BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of:	
ORANGE EXPRESS, INC.,	**Docket No. FMCSA-2007-28968**[1] **(Western Service Center)**
Respondent.	

FINAL ORDER

This matter comes before the Agency upon an August 14, 2007, Motion for Order of Default filed by the Field Administrator, Western Service Center, Federal Motor Carrier Safety Administration (FMCSA) (Claimant).

1. ***Background***

On May 14, 2007, FMCSA's California Division Administrator issued a Notice of Claim (NOC) against Orange Express, Inc. (Respondent) following a compliance review of Respondent conducted on April 25, 2007.[2] The NOC charged Respondent with nine violations of the Federal Motor Carrier Safety Regulations (FMCSRs), as follows: (1) 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 $1,840 per violation; (2) four violations of 49 CFR 395.3(b)(2)—requiring or permitting a property-carrying commercial motor vehicle driver to drive after having been on duty more than 70 hours in 8 consecutive days—with a proposed civil

[1] The prior case number was CA-2007-0421-US1164.

[2] Attachment **A** to Motion for Order of Default.

penalty of $1,870 per violation; and (3) three violations of 49 CFR 396.17(a)—using a commercial motor vehicle not periodically inspected—with a proposed civil penalty of $1,950 per violation. The NOC proposed a total civil penalty of $17,010.

Respondent replied to the NOC on June 15, 2007.[3] Its reply stated that it was no longer in business as of May 8, 2007, and had been bankrupt since January 1, 2007. It neither admitted nor denied the allegations made in the NOC and requested that the civil penalty be waived based on its cessation of operations.

Claimant moved for entry of an order of default declaring the NOC (including the civil penalty) as the final order in the proceeding because Respondent's reply was so deficient as to constitute no reply at all. Respondent did not reply to the motion.

2. *Decision*

Section 386.14(b) of the Agency's rules of practice requires a respondent to either pay the full amount of the claim, contest the claim by requesting administrative adjudication or seek binding arbitration regarding the proposed civil penalty. Respondent did not pay the claim, did not contest the claim and did not request binding arbitration. Instead, Respondent simply asserted it was no longer in business and requested that the proposed civil penalty be waived.

Under section 386.14(d)(1) of the rules of practice, "[a]ny allegation in the claim not specifically denied in the reply is deemed admitted." By not denying the alleged violations, Respondent admitted them. Admissions and defaults are not mutually exclusive, however. Once a respondent has admitted a violation or violations for which it is charged, it should choose either option one, pay the full amount of the civil penalty, or

[3] Attachment B to Motion for Order of Default.

option three, seek binding arbitration on the amount of the civil penalty and/or the length of time in which to pay it. Because Respondent chose neither option, Claimant's Motion for Order of Default will be granted.[4] Respondent's default makes the NOC, including the civil penalty proposed in the NOC, the Final Agency Order in this proceeding.

The fact that Respondent requested a waiver of the civil penalty in its reply does not warrant a different result. In two recent cases, *In the Matter of B. E. Pepin Poultry, Inc.*,[5] and *In the Matter of Layne Pumps, Inc.*, [6] we denied motions for orders of default despite the fact the respondents admitted the claims and did not specifically request binding arbitration. In those cases, however, both respondents took issue with the amount of the proposed penalties, claimed the violations had been corrected, and offered other mitigating factors. Consequently, we concluded the replies in these cases were *de facto* requests for binding arbitration.

Unlike the respondents in *B. E. Pepin* and *Layne Pumps*, the Respondent in this case made no claim that it had corrected the violations and showed no desire to further participate in this proceeding for the purpose of reducing the proposed civil penalty. According to the Declaration of FMCSA Enforcement Specialist Max LeBleu,[7] Respondent did not respond to attempts by the Western Service Center to discuss this case and engage in settlement negotiations. Moreover, despite Respondent's claim that it had been bankrupt since January 1, 2007, Enforcement Specialist LeBleu was unable to

---

[4] See *In the Matter of Archie Palmer*, Docket No. FMCSA-2007-26787, Final Order (May 11, 2007).

[5] Docket No. FMCSA-2008-0054, Order Denying Motion for Default (June 4, 2008).

[6] Docket No. FMCSA-2006-26197, Order (November 7, 2008).

[7] Attachment D to Motion for Order of Default.

discover any evidence of a bankruptcy filing and determined that the State of California shows Respondent to be an active corporation as of August 2007. Several violations cited in the NOC occurred after the date on which Respondent allegedly declared bankruptcy. Contrary to Respondent's allegation that it was no longer in business, Enforcement Specialist LeBleu obtained a copy of a New Mexico Driver Vehicle Examination Report indicating that Respondent was transporting clothing from Torrance, California to Columbus, Ohio on July 17, 2007, one month after Respondent submitted its reply to the NOC.[8]

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 $17,010 for nine violations of the FMCSRs. Payment may be made electronically through FMCSA's registration site at http://safer.fmcsa.dot.gov 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 the Certificate of Service.[9]

Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

4-16-09
Date

[8] Exhibit 4 to Motion for Order of Default.

[9] Pursuant to 49 CFR 386.64, a petition for reconsideration may be submitted within 20 days of the issuance of this Final Order.

Docket No. FMCSA-2007-28968

CERTIFICATE OF SERVICE

This is to certify that on this 17 day of April, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Jason Shih, President Orange Express, Inc. 8548 Villa Clara Street Rowland Heights, CA 91748	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
Terry D. Wolf California Division Administrator Federal Motor Carrier Safety Administration 1325 J Street, Suite 1540 Sacramento, CA 95814	One Copy U.S. Mail
Docket Operations U.S. Department of Transportation 1200 New Jersey Avenue SE Room W12-140 Washington, DC 20590	Original Personal Delivery

Jennie Miller