

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**APEX TANK LINES, INC.,  
(U.S. DOT No. 2397443)**

**Respondent.**

**Docket No. FMCSA-2013-0308<sup>1</sup>  
(Western Service Center)**

**FINAL ORDER**

**1. Background**

On August 16, 2013, the Acting California Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued an amended Notice of Claim (NOC) against Apex Truck Lines, Inc. (Respondent), proposing a total civil penalty of \$2,040.<sup>2</sup> The NOC, which was based on a compliance review conducted on April 18, 2013, charged Respondent with: (1) one violation of 49 CFR 172.800(b), offering or transporting hazardous materials without a security plan that conforms to the requirements of 49 CFR Part 172, Subpart I, with a proposed civil penalty of \$400; (2) one violation of 49 CFR 180.417(a), failing to retain a cargo tank manufacturer's data report, certificate and related papers as required, with a proposed civil penalty of \$820; and (3) one violation of 49 CFR 180.417(b), failing to retain a copy of test and inspection reports as required, with a proposed civil penalty of \$820.

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<sup>1</sup> The prior case number was CA-2013-0366-US1246.

<sup>2</sup> See Attachment A to Field Administrator's Submission of Evidence Pursuant to 49 CFR 386.16(a), Motion for Final Agency Order, and Memorandum of Law in Support (MFO). The Amended NOC was issued to correct language in the statement of charges of the initial NOC.

Respondent replied to the initial NOC on June 12, 2013.<sup>3</sup> In its reply, Respondent contested the alleged violations and requested administrative adjudication by submission of written evidence without a hearing. Respondent denied each of the three alleged violations on the same ground—that it is an intrastate hazmat carrier subject to the jurisdiction of the State of California and the U.S. Pipeline Hazardous Materials Safety Administration and, consequently, not subject to FMCSA jurisdiction. Respondent claimed it did not meet the requirements for obtaining a U.S. DOT Number because it only operates in intrastate commerce and alleged that FMCSA Safety Investigator (SI) Aaron Celiceo improperly completed an MCS-150 form on its behalf based on information given to him during the compliance review by Terry D. Sheff, Respondent's Director of Transportation and Logistics.<sup>4</sup> Respondent requested that all civil penalties be vacated because of SI Celiceo's illegal acts.

The Field Administrator for FMCSA's Western Service Center (Claimant) served his Submission of Evidence and MFO on November 22, 2013. Claimant contended that Respondent is subject to FMCSA jurisdiction under 49 U.S.C. §§ 5101 *et seq.* and 49 CFR §§ 1.73 and 171.1. He stated that SI Celiceo obtained a U.S. DOT Number for Respondent for tracking purposes to ensure that the compliance review was associated with the correct motor carrier. Claimant further argued that having a U.S. DOT Number is not determinative of whether Respondent is subject to the requirements of the Federal hazardous materials statutes and regulations, which apply to the transportation of hazardous materials in both intrastate and interstate commerce. Claimant contended that the evidence established the violations by a

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<sup>3</sup> See Attachment C to MFO. Respondent did not reply to the amended NOC; consequently, its reply to the original NOC will be treated as a reply to the amended NOC.

<sup>4</sup> Mr. Sheff signed the reply to the NOC on behalf of Respondent. An MCS-150 form is the form used to obtain a U.S. DOT Number from FMCSA.

preponderance of the evidence and that the civil penalty was correctly calculated in accordance with the applicable statutory requirements. Respondent did not submit any evidence with its reply to the NOC and did not respond to Claimant's Submission of Evidence and MFO.

## **2. Decision**

When a respondent contests alleged violations through submission of evidence and argument without a hearing, the claimant has the burden to demonstrate by a preponderance of the evidence that the respondent violated the regulations as charged.<sup>5</sup> To establish by a preponderance of the evidence means that something is more likely so than not.<sup>6</sup>

### *A. The Violations*

#### 1. 49 CFR 172.800(b)

Section 172.800(b) requires that each person who offers for transportation in commerce, or transports in commerce, one or more of 16 specified hazardous materials develop and adhere to a transportation security plan for hazardous materials that conforms to the requirements of 49 CFR Part 172, Subpart I. The materials specified in this section include large bulk quantities of a Class 3 material meeting the criteria for Packing Group I or II.<sup>7</sup> Section 172.800(b) defines a "large bulk quantity" as a quantity greater than 3,000 kg (6,614 pounds) for solids or 3,000 liters (792 gallons) for liquids or gases in a single packaging, such as a cargo tank motor vehicle, portable tank, tank car, or other bulk container.

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<sup>5</sup> See *In the Matter of R & R Express, Inc. dba KDK Transport, Inc.*, Docket No. FHWA-97-2425, Final Order: Decision on Review, Sept, 23, 1997, note 5, at 9, citing *United States v. Steadman*, 450 U.S. 91, at 95-104 (1981), *reh. denied*, 451 U.S. 933 (1981).

<sup>6</sup> See *In the Matter of Commodity Carriers, Inc.*, Docket No. FMCSA-2001-8676, Final Order: Decision on Petition for Safety Rating Review, June 30, 2004, note 23, at 11, citing *Blossom v. CSX Transp. Inc.*, 13 F.3d 1477, 1482 (11<sup>th</sup> Cir. 1994).

<sup>7</sup> See 49 CFR 172.800(b)(6).

The violation cited in the NOC involved the transportation by Respondent of 5,001 gallons of Gasoline, UN1203, from Wilmington, California to Temecula, California on March 24, 2013.<sup>8</sup> According to SI Celiceo, gasoline is a Class 3, packing group II hazardous material and was transported by Respondent in bulk, using a cargo tank vehicle. Accordingly, Respondent was required to have a security plan, as required by § 172.800(b). Mr. Sheff advised SI Celiceo that Respondent did not have such a plan, and admitted this fact in a signed statement dated April 17, 2013.<sup>9</sup>

2. 49 CFR 180.417(a)(1)

Section 180.417(a)(1) requires each owner of a specification cargo tank to retain the manufacturer's certificate, the manufacturer's ASME U1A data report, where applicable, and related papers certifying that the specification cargo tank identified in the documents was manufactured and tested in accordance with the applicable specification. The owner must retain the documents throughout his ownership of the specification cargo tank and for one year thereafter.

SI Celiceo determined that Respondent failed to retain the documents specified in § 180.417(a)(1) for company unit 10, a DOT specification MC 306 cargo tank, that was used to transport 8,800 gallons of gasoline from Bloomington, California to Temecula, California on or about March 15, 2013.<sup>10</sup> Mr. Sheff admitted, in his April 17, 2013 signed statement, that

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<sup>8</sup> See Exhibit 5 to Attachment D to MFO (Declaration of SI Aaron Celiceo).

<sup>9</sup> See Exhibit 7 to Attachment D to MFO.

<sup>10</sup> See Exhibit 8 to Attachment D to MFO with respect to the transportation. Exhibit 2 to Attachment D, Respondent's equipment list, identifies company unit 10 as a DOT specification MC 306 cargo tank.

Respondent did not have a copy of the manufacturer's certificate for this unit.<sup>11</sup>

3. 49 CFR 180.417(b)(3)

Section 180.417(b) requires that each person performing a test or inspection of DOT specification cargo tanks must prepare a written report, in English, containing certain specified information. Under § 180.417(b)(3), the owner of the tank and the motor carrier, if not the owner, must each retain a copy of the test and inspection reports until the next inspection of the same type is successfully completed.

SI Celiceo determined that Respondent failed to retain copies of test and inspection reports for company unit 22, which is identified in Respondent's equipment list as a DOT specification MC 406 cargo tank. This cargo tank was used to transport 8,801 gallons of gasoline from Carson, California to Temecula, California on or about March 25, 2013.<sup>12</sup> Mr. Sheff admitted, in his April 17, 2013 signed statement, that Respondent did not have copies of internal visual inspection and pressure test reports for company unit 22.<sup>13</sup>

Respondent did not deny the facts underlying each of the alleged violations. It contested the NOC based on the argument that FMCSA had no jurisdiction over its operations because all of its transportation was in intrastate commerce and subject to the jurisdiction of other State and Federal Agencies. It also argued that the completion of an MCS-150 form by SI Celiceo on its behalf was illegal, and warranted elimination of the proposed civil penalty.

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<sup>11</sup> See Exhibit 7 to Attachment D to MFO.

<sup>12</sup> See Exhibit 10 to Attachment D to MFO with respect to the transportation. Exhibit 2 to Attachment D, Respondent's equipment list, identifies company unit 22 as a DOT specification MC 406 cargo tank.

<sup>13</sup> See Exhibit 7 to Attachment D to MFO.

Respondent's jurisdictional objection lacks merit. Under 49 U.S.C. § 5103, the Secretary of Transportation is required to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. These regulations shall apply to, among others, persons who transport hazardous materials in commerce. Commerce includes transportation of hazardous materials within a single state.<sup>14</sup> Under 49 CFR 1.87(d)(1), the FMCSA Administrator has been delegated the functions vested in the Secretary by 49 U.S.C. §§ 5121(a), (b), (c), and (d), 5122, 5123, and 5124 related to the transportation or shipment of hazardous materials by highway. Section 5121 authorizes the Secretary to conduct inspections related to hazardous materials transportation and issue compliance orders, and sections 5122 through 5124 authorize enforcement of the hazardous materials regulations (HMRs) and statutes, including the assessment of civil penalties for noncompliance. It is clear, therefore, that Respondent's transportation of large quantities of gasoline within the State of California is subject to the HMRs and FMCSA has the authority to enforce the HMRs by assessing civil penalties for noncompliance with these regulations.

Accordingly, Respondent was subject to the HMRs regardless of whether it had obtained a U.S. DOT Number prior to the April 2013 compliance review. With respect to Respondent's allegation that SI Celiceo improperly obtained a DOT number for Respondent, Claimant admitted that SI Celiceo obtained a number for tracking purposes, but argued that doing so was not improper and did not prejudice Respondent.<sup>15</sup> It is not clear from Respondent's reply to the NOC whether SI Celiceo signed the MCS-150 form in Mr. Sheff's name. Mr. Sheff alleged that SI Celiceo "put my name" in the form's certification statement, but did not produce a copy of the

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<sup>14</sup> See 49 CFR 171.8.

<sup>15</sup> See MFO, page 5, footnote 10.

MCS-150 to determine whether it was signed. The propriety of SI Celiceo's actions, however, is irrelevant to the issue of whether Respondent violated the HMRs and the appropriate civil penalty.<sup>16</sup> I conclude, therefore, that Claimant has established the three violations alleged in the NOC by a preponderance of the evidence.

*B. The Civil Penalty*

Under 49 U.S.C § 5123(c), the Agency must take into account, in assessing a penalty for violation of the HMRs, the nature, circumstances, extent and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior violations, ability to pay, effect on ability to continue to do business, and other matters that justice requires. In support of the proposed civil penalty, Claimant submitted a Uniform Fine Assessment (UFA) worksheet prepared by SI Celiceo.<sup>17</sup> In the absence of any evidence the penalty calculation was either improper or inappropriate, the penalty assessment will be upheld.<sup>18</sup> Respondent did not challenge the calculation of the proposed civil penalty and a review of the UFA worksheet indicates that the appropriate factors were correctly considered. The civil penalty, therefore, is upheld.

ACCORDINGLY, *It Is Hereby Ordered That* Respondent pay to the Western Service Center, within 30 days of the service date of this Final Order, a total civil penalty of \$2,040 for three violations of the Federal Hazardous Materials Regulations. Payment may be made

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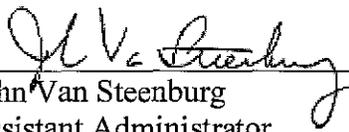
<sup>16</sup> See *Notice of Interpretation of Internal Agency Documents*, 74 Fed. Reg. 24897 (May 26, 2009), where the Agency stated that failure to comply with internal investigative guidelines or procedures will not excuse violations of the HMRs or provide grounds for reducing civil penalties.

<sup>17</sup> See Attachment B to MFO.

<sup>18</sup> See *In the Matter of Baker-Lewis Trucking, Inc.*, Docket No. FMCSA-2002-13749, Final Order, Nov. 15, 2004.

electronically through the Federal Motor Carrier Safety Administration'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 should be remitted to the Western Service Center at the address shown in the Certificate of Service.<sup>19</sup>

  
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John Van Steenburg  
Assistant Administrator  
Federal Motor Carrier Safety Administration

1/23/14

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Date

<sup>19</sup> Pursuant to 49 CFR 386.64, a petition for reconsideration may be submitted within 20 days of the issuance of this Final Order.

**CERTIFICATE OF SERVICE**

This is to certify that on this 24 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.

<p>Nancy Jackson, Esq. Office of Chief Counsel Enforcement and Litigation Division Federal Motor Carrier Safety Administration Western Service Center 12600 West Colfax Avenue, Suite B-300 Lakewood, CO 80215</p>	<p>One Copy US First Class Mail</p>
<p>Terry D. Sheff, Director of Transportation and Logistics Apex Tank Lines, Inc. 41707 Winchester Road Suite 206 Temecula, CA 92590-4867</p>	<p>One Copy US First Class Mail</p>
<p>William R. Paden, Field Administrator Federal Motor Carrier Safety Administration Western Service Center 12600 West Colfax Avenue, Suite B-300 Lakewood, CO 80215</p>	<p>One Copy U.S. First Class Mail</p>
<p>U.S. Department of Transportation Docket Operations, M-30 West Building Ground Floor Room W12-140 1200 New Jersey Avenue, S.E. Washington, D.C. 20590</p>	<p>Original</p>

Janice Miller