

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**AMADOU DIALLO DBA DIALLO
TRUCKING COMPANY,
(U.S. DOT No. 1447498)**

Respondent.

**Docket No. FMCSA-2013-0493¹
(Eastern Service Center)**

FINAL ORDER

1. Background

On October 15, 2013, the Maryland Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) against Amadou Diallo dba Diallo Trucking Company (Respondent) following a compliance review of Respondent conducted on September 19, 2013.² The NOC charged Respondent with one violation of 49 CFR 382.301(a), using a driver before the motor carrier has received a negative pre-employment controlled substance test result, and proposed a civil penalty of \$2,000.

Respondent submitted an undated reply to the NOC which stated, in its entirety: "I Amadou Diallo would like to go to court for fine of \$2,000.00 of first violation FMCSA."³

On December 6, 2013, the Regional Field Administrator for FMCSA's Eastern Service Center (Claimant) objected to Respondent's request for a hearing and moved for entry of an

¹ The prior case number was MD-2013-0154-US1249.

² See Exhibit B to Regional Field Administrator's "Motion for Default Alternatively Objection to Request for Hearing and Motion for Final Order" (hereafter Motion for Default).

³ See Exhibit C to Motion for Default. It is presumed that Respondent's reply was timely served, since the Regional Field Administrator did not issue a Notice of Default and Final Agency Order pursuant to 49 CFR 386.14(c)(1).

order of default finding the violation as alleged in the NOC and imposing a civil penalty of \$2,000. Claimant argued that Respondent should be found in default because his reply was so deficient as to constitute no reply at all. In the alternative, Claimant objected to Respondent's request for hearing, argued that the evidence submitted with the motion established a *prima facie* case that Respondent violated § 382.301(a), and moved for a final order. Respondent did not reply to the Motion for Default.

2. Decision

Section 386.14(b) of the Agency's Rules of Practice requires a respondent, in replying to an NOC, to pay the full amount of the claim, contest the claim by requesting administrative adjudication, or seek binding arbitration regarding the proposed civil penalty. Although Respondent requested administrative adjudication,⁴ he failed to state the grounds for contesting the claim or raise any affirmative defenses, as required by § 386.14(d)(1). According to that section:

“Any allegation in the claim not specifically denied in the reply is deemed admitted. A mere general denial of the claim is insufficient and may result in a default being entered by the Agency decisionmaker upon motion by the Field Administrator.”

Respondent's reply did not deny the charge alleged in the NOC and did not state the grounds for contesting it. Therefore, he admitted the charge. Once a respondent has admitted violations for which he is charged, he should choose to either pay the full amount of the civil penalty or seek binding arbitration on the amount of the civil penalty and/or the length of time in which to pay it.⁵ Because Respondent chose neither option, and did not request a reduction in

⁴ I interpret Respondent's request to go to court, which is not an option available under 49 CFR 386.14(d), as a request for a formal hearing under § 386.14(d)(1)(iii)(C).

⁵ See *In the Matter of Archie Palmer*, Docket No. FMCSA-2007-26787, Final Order, May 11, 2007. Respondent did not raise a specific objection to the amount of the civil penalty.

the proposed penalty or request a payment plan, Claimant's Motion for Default will be granted.

Respondent's default makes the NOC, including the civil penalty proposed in the NOC, the Final Agency Order in this proceeding.

The reply in this case is very similar to the reply filed by the respondent in *In the Matter of Keith L. Truxon dba Keith Truxon Trucking*, Docket No. FMCSA-2004-19853, which stated, in its entirety:

"I Keith Lamont Truxon is (sic) requesting a hearing on case number MD-2004-0048-US0170 and any other cases in the past that is (sic) affecting my business from making money in order to pay off some of this debt owed to the federal government. Please set up a hearing please. Thank you."

In that case, the Assistant Administrator found the respondent to be in default and stated:

"Although Respondent did request a hearing, the reply does not contain any admission or denial of the alleged violations or a statement of facts constituting each defense. It also does not list any material facts in dispute in support of the hearing request or include a certificate of service. The reply is thus so lacking in the essential elements of a proper reply as to constitute no reply at all. Respondent has in effect defaulted. Because Respondent has defaulted...the NOC, including the \$8,000 civil penalty, became the Final Agency Order in this proceeding"

Order on Default, November 16, 2005, p. 3.⁶

The default does not, however, establish liability for damages.⁷ 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.⁸ Claimant, therefore, is required to explain how he determined

⁶ See also *In the Matter of Marvin J. Seals*, Docket No. FMCSA-2007-0096, Final Order, June 29, 2010.

⁷ 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.

⁸ See 49 U.S.C. § 521.

the civil penalty.⁹

In support of the civil penalty, Claimant submitted the Uniform Fine Assessment (UFA) Worksheet identifying how he calculated the UFA proposed penalty for the violation.¹⁰ The UFA algorithm considers the statutory penalty factors set forth in 49 U.S.C. § 521(b)(2)(D) for violations of the FMCSRs. The UFA algorithm is presumed to properly consider the statutory penalty factors.¹¹ In the absence of any evidence the penalty calculation was improper or inappropriate, the penalty assessment will be upheld. Respondent did not challenge the civil penalty calculation. Accordingly, Claimant provided a reasonable basis for the proposed penalty.

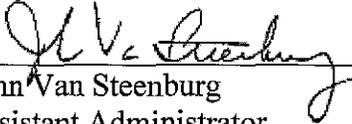
THEREFORE, *It Is Hereby Ordered That*, Respondent pay to the Regional Field Administrator for the Eastern Service Center, within 30 days of the service date of this Final Order, a total civil penalty of \$2,000 for one violation of the FMCSRs. Payment may be made electronically through FMCSA's registration 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 in

⁹ 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.

¹⁰ *See* Exhibit E to Motion for Default.

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

the Certificate of Service.¹²



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/23/14

Date

¹² 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.

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