

**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**WALLA, INC.
USDOT# 1712047**

Respondent

**Docket No. FMCSA-2009-0274¹
(Eastern Service Center)**

FINAL ORDER

I. Procedural History

On July 14, 2009, the New York Division of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) against Walla, Inc. (Respondent).² The NOC charged Respondent with one count of violating 49 CFR 385.325(c) – operating in violation of an FMCSA out-of-service order issued for refusal to a safety audit. The NOC proposed a civil penalty of \$5,400.³ The NOC was based on a Level III Driver Only inspection of a motor vehicle operated by Respondent’s driver, Yevgeniy Vostrikov conducted on May 5, 2009.⁴

Respondent replied to the NOC on or about August 12, 2009,⁵ and claimed that it did not

¹ The prior case number was NY-2009-0552-US1309.

² Exhibit A, Field Administrator’s Objection to Respondent’s Request for Hearing and Motion for Final Agency Order (Claimant’s Motion for Final Order).

³ *Id.*

⁴ *Id.*, Exhibit E.

⁵ *Id.*, Exhibit B.

refuse a safety audit.⁶ Respondent argued that the notices regarding revocation had been sent to a previous address and that he did not receive them.⁷ Respondent claimed that it engaged in discussions with “Joseph Costello” regarding scheduling the safety audit and that Respondent was unaware that its registration had been revoked.⁸ Respondent claimed that on June 11, 2009, it passed the safety audit.⁹

On October 6, 2009, the Field Administrator for FMCSA’s Eastern Service Center (Claimant) submitted his objection to Respondent’s request for hearing and Motion for Final Agency Order. Claimant argued that Respondent was not entitled to a formal hearing and that Claimant was entitled to judgment as a matter of law because Respondent failed to set forth any disputes of material fact. Respondent did not respond to the Motion for Final Order.¹⁰

II. Standard of Proof

A motion for final order is analogous to a motion for summary judgment. Therefore, the moving party bears the burden of clearly establishing there is no genuine issue of material fact, and that it is entitled to a judgment as a matter of law.¹¹ All inferences must be drawn in favor of the non-moving party, Respondent in this case. Claimant must establish a *prima facie* case; in

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Under 49 CFR 386.16(b)(3), Respondent must, within 45 days of service of the motion for Final Agency Order, submit and serve a response to the motion.

¹¹ See *Forsyth Milk Hauling Co., Inc.*, Docket No. R3-90-037, 58 Fed. Reg. 16916, at 16983, March 31, 1993 (Order, December 5, 1991).

other words, he must present evidence clearly establishing all essential elements of his claim.¹²

If Claimant makes a *prima facie* case and Respondent fails to produce evidence rebutting the *prima facie* case, the motion for final order will be granted.¹³ Conversely, if Claimant fails to establish a *prima facie* case, judgment will be entered in favor of the non-moving party, the Respondent.¹⁴

III. Decision

Claimant's evidence demonstrates that on May 1, 2009, FMCSA served Respondent with an Order to Revoke "New Entrant" Registration and Cease All Interstate Transportation (Out-of-service Order).¹⁵ FMCSA served the Out-of-service Order by mailing it to Respondent at 6807 141st Street, Flushing, New York, 11367.¹⁶ Respondent identified the same address as its principal place of business on its Motor Carrier Identification Report (MCS-150) filed on November 28, 2007.¹⁷ The Out-of-Service Order required Respondent to cease "interstate motor carrier operations in the United States."

Claimant's evidence demonstrates that on May 12, 2009, Respondent's vehicle was

¹² *Id.*

¹³ *Id.*

¹⁴ *Suburban Restoration Co., Inc.*, FMCSA-2008-0394 (Final Order, June 2, 2012); *Robert P. Mixen*, FMCSA-2008-0253 (Final Order, Dec. 16, 2010); *Triangle Transport, Inc.*, FMCSA-2006-25761 (Final Order, July 7, 2009); *Gregory S. Chico dba G. Chico's Trucking*, FMCSA-2005-21251 (Final Order, Jan. 5, 2007).

¹⁵ *Id.*, Exhibit D.

¹⁶ *Id.*

¹⁷ *Id.*, Exhibit F.

stopped for a Level III Driver Only inspection by the Arizona Department of Public Safety.¹⁸ The Driver/Vehicle Examination Report (Report) reflects the origin of the trip as Philadelphia, PA with the destination as Las Vegas, NV.¹⁹ The Report indicates that the vehicles were transporting household goods. The Report identifies the vehicles as a "TT FRHT 2005" and a "ST UTIL 1998."²⁰ The Report shows Gross Vehicle Weight Rating for both vehicles as "0."²¹ The report is unsigned

Notwithstanding Respondent's failure to respond to Claimant's Motion for Final Order, Claimant must present evidence establishing each of the elements of the violation alleged in the NOC.²² The NOC alleges that "on or about May 12, 2009, Respondent used driver Yevgeniy Vostrikov to operate a commercial motor vehicle in interstate commerce from Philadelphia, PA to Las Vegas, NV, in violation of an FMCSA out-of-service order issued for refusal to submit to a safety audit. Walla, Inc. was prohibited from operating in interstate commerce, effective 5/1/2009." (emphasis added).²³

Claimant's evidence demonstrates that Respondent operated motor vehicles in interstate commerce on May 12, 2009. Claimant's evidence, however, fails to establish that Respondent

¹⁸ *Id.*, Exhibit E. Roadside inspections are conducted by state enforcement agencies under FMCSA's Commercial Motor Carrier Safety Assistance Program (MCSAP), 49 CFR Part 350. The Commercial Motor Vehicle Safety Alliance (CVSA) establishes the standards and levels for inspections. 49 CFR 350.105.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* I do not know why the inspection report omitted the gross vehicle weight rating from the vehicle information. Unless disputed, if the gross vehicle weight rating were identified on the inspection report, it would be sufficient to determine whether a vehicle met the definition of commercial motor vehicle.

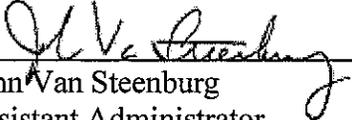
²² *Suburban Restoration Co., Inc.*, FMCSA-2008-0394 (Final Order, June 2, 2012).

²³ *Id.*, Exhibit A.

operated a “commercial motor vehicle” on the date of the inspection. Although the Report identifies the vehicle as a combination vehicle, there is no evidence from which I could infer that either vehicle or the vehicles in combination exceeded 10,001 pounds or met any of the other definitions of commercial motor vehicle.²⁴ As part of his *prima facie* case, Claimant was required to establish that the vehicles met the definition of a commercial motor vehicle to establish a violation of the out-of-service Order.²⁵ Claimant failed to do so.

Even if Claimant had presented evidence to support the violation, he failed to support the proposed civil penalty. Claimant submitted a “Carrier Roadside OOS Violation Uniform Penalty Assessment Worksheet” (OOS Worksheet) in support of the proposed civil penalty. 49 U.S.C. § 521 requires the Agency to take into account eight penalty factors when proposing the amount of a civil penalty. The OOS Worksheet fails to explain how the statutory factors were considered to arrive at the proposed civil penalty.²⁶

THEREFORE, *it is hereby Ordered*, that the Field Administrator’s Motion for Final Agency Order is denied, the proceeding is terminated, and the docket is closed.



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/29/14
Date

²⁴ 49 CFR 390.5.

²⁵ *Suburban Restoration Co., Inc.*, FMCSA-2008-0394 (Final Order, June 2, 2012, Page 3).

²⁶ *Shanahan Champion, Inc.*, FMCSA-2006-25364 (Order Appointing Administrative Law Judge, June 10, 2006); *Thomas Hammond*, FMCSA-2003-15980 (Final Order, Jan. 24, 2006 at 5-7); *Peter Pan Bus Lines*, FMCSA-2003-14655 (Final Order, Aug. 6, 2003 at 15016).

CERTIFICATE OF SERVICE

This is to certify that on this 30 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.

Ido Magori President, Walla, Inc. 1011 East 3 rd Street New York, NY 11230 <i>Respondent</i>	One Copy U.S. Mail
Anthony G. Lardieri Trial Attorney Office of Chief Counsel FMCSA Eastern Service Center 802 Cromwell Park Drive, Suite N Glen Burnie, MD 21061 <i>Field Administrator's Attorney</i>	One Copy U.S. Mail
U.S. Department of Transportation Docket Operations, M-30 West Building Ground Floor Room W12-140 1200 New Jersey Avenue, SE Washington, DC 20590	Original Personal Delivery

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