

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**CLG DELIVERY SERVICE, INC.,
(U.S. DOT No. 2117710)**

Petitioner.

**Docket No. FMCSA-2013-0481¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On September 24, 2013, the Maryland Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on CLG Delivery Service, Inc. (Petitioner) proposing a civil penalty of \$6,400.² The NOC, which was based on an August 6, 2013 roadside inspection, charged Petitioner with one violation of 49 CFR 385.337(b), operating in violation of an FMCSA Out-of-Service Order issued for refusal to submit to a new entrant safety audit.

After Petitioner failed to respond to the NOC, the Regional Field Administrator for FMCSA's Eastern Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on Petitioner on October 30, 2013.³ The NDFAO advised Petitioner that the NOC would become the Final Agency Order in this proceeding effective November 4, 2013, with the civil penalty immediately due and payable on that date.

¹ The prior case number was MD-2013-0144-US1249.

² See Exhibit A to Regional Field Administrator's Response and Opposition to Petition for Reconsideration (Claimant's Answer to Petition).

³ See Exhibit B to Claimant's Answer to Petition.

On November 9, 2013, Petitioner served a Petition for Reconsideration of the Final Agency Order. Petitioner claimed that it tried to schedule an audit and faxed to FMCSA necessary information requested by the Agency for the purpose of scheduling an audit.⁴ After receiving the NOC, Petitioner alleged it contacted FMCSA again and was told “a specialist person” would return its call, but no one ever did. Petitioner contended that its suspension was issued erroneously, requested a hearing, and argued that the Final Agency Order be vacated. In his Answer to the Petition served December 3, 2013, Claimant requested that the petition be denied because Petitioner defaulted by failing to timely reply to the NOC and did not set forth any basis for reconsideration of the Final Agency Order.

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.⁵ Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Regional 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. Petitioner acknowledged receiving the NOC and, instead of submitting a written reply, claimed that it called FMCSA to discuss the matter, but did not receive a return call from

⁴ Petitioner submitted copies of two faxes he sent to FMCSA regarding the scheduling of a new entrant safety audit. They were dated June 30, 2013 and September 25, 2013.

⁵ The NOC reply deadline was October 29, 2013. This date was calculated by adding 30 days to the September 24, 2013 service date of the NOC, plus an additional five days because the NOC was served by mail. *See* 49 CFR 386.8(c)(3).

“a specialist person.” The NOC, however, provides detailed instructions for responding to the document. It requires that the reply be in writing and, in bold capital letters, states:

“FAILURE TO REPLY TO THE NOTICE OF CLAIM IN THE EXACT MANNER SPECIFIED IN 49 CFR § 386.14 MAY BE TREATED AS IF NO REPLY HAS BEEN FILED. UNDER 49 CFR § 386.14(c), A FAILURE TO REPLY MAY CAUSE THE FMCSA TO ISSUE A NOTICE OF DEFAULT AND FINAL AGENCY ORDER THIRTY (30) DAYS AFTER THIS NOTICE OF CLAIM IS SERVED. THE NOTICE OF DEFAULT AND FINAL AGENCY ORDER WILL DECLARE YOU TO BE IN DEFAULT AND DECLARE THE NOTICE OF CLAIM, INCLUDING THE CIVIL PENALTY PROPOSED IN THE NOTICE OF CLAIM, TO BE THE FINAL AGENCY ORDER IN THE PROCEEDINGS. THE FINAL AGENCY ORDER WILL BECOME EFFECTIVE FIVE (5) DAYS AFTER THE NOTICE OF DEFAULT AND FINAL AGENCY ORDER IS SERVED.”⁶

Petitioner, therefore, was advised of the requirements for replying to the NOC and the consequences for failing to comply with these requirements. The failure to timely reply to the NOC was clearly within Petitioner’s control and, consequently, not due to excusable neglect.⁷

Petitioner also failed to present a meritorious defense to the charges. Although it claimed that the Out-of-Service Order was issued erroneously, the evidence it submitted with its Petition did not support this allegation. The Order revoking Petitioner’s new entrant registration became effective June 24, 2013.⁸ Before that Order was issued, Petitioner was warned by FMCSA on June 11, 2013 that its registration would be revoked unless it agreed in writing to a safety audit within 10 days.⁹ The faxes sent by Petitioner seeking to arrange a safety audit are dated June 30, 2013 (after its new entrant registration was revoked) and September 25, 2013 (after the NOC was

⁶ See NOC, pages 4-5.

⁷ See *In the Matter of Geffen Management, Inc., dba Allegiance Moving Solutions*, Docket No. FMCSA-2009-0141, Order Denying Petition for Reconsideration, Aug. 27, 2009, at 4.

⁸ See Exhibit D to Claimant’s Answer to Petition.

⁹ See Exhibit C to Claimant’s Answer to Petition.

issued). The June 11, 2013 warning letter advised Petitioner that: “A safety auditor has tried on three separate occasions to contact you to schedule a safety audit, but was unable to reach you. In light of this, you are considered to have refused to submit to a safety audit under 49 CFR 385.337.” The evidence submitted by Petitioner does not rebut this statement and there is no basis for concluding that the Out-of-Service/Revocation Order was erroneously issued. Moreover, Petitioner did not contest that one of its vehicles operated in interstate commerce on August 6, 2013 in violation of that Order, as alleged in the NOC.¹⁰ I conclude, therefore, that Petitioner did not present a meritorious defense to the allegations in the NOC.

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 in filing its Petition for Reconsideration, it would be an empty exercise or futile gesture to vacate the Final Agency Order because it did not demonstrate a meritorious defense.¹¹

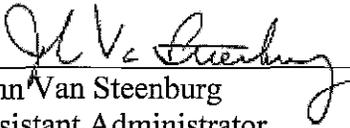
The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding. The civil penalty of \$6,400 is due and payable immediately. Payment may be made electronically through FMCSA’s registration site at <http://safersys.org/> by selecting “Online Fine Payment” 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

¹⁰ See Exhibit F to Claimant’s Answer to Petition.

¹¹ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, Oct. 8, 2008, at 5.

the address shown in the Certificate of Service.

It Is So Ordered.



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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