

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**UNITED COACH TOURS, INC.,
(U.S. DOT No. 1652568)**

Respondent.

**Docket No. FMCSA-2009-0004¹
(Western Service Center)**

FINAL ORDER

1. Background

On October 21, 2008, the California Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) to United Coach Tours, Inc. (Respondent), proposing a civil penalty of \$2,000. The NOC, which was based on an October 8, 2008 compliance review, charged Respondent with two violations 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 \$1,000 per count.²

In a reply dated November 21, 2008, Respondent contested the violations, but did not request a particular form of administrative adjudication, as required by 49 CFR 386.14(b).³ Respondent asserted that the two drivers involved in the violations had participated in a drug and alcohol testing program within the 30 days prior to the compliance review, were randomly

¹ The prior case number was CA-2009-0021-US1191.

² See Attachment A to Field Administrator's Submission of Evidence Pursuant to 49 CFR 386.16(a) (Claimant's Submission of Evidence).

³ See Attachment C to Claimant's Submission of Evidence.

tested for controlled substances within the previous 6 months, and tested negative for controlled substances. In essence, Respondent argued that it is entitled to the exemption from pre-employment controlled substances testing provided in 49 CFR 382.301(b). Respondent claimed it did not have the necessary documentation to demonstrate these facts at the time of the compliance review, but was subsequently able to obtain this information from the drug testing program in which its drivers participated. It attached documentation that purportedly supported its position.

The Field Administrator for FMCSA's Western Service Center (Claimant), contending that Respondent waived its right to a formal hearing, served his Submission of Evidence on January 26, 2009. Because Respondent enclosed written evidence with its Reply and did not request a formal or informal hearing, its Reply will be treated as a *de facto* election of administrative adjudication by submission of written evidence without hearing under § 386.14(d)(1)(iii)(A).⁴ Claimant's submission of evidence was timely filed under 49 CFR 386.16(a)(1).

Claimant contended that the documents submitted with Respondent's Reply did not demonstrate that Respondent was entitled to claim the § 382.301(b) exemption from pre-employment controlled substances testing. Claimant asserted that he established the violations by a preponderance of the evidence and that the civil penalty was correctly calculated in accordance with the applicable statutory requirements. Respondent did not respond to Claimant's Submission of Evidence.

⁴ See *In the Matter of All Star Trucking & Hauling, LLC*, Docket No. FMCSA-2006-24089, Order on Request for Extension of Time and Motion for More Definite Statement, Mar. 17, 2006; and *In the Matter of Bybee Transport, Inc.*, Docket No. FMCSA-2006-24810, Final Order, Mar. 24, 2009, at 2

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.⁵ To establish by a preponderance of the evidence means that something is more likely so than not.⁶

A. The Violations

Section 382.301(a) provides:

“Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for controlled substances as a condition prior to being used, unless the employer uses the exception in paragraph (b) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the employer has received a controlled substances test result from the MRO or C/TPA indicating a verified negative test result for that driver.”

The NOC alleged that Respondent’s drivers Ying Wu and Gary Ziqin Ng performed safety sensitive functions (operating commercial motor vehicles) on July 1, 2008 and August 9, 2008, respectively, before Respondent received negative pre-employment controlled substances test results for these drivers. In support of these allegations, Claimant submitted the Declaration of Safety Investigator (SI) Manuel Villalobos, who conducted the October 8, 2008 compliance review of Respondent.⁷

SI Villalobos determined that Respondent operated three commercial motor vehicles designed to transport 16 or more passengers, and was thus subject to the controlled substance

⁵ 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).

⁶ 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 (11th Cir. 1994).

⁷ See Attachment D to Claimant’s Submission of Evidence.

testing requirements of 49 CFR Part 382.⁸ SI Villalobos' review of Respondent's records indicated that Ying Wu drove a commercial motor vehicle in commerce on behalf of Respondent from San Francisco, California to Colusa, California on July 1, 2008, as shown by the driver's record of duty status.⁹ The investigator obtained documents indicating that this driver did not receive a pre-employment controlled substances test until August 18, 2008.¹⁰ According to the signed statement of Kevin Quan Lu, Respondent's President, Ying Wu was hired on December 25, 2007.¹¹ Mr. Lu further stated that he had no documentation that Ying Wu was participating in any other controlled substances program on July 1, 2008.¹²

SI Villalobos' review of Respondent's records also indicated that Gary Ziqin Ng drove a commercial motor vehicle in commerce on behalf of Respondent from South San Francisco, California to South San Francisco, California on August 9, 2008, as shown by the driver's record of duty status.¹³ The investigator obtained documents indicating that this driver did not receive a pre-employment controlled substances test until August 11, 2008.¹⁴ According to Mr. Lu's signed statement, Gary Ziqin Ng was hired on July 11, 2008.¹⁵ Mr. Lu further stated that he had

⁸ See 49 CFR 382.103(a)(1) and 49 CFR §§ 383.3(a) and 383.5.

⁹ See Attachment D to Claimant's Submission of Evidence, Exhibit 4.

¹⁰ See Attachment D to Claimant's Submission of Evidence, Exhibit 7. The test was not verified by the Medical Review Officer as negative until August 27, 2008.

¹¹ See Attachment D to Claimant's Submission of Evidence, Exhibit 8.

¹² *Id.*

¹³ See Attachment D to Claimant's Submission of Evidence, Exhibit 9.

¹⁴ See Attachment D to Claimant's Submission of Evidence, Exhibit 12. The test was not verified by the Medical Review Officer as negative until August 15, 2008.

¹⁵ See Attachment D to Claimant's Submission of Evidence, Exhibit 8.

no documentation that Mr. Ng was participating in any other controlled substances program on August 9, 2008.¹⁶

In its Reply, Respondent stated: "At that time, we assumed that the negative test results and the enrollment in the Drug and Alcohol program with Harvest Vacation, which was maintained by TruSST Team, would be sufficient." Respondent submitted a "confirmation letter" from TruSST Team verifying that both drivers were enrolled in the Harvest Vacation Drug and Alcohol Program. However, the letter from TruSST Team, which is dated November 18, 2008, stated that Harvest Vacation, Ltd. was enrolled with TruSST Team as a non-DOT company until October 1, 2008. All drug testing prior to October 1, 2008 was done using a non-DOT Custody and Control Form.¹⁷

Section 382.301(b) provides an exception to the § 382.301(a) pre-employment testing requirement for drivers who participated in the controlled substances testing program of a previous employer, provided certain conditions are met. The driver must have participated in a DOT-compliant controlled substances testing program within the previous 30 days and, while participating in that program, either was tested for controlled substances within the past 6 months or participated in the random controlled substances testing program for the previous 12 months. In order to claim this exception, however, the new employer must first comply with § 382.301(c)(1), which requires that, before using the driver to perform a safety sensitive function, it contact the involved controlled substances testing program and obtain certain specified information, including verification of the driver's participation in the program and the

¹⁶ *Id.*

¹⁷ Under 49 CFR 382.105, the provisions of 49 CFR Part 40 that address alcohol and controlled substances testing are made applicable to all employers subject to Part 382. Such provisions include 49 CFR 40.45, which prohibits the use of a non-DOT Custody and Control Form.

driver's controlled substance testing results while participating in the program.

Since Respondent admitted it did not conduct pre-employment tests on Ying Wu and Gary Ziqin Ng before they drove commercial motor vehicles in commerce on its behalf, Respondent had the burden of establishing that such testing was unnecessary under the § 382.301(b) exception. It failed to do so. The letter from TruSST Team submitted by Respondent indicated that TruSST Team's drug testing program did not meet the requirements of Parts 40 and 382 because drug testing of Harvest Vacation Ltd. drivers prior to October 1, 2008 was done using a non-DOT Custody and Control Form.

Even if drug testing conducted by TruSST Team had complied with 49 CFR Parts 40 and 382, Respondent could not have claimed the § 382.301(b) exception because it failed to comply with the § 382.301(c) requirement that, prior to using the drivers to perform a safety sensitive function, it contact TruSST Team and obtain and retain information verifying that the drivers participated in a DOT-compliant testing program, as well as information concerning the results of prior drug testing. Obtaining such information after using the drivers does not comply with the regulatory requirements. I conclude, therefore, that Claimant established two violations of 49 CFR 382.301(a) by a preponderance of the evidence.

B. The Civil Penalty

Claimant contended that the proposed penalty was calculated to induce further compliance while taking into account the factors required by 49 U.S.C. § 521(b)(2)(D)¹⁸ and attached a copy of the Uniform Fine Assessment (UFA) worksheet that was used to calculate the

¹⁸ These factors include the nature, circumstances, extent and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other factors as justice and public safety may require.

penalty.¹⁹ The UFA is software designed to implement a uniform and fair application of penalties by devising a formula for determining the penalty based on consideration of the specific statutory factors referenced in 49 U.S.C. § 521(b)(2)(D). The correct use of UFA algorithms is presumed to meet statutory requirements.²⁰ Respondent did not take issue with the penalty calculation. In the absence of any evidence the penalty calculation was either improper or inappropriate, the penalty assessment will be upheld.²¹ Therefore, a final order will be entered.

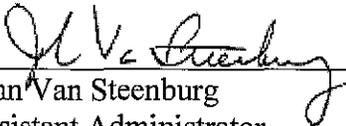
THEREFORE, *It is Hereby Ordered That* Respondent pay to the Field Administrator for the Western Service Center, within 30 days of the service date of this Final Order, a total civil penalty of \$2,000 for two violations of the Federal Motor Carrier Safety Regulations. Payment may be made electronically through the Federal Motor Carrier Safety Administration's registration site at <http://safersys.org/> by selecting "Online Fine Payment" under the "FMCSA Services" category. This penalty is in addition and not in lieu of any additional outstanding penalties previously assessed. In the alternative, payment by cashier's check, certified check, or money order should be remitted to the Western Field Administrator at the address shown in the

¹⁹ See Attachment B to Claimant's Submission of Evidence.

²⁰ See *In the Matter of Alfred Chew & Martha Chew, and Alfred & Martha Chew d/b/a Alfred & Martha Chew Trucking*, Docket No. FHWA-1996-5323, Final Order, Feb. 7, 1996.

²¹ See *In the Matter of Baker-Lewis Trucking, Inc.*, Docket No. FMCSA-2002-13749, Final Order, Nov. 15, 2004.

Certificate of Service.²²



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/23/14

Date

²² 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.

Kevin Q. Lu, President
United Coach Tours, Inc.
1745 San Jose Avenue
San Francisco, CA 94112

One Copy
U.S. Mail

Nancy Jackson, Esq.
Trial Attorney
Office of Chief Counsel (MC-CCE)
Federal Motor Carrier Safety Administration
Golden Hill Office Center
12600 W. Colfax Ave., Suite B-300
Lakewood, CO 80215

One Copy
U.S. Mail

William R. Paden
Field Administrator
Federal Motor Carrier Safety Administration
12600 W. Colfax Ave., Suite B-300
Lakewood, CO 80215

One Copy
U.S. Mail

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