

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**C & H PAVING, INC.,  
(U.S. DOT No. 854719)**

**Petitioner.**

**Docket No. FMCSA-2013-0476<sup>1</sup>  
(Southern Service Center)**

**ORDER DENYING PETITION FOR RECONSIDERATION**

**1. Background**

On November 22, 2013, C & H Paving, Inc. (Petitioner) served a Petition for Reconsideration of a Notice of Default and Final Agency Order (NDFAO) issued by the Field Administrator for the Southern Service Center, Federal Motor Carrier Safety Administration (FMCSA) on November 20, 2013.<sup>2</sup> The NDFAO was issued after Petitioner failed to timely reply to a Notice of Claim (NOC) served October 11, 2013 proposing a civil penalty of \$4,720 based on one alleged violation of 49 CFR 391.25(a), failing to make an inquiry into the driving record of each driver to the appropriate State agencies in which the driver held a commercial motor vehicle operator's license at least once every 12 months.<sup>3</sup> The NDFAO advised Petitioner that the NOC would become the Final Agency Order in this proceeding effective November 25, 2013, with the civil penalty immediately due and payable on that date.

Petitioner claimed it could demonstrate excusable neglect because it was not aware of the regulatory requirement for which it was cited. It apologized for not responding to the NOC,

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<sup>1</sup> The prior case number was GA-2013-0410-GA0118.

<sup>2</sup> See Enclosure (b) to Petition for Reconsideration.

<sup>3</sup> See Enclosure (c) to Petition for Reconsideration.

stated that it has taken the necessary corrective action, and requested that the Final Agency Order be vacated.

On December 19, 2013, the Field Administrator for FMCSA's Southern Service Center (Claimant) served a "Response and Opposition to the Petition for Reconsideration." The Field Administrator argued that the Petition for Reconsideration should be denied because it did not meet the standards for vacating a properly issued NDFAO.

## **2. Decision**

Because Petitioner did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a), it defaulted.<sup>4</sup> Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Petitioner can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Petitioner failed to meet its burden of demonstrating that the Final Agency Order should be vacated. Because Petitioner admitted that it failed to timely reply to the NOC and provided no explanation for its inaction, there are no grounds for finding excusable neglect.<sup>5</sup> Moreover, Petitioner admitted that it violated § 391.25(a) by acknowledging that it was not even aware that there was such a requirement. Petitioner is responsible for knowing and complying with all regulations applicable to its operations, as required by 49 CFR 390.3(e)(1). Ignorance of the law

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<sup>4</sup> The NOC reply deadline was November 15, 2013. This date was calculated by adding 30 days to the October 11, 2013 service date of the NOC and an additional five days because the NOC was served by mail. See 49 CFR 386.8(c)(3).

<sup>5</sup> Petitioner misconstrued the meaning of the excusable neglect standard, which applies to the failure to file a timely reply, and is not a defense to the substantive violation alleged in the NOC.

is neither a defense nor an excuse for violating the law.<sup>6</sup> Consequently, Petitioner did not present a meritorious defense. Although Petitioner requested that the Final Agency Order be vacated based on corrective action, the term “meritorious defense” in § 386.64 does not apply to requests to reduce a civil penalty where the Petitioner does not contest the substantive violations set forth in the NOC.<sup>7</sup>

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Petitioner acts with due diligence in seeking relief. Even if, for the sake of argument, Petitioner acted with due diligence by promptly seeking reconsideration of the NDFAO, it would be an empty exercise or futile gesture to vacate the Final Agency Order because it did not demonstrate a meritorious defense.<sup>8</sup>

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding. The civil penalty of \$4,720 is due and payable immediately. Payment may be made electronically through FMCSA’s registration site at <http://safersys.org/> 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.

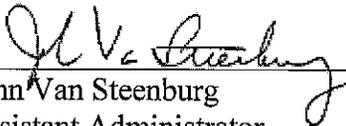
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<sup>6</sup> See *In the Matter of Robert Hansen Trucking, Inc.*, FHWA Docket No. R5-89-174, Order in Response to Respondent’s Motion to Dismiss (May 20, 1991), 57 FR 28731, 28732 (June 26, 1992).

<sup>7</sup> See *In the Matter of Curtis R. Lunney dba L & F Transport*, Docket No. FMCSA-2007-28487, Order Denying Petition for Reconsideration, May 5, 2009, at 3.

<sup>8</sup> See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, Oct. 8, 2008, at 5.

*It Is So Ordered.*



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John Van Steenburg  
Assistant Administrator  
Federal Motor Carrier Safety Administration

1/7/14  
Date

**CERTIFICATE OF SERVICE**

This is to certify that on this 8 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.

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