

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**JOSE RAMIREZ DBA MILE HIGH
MOUNTAIN,
(U.S. DOT No. 1641816)**

Petitioner.

**Docket No. FMCSA-2014-0023¹
(Western Service Center)**

INTERIM ORDER

1. Background

On October 16, 2013, the Colorado Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on Petitioner, Jose Ramirez dba Mile High Mountain.² The NOC, based on a July 18, 2013 compliance review, proposed assessing a civil penalty of \$22,610 on Petitioner based on: (1) one violation of 49 CFR 382.301(a), using a driver before the motor carrier has received a negative pre-employment controlled substances test result, with a proposed civil penalty of \$6,443; (2) one violation of 49 CFR 382.303(a), failing to conduct post-accident alcohol testing on a driver following a recordable crash, with a proposed civil penalty of \$6,443; (3) one violation of 49 CFR 382.303(b), failing to conduct post-accident controlled substances testing on a driver following a recordable crash, with a proposed civil penalty of \$6,443; and (4) one violation of 49 CFR 383.37(a)/383.23, knowingly allowing, requiring, permitting, an employee to operate a

¹ The prior case number was CO-2013-0097-CO1093.

² See Exhibit 1 to Field Administrator's Answer and Opposition to Petition for Reconsideration (Claimant's Answer to Petition).

commercial motor vehicle during any period in which the driver does not have a current commercial learner's permit (CLP) or commercial driver's license (CDL), or does not have a CLP or CDL with the proper class or endorsements, with a proposed civil penalty of \$3,281.

After Petitioner failed to respond to the NOC, the Regional Field Administrator for FMCSA's Western Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on November 21, 2013.³ The NDFAO advised Petitioner that the NOC would become the Final Agency Order in this proceeding effective November 26, 2013, with the civil penalty immediately due and payable on that date.

On December 12, 2013, Petitioner served a reply to the NOC, which Claimant, out of an abundance of caution, treated as a Petition for Reconsideration of the NDFAO.⁴ Petitioner admitted the §§ 382.303(a) and (b) violations. In response to the alleged § 382.301(a) violation, he stated: "We are part of a consortium in which drivers take the test prior to driving our vehicles/trucks." He claimed that the driver involved in the alleged § 383.37(a)/383.23 violation had a foreign CDL and believed that he could use such a driver, but has since learned otherwise. Petitioner claimed that the amount of the proposed civil penalty would cause him financial hardship and requested that it be reduced and/or that he be allowed to pay under a payment plan.

In his Answer to the Petition served January 7, 2014, Claimant requested that the petition be denied because Petitioner defaulted by failing to timely reply to the NOC and did not set forth any basis for reconsideration of the Final Agency Order.

³ See Exhibit 3 to Claimant's Answer to Petition.

⁴ See Attachment B to Claimant's Answer to Petition.

2. Decision

Because Petitioner did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a), he defaulted.⁵ Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Regional Field Administrator based on failure to timely reply to the NOC may be vacated if Petitioner can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Claimant established that United Parcel Service delivered the NOC to Petitioner on October 18, 2013.⁶ Petitioner did not deny that the NOC was delivered, and did not provide an explanation for failing to serve a timely reply to the NOC. Petitioner, therefore, did not establish excusable neglect. Moreover, Petitioner admitted the §§ 382.303(a) and (b) violations and did not present a meritorious defense to the alleged § 382.301(a) violation. Petitioner's claim that he is enrolled in a consortium which conducts pre-employment drug testing for his drivers does not address the violation charged in the NOC—that he allowed a driver to drive in commerce before receiving a negative test result.

There is insufficient information, however, to determine whether Petitioner provided a potentially meritorious defense to the fourth violation alleged in the NOC. The NOC's Statement of Charges stated that the license of the involved driver "was not a CDL, was not the correct class, did not have the required endorsement, had an unpermissible (sic) restriction, etc." The Answer to the Petition did not address Petitioner's claim that the driver had a foreign CDL, which he believed complied with Part 383. Footnote 1 to 49 CFR 383.23(b) states that

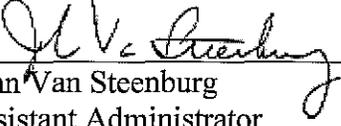
⁵ The NOC reply deadline was November 20, 2013. This date was calculated by adding 30 days to the October 16, 2013 service date of the NOC and an additional five days because the NOC was served by mail. *See* 49 CFR 386.8(c)(3).

⁶ *See* Exhibit 2 to Claimant's Answer to Petition.

commercial driver's licenses issued by Canada and Mexico are considered to be in accordance with the standards of Part 383. It is unclear from the language in the NOC whether the driver had a CDL issued by one of these countries and, if so, in what respect the license was deficient.⁷

Accordingly, before determining whether Petitioner presented a meritorious defense to the allegation that it violated § 383.37(a)/383.23, it would be helpful if Claimant were to provide additional information regarding the facts underlying this violation, as well as any argument addressing whether Petitioner presented a potentially meritorious defense. This information shall be submitted within 15 days from the service date of this Order.

It Is So Ordered.



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/23/14

Date

⁷ The language quoted from the NOC's Statement of Charges appears to be boilerplate and does not state why the license was not the correct class, did not have the required endorsement, or had an impermissible restriction.

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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