered against Respondent finding the violations alleged in the Notice of Claim and entering a penalty in the amount of \$28,390. Respondent is required to pay to the Federal Motor Carrier Safety Administration's Eastern Service Center, within 30 days of the service date of this Final Agency Order, a total civil penalty of \$28,390 for the violations set forth in the NOC. Payment may be made electronically through FMCSA's registration site at <http://safersys.org> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order may be remitted to the Claimant at the address shown on the Certificate of Service.<sup>12</sup>

  
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John Van Steenburg  
Assistant Administrator  
Federal Motor Carrier Safety Administration

1/7/14  
Date

<sup>11</sup> See *In the Matter of Alfred Chew and Martha Chew*, FHWA-1996-5323, Final Order, Feb. 7, 1996.

<sup>12</sup> Under 49 CFR 386.64, a petition for reconsideration may be submitted within 20 days of the issuance of this Final Agency Order.

**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.

Alfred Burney, President  
MTZ Tours, Inc.,  
143 Main Street, 3rd Floor, Space 304  
West Springfield, MA 01089

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