

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**HECTOR GARZA dba
TRINITY TRANSPORTS,**

USDOT# 2131513

Respondent.

**Docket No. FMCSA-2013-0356
(Western Service Center)**

ORDER APPOINTING ADMINISTRATIVE LAW JUDGE

I. Procedural History

On July 2, 2013, the Washington Division of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) to Respondent, Hector Garza dba Trinity Transports, proposing a civil penalty of \$2,000, for alleged violations of the Hazardous Materials Regulations (HMRs). Specifically, the Notice of Claim, which stated that it was based upon a July 2, 2013 compliance review (CR), charged Respondent with the following: a) one violation of 49 CFR 173.24(b)(1) – offering or transporting hazardous materials in a package which has an identifiable release of hazardous materials to the environment, with a proposed civil penalty of \$1,000; one violation of 49 CFR 177.801 – transporting or accepting a shipment of hazardous materials not in proper condition for transportation or not certified as to proper packaging, marking and description, with a proposed civil penalty of \$1,000; and one violation of 49 CFR 385.403 – transporting a type and quantity of hazardous material requiring a hazardous materials safety permit in commerce when the motor carrier does not hold a safety permit. The Division Administrator did not propose a civil penalty for

this count.

On July 11, 2013, Respondent served a timely reply to the NOC and requested a formal hearing. Claimant, the Regional Field Administrator for FMCSA's Western Service Center, served his Notice of Objection to Respondent's Request for Formal Hearing on September 5, 2013, arguing that Respondent's reply did not raise a material factual dispute. Claimant stated he will submit evidence to establish a *prima facie* case for the charged violations, as well as documentation supporting the proposed civil penalty. Claimant gave notice of his intent to file a Motion for Final Order, in which he would submit his evidence, asserting that there was no genuine dispute of material fact. As of this date, Claimant has not submitted a Motion for Final Order. The civil penalty proceeding is contained in Docket No. FMCSA-2013-0356.

The July 3, 2013 compliance review also resulted in a Conditional safety rating for Respondent. In Docket No. FMCSA-2013-0379, the parties submitted evidence and argument regarding Respondent's petition for administrative review of its Conditional safety rating.¹ With respect to the violation of 49 CFR 173.24(b)(1), Respondent argued that the liquid observed on the tank was not a leak of ammonia, the hazardous material being transported, but instead it was condensation on the tank, "which forms as a consequence of the difference between the exterior temperature of the environment and the interior temperature of the cargo."² In support of its argument, Petitioner submitted the declarations of Hector Garza, owner of Trinity Transports, and Peter Vanourek, the

¹ See Petition for Administrative Review Under 49 CFR 385.15 (Petition) and Regional Field Administrator's Response to Request for Administrative Review.

² Petition at 13.

driver of the vehicle that was inspected. Mr. Vanourek stated that the anhydrous ammonia on the inside of the steel valves is so cold that it makes the steel valves themselves extremely cold, therefore causing water vapor in the air to condense into liquid form on the outside of the valve. Mr. Vanourek also noted that there was no smell of gas from the valve.³

In response to the Petition, the RFA submitted the Driver/Vehicle Examination Report which states that ammonia “is leaking around threads on threaded pipe cap below internal valve.”⁴ The RFA also submitted the declaration of Officer Jonathan Wilson, Hazardous Materials Compliance Specialist with the Oregon Department of Transportation. Officer Wilson stated that he observed “bubbling from the piping under the cargo tank, and recorded a video clip of “bubbling consistent with a leak” from the portable tank.⁵ Officer Wilson stated that he did not remember smelling for anhydrous ammonia, asserting that he does not “attempt to smell poisonous gases in the course of [his] duties.”⁶

II. Discussion

In accordance with 49 CFR 386.16(b)(2), if a respondent requests a hearing, Claimant must serve upon the decisionmaker and Respondent a notice of consent or objection with basis within 60 days of the request. “Failure to serve an objection within the time allotted may result in referral of the matter to hearing.” Prior Agency decisions

³ Exhibit 1 to Petition.

⁴ Exhibit C.

⁵ Attachment B, Exhibits 1 and 2.

⁶ Attachment B.

have found that the objection with basis must provide the decisionmaker with a sufficient explanation of Claimant's issues.⁷ Claimant did not do so. While Respondent denied each of the violations, it also asserted an affirmative defense in arguing that any violations "were the result of operations by Multi-Star Industries, Inc., utilizing Multi-Star Industries' equipment."⁸ Claimant merely concluded that the evidence supports the allegations in the NOC and that a *prima facie* case is fully demonstrated, without explaining why. Claimant's stated basis is nothing more than a conclusion that a hearing is not warranted, and as such, equates to a failure to submit a timely objection with basis.⁹ As a result, in accordance with 49 CFR 386.16(b)(2), the matter may be, and is, referred to the U.S. Department of Transportation's Office of Hearings.

The same compliance review and nexus of facts gave rise to both the civil penalty and safety rating matters. Therefore, even if I consider the evidence the RFA submitted in the safety rating matter, I still find that there is an issue of material fact in dispute as to whether there was an identifiable release of hazardous material.

III. Appointment of Administrative Law Judge

In accordance with 49 CFR 386.54, I hereby appoint an administrative law judge, to be designated by the Chief Administrative Law Judge of the Department of Transportation, to preside over this matter and render a decision on all issues arising out

⁷ See, e.g., *In the Matter of Mio Transp., LLC*, Order Appointing Administrative Law Judge (Mar.13, 2009).

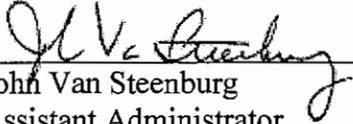
⁸ Regional Field Administrator's Notice of Objection to Respondent's Request for Formal Hearing, Attachment B, Reply to Notice of Claim at I.

⁹ *Id.* See also *In the Matter of Metro Interstate, Inc.*, FMCSA-2011-0284, Order Appointing Administrative Law Judge (Dec. 14, 2012).

of the NOC, including the civil penalty, if any, to be imposed. The proceeding shall be governed by Subparts D and E of 49 CFR Part 386 of Rules of Practice, and all orders issued by the administrative law judge.

The administrative law judge is advised that evidence and argument pertaining to the Notice of Claim in this matter is also contained in Docket No. FMCSA-2013-0379 concerning Respondent's safety rating.

It Is So Ordered.



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

2/24/14
Date

CERTIFICATE OF SERVICE

This is to certify that on this 24 day of February, 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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The Honorable Ronnie A. Yoder
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