BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF FEDEX CUSTOM CRITICAL, INC., NOTICE OF APPARENT VIOLATION AND INTENT TO ASSESS FORFEITURE.	Case No. 17-1960-TR-CVF

RESPONDENT'S POST-HEARING BRIEF

Respondent FedEx Custom Critical, Inc. ("FXCC"), by counsel, hereby files its post-hearing brief and respectfully requests that this Tribunal overturn the civil forfeiture at issue in the case.

I. INTRODUCTION

This is a civil forfeiture case stemming from alleged violations discovered during the Public Utilities Commission of Ohio's ("PUCO") non-rated, focused investigation of FXCC in September, 2015. At issue are two regulations, one pertaining to post-accident drug and alcohol testing and the other relating to driver vehicle inspection reports ("DVIRs"). PUCO has not met its burden to establish the alleged violations. Moreover, the evidence adduced at trial establishes that FXCC met its regulatory post-accident drug and alcohol testing obligations by documenting why, in rare circumstances, the required tests could not be timely completed. Accordingly, the civil forfeiture should be overturned.

II.
FACTS

FXCC is a federally-regulated motor carrier that transports general freight on an expedited basis. *Transcript ("Tr.")* at 7:9-14. Its fleet is comprised of approximately 1,150 trucks and 2,100 qualified drivers. *Tr.* at 7:17-19. Each truck is leased to FXCC by independent contractor owner-operators. *Tr.* at 19:23-20:2.

All FXCC drivers are subject to the company's federally-mandated Department of Transportation drug and alcohol testing program, including post-accident testing. *Tr.* at 8:1-7. Applicable regulations mandate that a carrier's drivers be tested for drugs and alcohol following certain types of accidents (e.g., those involving a fatality, and those where the carrier's driver receives a citation and the accident involves either a tow-away or an injury requiring medical attention away from the scene). *Tr.* at 8:13-24.

Pursuant to their contracts with FXCC and the company's safety standards, all owner-operators are required to immediately report any accidents to the company for purposes of, among other things, determining whether a post-accident drug and alcohol test is required. *Tr.* at 9:5-15; 27:1-28:5 FXCC gathers this accident information and data through its dedicated accident specialists, who are available 24/7 to input the details into the company's freight management system. *Tr.* at 9:9-15; 28:20-29:23. Based on the information provided by the driver, the system will flag any accidents that require post-accident testing. *Tr.* at 29:6-19. If that happens, the on-call specialist will be notified, will alert the driver to the fact that testing is necessary, and will work to locate a nearby collection site for the tests. *Tr.* at 25:3-9;

30:19-31:14. The specialists remain in constant contact with the drivers (i.e., every 30 minutes) to ensure that the required testing is completed. *Tr.* at 31:15-32:11.

FXCC also contracts with third-party vendors (e.g., DSI and EMSI) that occasionally facilitate the company's post-accident tests through their nationwide networks of collection sites if there are no collection sites known or immediately available to the company. *Tr.* at 10:6-17; 18:20-19:2; 25:13-26:4. These include mobile collection sites for situations that require testing after hours or in rural areas. *Tr.* at 10:18-11:4.

III.
ARGUMENT

A.
The Notice of Apparent Violation Lacks the Specificity Required by OAC 4901:2-7-05

PUCO is the charging party in this case—akin to a plaintiff in a civil case or the state in a criminal case—and it bears the burden to prove the occurrence of any alleged violations by a preponderance of the evidence. OAC 4901:2-7-20. Its only charging document is the Notice of Apparent Violation dated October 1, 2015 (the "Notice). The Notice is a one-page document that includes, in pertinent part, the following information:

CODE	VIOLATION	FORFEITURE
382.303(b)	Failing to conduct post accident testing on driver for controlled substances.	800.00
396.3(b)	Failing to keep minimum records of inspection and vehicle maintenance.	0.00
396.11(a)	Failing to require driver to prepare driver vehicle inspection report.	5400.00
382.303(a)	Failing to conduct post accident alcohol testing on driver following a recordable crash.	1200.00

Although the Notice cites particular code provisions and generically describes alleged violations of those provisions, it fails to identify any particular instances of the alleged violations or any evidence to support them. As the only charging document in this case—akin to a complaint in a civil or criminal case—the Notice lacks the bare minimum specificity that is necessary to put FXCC on notice of basis for PUCO's contentions. Indeed, it fails to list (1) "the date of the violation and person, vehicle, or facility concerning which the violation occurred"; and (2) "[a] brief description of the manner in which the violation is alleged to have occurred," which are explicitly required by OAC 4901:2-7-05.

This utter lack of specificity is prejudicial to FXCC, as it required the company to defend against vague charges during the hearing, exacerbated by the fact that FXCC was forced to present its case-in-chief prior to PUCO's. *See Tr.* at 5:23-25. In essence, PUCO is impermissibly attempting to shift its burden of proof to FXCC. Companies cannot be forced to guess which facts an administrative agency is relying on to support alleged regulatory violations and then to present evidence to clear themselves of those charges. That's entirely backwards and inconsistent with OAC 4901:2-7-05 and 4901:2-7-20. It is also precisely why Ohio courts routinely dismiss civil and criminal complaints that contain nothing more than bare legal conclusions, like the Notice at issue here. *See, e.g., Tuleta v. Med. Mut. Of Ohio,* 6 N.E.3d 106, 116 (Ohio Ct. App. 2014) (dismissing complaint and explaining that complaints must contain sufficient factual allegations to support legal conclusions).

Because the Notice failed to meet the requirements of OAC 4901:2-7-05, leaving FXCC to defend against uncertain claims, it should be dismissed at the outset.

B.
FXCC Complied with the Post-Accident Drug and Alcohol Testing Regulations

Notwithstanding the problems with its Notice, PUCO failed to meet its burden to prove that FXCC violated 49 C.F.R. § 382.303(a) and (b), which provide, in part:

> (a) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for alcohol for each of its surviving drivers:
> ***
> (b) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each of its surviving drivers:
> ***
> (d)(1) Alcohol tests. If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FMCSA upon request.
>
> (2) Controlled substance tests. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FMCSA upon request.

As addressed above, the Notice fails to identify any particular violations, but, upon information and belief, the following drivers and accidents are at issue:

ALLEGED VIOLATION	DRIVER	DATE
49 C.F.R. §382.303(a)	Steven Moreland	12/22/2014
49 C.F.R. §382.303(a)	Chaune Duffy	4/21/2015
49 C.F.R. §382.303(b)	Chaune Duffy	4/21/2015
49 C.F.R. §382.303(a)	Michael Bridgett	2/4/2015

From this list, it is evident the alleged violations stem from three distinct accidents, involving three separate drivers.

While it is true that alcohol and/or controlled substance tests were not completed following these particular accidents, FXCC complied with § 382.303 by preparing and maintaining records stating the reasons this was so. *See* FXCC Exhibit 1; *see also* 49 C.F.R. § 382.303(d) (providing that if post-accident alcohol or drug tests cannot be promptly completed, a carrier shall maintain records indicating why the tests were not completed).

These records establish the reasons the tests were not completed were beyond FXCC's control. For example, driver Steven Moreland was not tested for alcohol following his December 22, 2014 accident because the company was not initially made aware that a citation had been issued to Mr. Moreland as a result of the accident. *See* FXCC Exhibit 1; *Tr.* at 14:3-24. The accident occurred at 12:40 AM, and when the driver notified the third-shift FXCC accident specialist of the accident shortly thereafter, he did not indicate that a citation had been issued. FXCC Exhibit 1; *Tr.* at 33:4-36:11. As a result, the company's system did not flag the accident as one requiring post-accident testing. *Id.* FXCC did not become aware of the issuance of a

citation and, by extension the necessity of post-accident testing, until 7:50 AM, at which point the driver could not feasibly have been tested in time. *Id.*

Likewise, Michael Bridgett was not tested for alcohol following his February 4, 2015 accident because he did not inform FXCC that he had received a citation until the 8-hour threshold set by § 382.303 had expired. *See* FXCC Exhibit 1; *Tr.* at 15:15-17:7; 36:12-38:2. Similarly, neither driver Chaune Duffy nor FXCC became aware that Duffy's April 21, 2015 accident involved disabling damage to the other vehicle until they received the roadside inspection report a week later – well beyond the applicable thresholds for drug and alcohol testing. *See* FXCC Exhibit 1; *Tr.* at 17:8-18:19; 38:3-39:3.

By maintaining these records, FXCC satisfied its obligations under § 382.303, and PUCO has no basis to issue the company a civil forfeiture for alleged violations of the regulation. Indeed, the Chief Safety Officer of the Federal Motor Carrier Safety Administration ("FMCSA")—the agency that promulgated these regulations, which the state of Ohio has adopted by reference—has specifically held that a motor carrier does not *per se* violate § 382.303 if a required drug or alcohol test is not timely completed, so long as the carrier's negligence did not cause the failure to test. *See In the matter of Four Towers Transportation, Inc.*, No. FMCSA-2018-0092, 2018 WL 2296922, at *4 (FMCSA May 18, 2018).[1]

What's clear from the testimony in this case is that PUCO's investigator did not fully appreciate the FMCSA's guidance on this issue when he assessed the alleged

[1] A copy of the FMCSA's decision is attached as *Exhibit A*.

violations. *See Tr.* at 64:18-65:9 (testifying that he understood FMCSA guidance to mean that a carrier can only be excused from its obligations to conduct post-accident testing if a driver is "completely not accessible"). However, as the FMCSA made abundantly clear in the *Four Towers* case, the correct standard is *not* whether the driver was completely inaccessible for testing, but rather whether the carrier's negligence resulted in the failure to test. *Four Towers Transp., Inc.*, 2018 WL 2296922, at *5.

This outcome makes sense because the reasons the carrier did not comply with the requirement were beyond its control and it would not be fair to hold it responsible. This is precisely why the regulations permit the carrier to document those reasons, so that the FMCSA or PUCO can readily determine that the carrier was not simply derelict in its duty (in which case it would be in violation). Here, FXCC cannot be charged with failing to promptly administer post-accident alcohol and/or drug tests in instances where it complied with the FMCSA's regulation that explicitly allows it to document why it was not feasible to administer those tests in the first place and where those reasons were not the result of FXCC's negligence. These are not instances where FXCC simply ignored its responsibilities under § 382.303; the circumstances were beyond its control, and it would not be fair or consistent with FMCSA's guidance on this issue to hold FXCC responsible.

Moreover, in situations like Mr. Bridgett's accident, where drivers tell FXCC they did not receive a citation, FXCC runs the risk of committing a violation if it instructs these drivers to submit to DOT drug and alcohol testing when such tests

are not required under the regulations. *See* 49 C.F.R. § 40.13 (prohibiting motor carriers from conducting DOT drug and alcohol tests, unless those tests are "specifically authorized" by the regulations); *see also Tr.* at 95:2-4 (admitting it would be a violation for FXCC to require drivers to submit to a DOT post-accident test when one is not required). This puts carriers in the unenviable situation of testing the drivers and receiving a violation or not testing them and receiving a violation.

III.
CONCLUSION

PUCO's Notice fails to meet the specificity requirements of OAC 4901:2-7-05, which forced FXCC to have to defend vague charges. The Notice should be dismissed for that reason alone. In addition, PUCO has failed to meet its burden to prove that FXCC violated 49 C.F.R. § 382.303. Accordingly, the civil forfeiture should be overturned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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2018 WL 2296922 (D.O.T.)

Department of Transportation (D.O.T.)

Motor Carrier Safety

IN THE MATTER OF: FOUR TOWERS TRANSPORTATION, INC., U.S. DOT NO. 1532233 PETITIONER.

Docket No. FMCSA-2018-0092.

(Southern Service Center)

May 18, 2018

FINAL ORDER ON PETITION FOR ADMINISTRATIVE REVIEW OF CONDITIONAL SAFETY RATING

I. Background

*1 On November 9, 2017, the Federal Motor Carrier Safety Administration (FMCSA) issued a notice of proposed Conditional safety rating (Notice) to Four Towers Transportation, Inc. (Petitioner). The proposed safety rating was based on a November 3, 2017 compliance review (CR) conducted by FMCSA's Florida Division and became effective on January 9, 2018. [1]

On February 8, 2018, Petitioner served a request for administrative review of the Conditional safety rating (Petition). By Order issued February 16, 2018, I directed the Regional Field Administrator (RFA) to respond to the Petition within 30 days of the Order's service date and provide a complete copy of the CR report and the Notice. On March 19, 2018, the RFA served his response to the Petition (Response).

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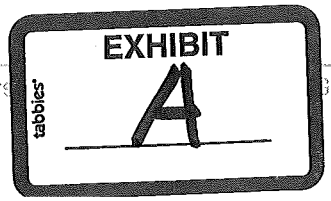
A. The Safety Rating Process

The procedures for assigning a safety rating at the conclusion of a compliance review are set out in Appendix B to 49 CFR part 385. Ratings are assigned for each of six factors, if applicable. [2] These factor ratings then determine a carrier's overall safety rating according to the Motor Carrier Safety Rating Table. [3] A "conditional" rating in more than two factors, with no "unsatisfactory" ratings, or an "unsatisfactory" rating in one factor, even if all other factors are rated "satisfactory," will result in an overall Conditional safety rating. An "unsatisfactory" rating in one factor and a ""conditional" rating in more than two factors or an "unsatisfactory" rating in two or more factors will result in an overall Unsatisfactory safety rating. [4]

The ratings for Factors 1 through 5 are assigned based on violations of acute regulations and patterns of noncompliance with critical regulations. [5] A pattern of noncompliance with a critical regulation exists when the number of violations equals 10 percent or more of the records examined. A carrier is assessed one point for each violation of an acute regulation and each pattern of noncompliance with a critical regulation; however, a carrier is assessed two points for each pattern of noncompliance with a critical regulation in 49 CFR part 395. [6] The carrier will be rated ""unsatisfactory" in a factor if the acute violations and patterns of violating critical regulations for that factor total two or more points. It will be rated "conditional" in a rating factor if the acute violation or pattern of violating a critical regulation for that factor equals one point. [7]



*2 FMCSA 3

B. Calculation of Petitioner's Safety Rating

Petitioner received an "unsatisfactory" Factor 2 (Driver) rating based on a pattern of violating critical regulation 49 CFR 382.303(a) (382.303(a)) -- failing to conduct post-accident alcohol testing on a driver following a recordable crash; and a pattern of violating critical regulation 49 CFR 382.303(b) (382.303(b)) -- failing to conduct post-accident controlled substances testing on a driver. Petitioner also received a "conditional" Factor 4 (Vehicle) rating based on 10 out-of-service vehicles out of 20 vehicles inspected. [8] Because it received one "unsatisfactory" factor rating and one "conditional" factor rating, Petitioner received an overall safety rating of Conditional.

II. Discussion

A. Standard

The purpose of an administrative appeal under 49 CFR 385.15 is to determine whether FMCSA committed an error in assigning a safety rating. Under 49 CFR 385.15(b), the petitioner must explain the error that it believes FMCSA committed in assigning the rating and provide information or documents in support of its argument. The petitioner must therefore demonstrate, by a preponderance of the evidence, that the Agency erred in the issuance of the safety rating. [9]

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Only those issues that pertain to the assignment of the less-than-Satisfactory safety rating will be reviewed. [10]

B. The Petition

Petitioner challenged the "unsatisfactory" rating for Factor 2. The Agency calculated the Factor 2 rating using two alleged violations of 382.303(a) discovered out of two records checked and two alleged violations of 382.303(b) discovered out of two records checked. [11] Petitioner contended that one of the two violations of 382.303(a) and one of the two violations of 382.303(b) were used in error. Specifically, Petitioner contended that the 382.303(a) and 382.303(b) violations that allegedly resulted from a March 7, 2017 accident involving its driver, Felix R. Diaz, should not have been used to calculate the Factor 2 rating.

On March 7, 2017, driver Diaz was driving on Highway Interstate 80, in Uinta County, Wyoming, when he lost control of his vehicle and he struck the median's guardrail. [12] He received a citation for driving too fast for the external conditions, which included icy roadways and blowing snow. [13] Petitioner explained that, as soon as practicable following the accident, driver Diaz contacted Petitioner to notify it of the accident. Petitioner instructed him to follow its post-accident procedures and informed him that it would contact a nearby post-accident testing facility where he could complete testing.

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Petitioner averred that driver Diaz inadvertently left his cellular phone in the vehicle, which needed to be towed from the scene, and was unable to communicate with Petitioner until he arrived at his hotel room two hours after the accident. [14] At that time, Petitioner was unable to locate a nearby open and available testing facility. Moreover, driver Diaz complained to Petitioner of severe back pain and indicated that he was unable to travel to a testing facility. Petitioner instructed him to go to the hospital the following morning so that he could receive treatment for his injuries and conduct

post-accident testing. Petitioner contended that, upon arrival at the hospital, driver Diaz requested post-accident testing, but he did not receive it.

*3 Following these events, Petitioner's safety director prepared a note under 49 CFR 383.303(d), stating the reasons why the testing was not conducted. Petitioner indicated that the original note reviewed by the safety investigator had contained incorrect facts and attached a copy of the note that was a revised version of the original. [15] The revised version specifically stated that the accident occurred at 8:00 a.m. on March 7, 2017; driver Diaz first reported the accident to Petitioner at 2:00 p.m.; and driver Diaz's vehicle (a truck) was towed from the accident scene at 2:30 p.m. Driver Diaz's phone had no battery and was inside the truck; therefore, Petitioner did not receive a full report of the accident until 3:00 p.m., at which time, it learned that driver Diaz had received a citation. [16]

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At that time, according to the revised note, Petitioner began searching for a nearby facility that conducts post-accident testing. Petitioner contacted National Drug Screening Inc. (National Drug Screening), which responded an hour later and provided Petitioner with the name of a facility that was 53 miles away. Petitioner also contacted Uinta Urgent Care, Express Labs, and Samhsa Drug Screening, as well as other facilities in Cheyenne, Wyoming, but they were 350 miles away. The revised note also indicated that communication with driver Diaz was difficult and the weather, blowing snow, was affecting travel. The following morning, when an ambulance transported driver Diaz to Evanston Regional Hospital to be treated for back pain and hypertension, [17] the revised note indicated that a post-accident test was ordered, but Petitioner did not receive results. Petitioner submitted the ambulance and hospital records covering driver Diaz's treatment. [18]

C. RFA's Response

The RFA contended that Petitioner failed to conduct post-accident testing for controlled substances and alcohol as soon as practicable and Petitioner admitted the violations in a signed statement. [19] The RFA also contended that Petitioner did not adequately explain the reason for its failure to conduct post-accident testing on driver Diaz. During the CR, the FMCSA safety investigator was given an accident file that did not contain the same note that Petitioner submitted with its Petition. The note that FMCSA had received stated that Petitioner had been unable to conduct post-accident testing on driver Diaz because it was a Sunday and due to the weather conditions. [20] The RFA argued that although the note attempted to explain why Petitioner

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did not immediately conduct post-accident testing, it did not explain why the testing was not conducted when practicable and Petitioner still has not produced post-accident drug or alcohol test results for driver Diaz.

With respect to the revised note, the RFA argued that this was evidence of corrective action and should be considered under a request for an upgrade under 49 CFR 385.17, not 385.15. [21] Moreover, the RFA argued that the revised note still does not comport with the § 382.303(d) requirement to provide the reasons for failing to conduct post-accident testing for controlled substances and alcohol. The RFA argued that Petitioner did not submit any evidence showing that the post-accident tests had been requested from the hospital and why the driver was never tested; if Petitioner had conducted the post-accident tests as soon as practicable after driver Diaz had been released from medical care and the test results had been included in Petitioner's accident file, together with a reasonable explanation for the delay, the Agency would not have cited Petitioner for violations under 49 CFR 382.303. [22] The RFA averred that the regulation does not require the delay of necessary medical attention following an accident, but Petitioner was required to comply with 49 CFR part 382 at any time after the crash and after driver Diaz was released from medical care.

D. Analysis

***4** Section 382.303(a) requires post-accident alcohol testing "as soon as practicable" if the driver, within eight hours of an accident, receives a citation for a moving traffic violation arising from the accident and one or more motor vehicles incur disabling damage as a result of the

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accident, requiring the vehicle or vehicles to be transported away from the scene by a tow truck or other motor vehicle. Under 49 CFR 382.303(d)(1), if a post-accident alcohol test is required, but not administered within two hours following the accident, the carrier must prepare and maintain on file a record stating the reasons the test was not promptly administered. Subsection (d)(1) further provides that if the test is not administered within eight hours following the accident, the carrier must cease attempts to administer the test and prepare and maintain the same record stated above. With subsection (d) following the "as soon as practicable" language under subsection (a), the rule is intended to hold an employer liable only if the employer's failure to test was not caused by an objective impracticability of administering the tests.[23] A carrier is not in violation *per se* if it fails to administer the required post-accident test within the designated timeframe; the failure must be caused by the carrier's negligence.[24]

Petitioner did not dispute that it was required to comply with 49 CFR 382.303(a) or that it failed to conduct post-accident alcohol testing on driver Diaz for the March 7, 2017 accident. Instead, Petitioner argued that it complied with the regulation because, as required under 49 CFR 382.303(d)(1), it prepared a note for the accident file, recording the reasons why it was unable to conduct the testing in the allotted timeframe. Based on the notes and Petitioner's explanation, I find Petitioner has demonstrated that a post-accident alcohol testing was objectively impracticable.

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The accident occurred at 8:00 a.m. Under 49 CFR 382.303(d)(1), if a post-accident alcohol test is not administered within two hours of the accident, the employer must prepare and maintain on file a record stating the reasons the test was not properly administered. More than two hours passed before Petitioner began searching for a testing facility at 3:00 p.m.; therefore, Petitioner was required to prepare a record stating the reasons why it did not promptly conduct post-accident alcohol testing.[25] Petitioner averred that driver Diaz first contacted it at 2:00 p.m. and did not inform Petitioner of the citation until 3:00 p.m., when he arrived at his hotel room upon leaving the accident scene, because driver Diaz's cellular phone had been left in the truck and the phone's battery needed recharging. This reason, without any supporting evidence, would likely be insufficient to find that Petitioner made all reasonable efforts to conduct post-accident alcohol testing;[26] however, because of Petitioner's attempts to find a post-accident testing facility and other circumstances affecting its ability to conduct the testing (discussed below), I find that conducting post-accident alcohol testing was objectively impracticable.

***5** Petitioner made numerous, albeit unsuccessful, attempts to find a testing facility. The original note in the accident file indicated that several attempts to conduct post-accident testing had been made.[27] Petitioner further explained, in its revised note and Petition, that it had

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contacted several testing facilities or service providers, including National Drug Screening,[28] Uinta Urgent Care,[29] and Express Labs,[30] but they were either too far away,[31] closed, or did not accept "walk-in" patients.[32] These searches demonstrate that Petitioner made reasonable efforts to conduct post-accident testing.[33]

Moreover, Petitioner was unable to conduct post-accident testing because of the icy roads and blowing snow. [34] Both notes in Petitioner's accident file and the Wyoming Investigator's Traffic Crash Report (Crash Report), which indicates that there was "Ice/Frost" on the road and there was "Blowing Snow," verifies the difficult road and weather conditions on March 7, 2017. [35]

Furthermore, driver Diaz was unwilling to travel to a testing facility because of back pain. Petitioner submitted driver Diaz's medical records, which show that an ambulance transported him to the hospital the following day for back pain. [36] The poor road and weather

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conditions, along with driver Diaz's injuries making travel difficult, demonstrates that conducting a post-accident alcohol test was objectively impracticable despite Petitioner's reasonable efforts to do so.

The RFA countered that Petitioner admitted the violations in a statement signed by Petitioner's president Ruben Torres. The signed statement, however, merely admits that Petitioner failed to conduct post-accident testing on driver Diaz and therefore could not provide the testing results to the FMCSA safety investigator upon request. [37] The signed statement does not admit that Petitioner failed to prepare a record as to why it could not conduct the post-accident testing.

The RFA further argued that the revised note was not in Petitioner's file during the CR and is evidence of corrective action. I disagree. The original note explained that the road and weather conditions attributed to Petitioner's inability to conduct post-accident testing even though it had made attempts to do so. While the revised note was not in Petitioner's file, it did not contradict the original note. Rather, it expanded upon the original note, including information regarding driver Diaz's back injuries, leading me to conclude that Petitioner's failure to conduct post-accident testing was not due to its negligence. Petitioner's evidence clearly shows that driver Diaz suffered back and other health issues that required an ambulance and medical care. The evidence also shows that Petitioner made several attempts to find a nearby testing facility in a rural area during difficult road and weather conditions. Therefore, I find Petitioner sufficiently explained why it was objectively impracticable to conduct post-accident alcohol testing to comply with 49 CFR 382.303(d)(1).

***6** FMCSA 12

In addition, the RFA contended that both notes failed to explain why driver Diaz was never tested. This argument, however, is irrelevant. If a test is not administered within eight hours following the accident, the carrier must cease attempts to administer the test and prepare a record stating the reasons the test was not promptly administered, [38] which Petitioner did.

Therefore, Petitioner has demonstrated that the 49 CFR 382.303(a) violation was cited in error. After removing this violation, only one 49 CFR 382.303(a) violation remains. Because more than one violation is required to find a pattern of violating a critical regulation, [39] the pattern of violating 49 CFR 382.303(a), and the corresponding point assessed, is removed and Petitioner's Factor 2 rating is upgraded to "conditional." Although Petitioner challenged a 49 CFR 382.303(b) violation as well, I need not address the alleged error because it would not make a difference in the outcome. Two "conditional" factor ratings (Factor 2 and Factor 4) results in an overall Satisfactory safety rating. [40] Accordingly, Petitioner's Factor 2 "unsatisfactory" rating is upgraded to "conditional" and the overall safety rating is upgraded to Satisfactory, effective immediately.

It Is So Ordered.

John Van Steenburg

Assistant Administrator
Federal Motor Carrier Safety Administration

Footnotes

1 *See* Regional Field Administrator's Response to Petition for Administrative Review of Conditional Safety Rating (RFA's Response), Exhibit RFA-1.

2 A carrier's Factor 6 rating, which is determined by its recordable accident rate, is not at issue in this proceeding.

3 49 CFR part 385, app. B.III.A.

4 *Id.* app. B.III.A(b).

5 These regulations are identified in section VII of Appendix B to 49 CFR part 385.

6 49 CFR part 385, app. B.II(h).

7 *Id.*, app. B.II.C(b).

8 If a motor carrier has had three or more roadside vehicle inspections in the twelve months prior to the compliance review, three vehicles inspected at the time of the review, or a combination of the two totaling three inspections or more, and the vehicle out-of-service rate is 34 percent or greater, the Factor 4 (Vehicle) rating will be "conditional." *Id.*, app. B.II.A(a)(1). The Vehicle Factor is lowered to "unsatisfactory" if noncompliance with an acute regulation or a pattern of noncompliance with a critical regulation is discovered. *Id.*

9 *See AA Logistic, Inc. f/k/a P&A Transport, Inc.*, Docket No. FMCSA-2012-0206-0005, at 2, Final Decision on Petition for Review of Safety Rating (Aug. 13, 2012). To establish by a preponderance of the evidence means that something is more likely so than not. *See Commodity Carriers, Inc.*, FMCSA-2001-8676-0007, at 11 n.23, Final Order: Decision on Petition for Safety Rating Review (June 30, 2004) (citing *Blossom v. CSX Transp. Inc.*, 13 F.3d 1477, 1482 (11th Cir. 1994)).

10 *See Multistar Industries, Inc.*, FMCSA-2012-0315-0007, Final Decision on Petition for Review of Unsatisfactory Safety Rating (Oct. 1, 2012) *aff'd* 707 F.3d 1045 (Feb. 7, 2013); *A&B Marine Trucking, Inc.*, FMCSA-2002-13104-0001, Final Order Under 49 CFR 385.15 (Sept. 7, 1999).

11 *See* RFA's Response, Exhibit RFA-2.

12 *See* Petition, Exhibit A.

13 *Id.* Driver Diaz was driving 50 miles per hour (mph) when the posted speed limit was 45 mph. *Id.*

14 The Petition indicated that driver Diaz did not call until two hours after the accident; however, the revised note stated that the accident occurred at 8:00 a.m. and he called Petitioner at 3:00 p.m., one hour after the initial contact at 2:00 p.m. *See* Petition, unmarked p. 4 and Exhibit B.

15 *See id.*, Exhibit B. Petitioner did not submit the original note into the record. However, as discussed *supra*, the RFA provided a copy.

16 Post-accident testing for controlled substances and alcohol is required if the driver, within eight hours of the accident, receives a citation for a moving traffic violation arising from the accident if one or more motor vehicles incur disabling damage as a result of the accident, requiring the vehicle to be transported away from the scene by a tow truck or other vehicle. *See* 49 CFR 382.303(a)(2)(h), (b)(2)(h).

17 *See id.*, Exhibit D.

18 *See id.*, Exhibit D.

19 *See* RFA's Response, Exhibit RFA-4.

20 *See id.*, Exhibit RFA-7.

21 A request for an upgrade under 49 CFR 385.17 is based on corrective action and must be made to the appropriate FMCSA Service Center. 49 CFR 385.17(a) -- (b).

22 The RFA does not indicate whether he was referring to a violation under 49 CFR 382.303(a), (b), or both.

23 *Yarmouth Lumber, Inc.*, FMCSA-2006-25293, Final Order (June 10, 2009).

24 *Id.*; *see also U.S. Freightways Logistics, Inc. (U.S. Freightways)*, FMCSA-2017-0305, Final Order on Petition for Administrative Review of Unsatisfactory Safety Rating (Final Order) (Nov. 27, 2017). In *U.S. Freightways*, I found that the petitioner was not negligent in failing to test its driver for controlled substances post-accident under 49 CFR 382.303(b) within the required 32-hour period because the driver had been hospitalized and sedated, and the hospital was unwilling to conduct a controlled substances test without the driver's permission. FMCSA-2017-0305, at 4 -- 10, Final Order (Nov. 27, 2017).

25 *See* 49 CFR 382.303(d)(1).

26 *See Continental Express, Inc. (Continental Express)*, FMCSA-2011-0251, Order Appointing Administrative Law Judge (Nov. 9, 2015) (finding that "if [the driver] Mr. Lucas's phone was towed with his truck, and if the 'lapse in time' during which Respondent[, the motor carrier,] was unable to contact Mr. Lucas was lengthy, it is conceivable that Respondent was unable to contact Mr. Lucas to arrange for post-accident testing to be administered 'as soon as practicable,' or at all within the eight-hour period following the accident"). In *Continental Express*, however, the Agency had the burden of demonstrating that it was "practical and possible" for the motor carrier to test its driver within the eight-hour window. *See id.*, at 16.

27 *See* RFA's Response, Exhibit RFA-7.

28 The National Drug Screening website lists Evanston Regional Hospital, which is also in Uinta County, where the accident occurred, but it does not indicate whether walk-in appointments are available. *See* https://www.nationaldrugscreening.com/Wyoming.html.

29 Uinta Urgent Care does not provide its hours of service on its website. https://www.uintaurgentcare.com/ (last visited May 14, 2018). However, the RFA does not dispute that this facility was closed at 3:00 p.m. on March 7, 2017.

30 Express Labs provides locations and hours through Quest Diagnostics (www.expresslabs.com). The closest facility provided was J.A.G Exam Services, which is 53 miles away from Evanston, WY. https://secure.questdiagnostics.com/hcp/psc/isp/SearchLocation.do (last visited May 14, 2018).

31 The Crash Report indicated that the accident had occurred in a rural area. *See id.*; *See also* Petition, Exhibit A.

32 *See* Petition, Exhibit B.

33 *See IMG Trucking, Inc.*, FMCSA-2017-0333, at 10-11, Final Order on Petition for Review of Proposed Unsatisfactory Safety Rating (Dec. 15, 2017) (finding that there were several nearby testing facilities that were open during the eight-hour period).

34 *See* Petition, Exhibit B; *see also* RFA's Response, Exhibit RFA-7.

35 *See* Petition, Exhibit A; *see also* RFA's Response, Exhibit RFA-7.

36 *See* Petition, Exhibit D. Although Evanston Regional Hospital provides post-accident testing services (https://www.nationaldrugscreening.com/Wyoming.html), by the time driver Diaz went to the hospital on March 8, 2017 (more than 24 hours after the March 7, 2017 accident), it was too late for him to be tested for alcohol under 49 CFR 382.303(a). *See* 49 CFR 382.303(b).

37 *See* RFA's Response, Exhibit RFA-4. The exhibit is incorrectly marked Exhibit RFA-5.

38 49 CFR 382.303(d)(1).

39 *Id.* part 385, app. B.II(g).

40 *Id.*, app. B.III.A.

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End of Document

Summary: Brief Respondent's Post-Hearing Brief electronically filed by Mr. Timothy W Wiseman on behalf of FedEx Custom Critical, Inc.