

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**CHRIS ROSHARD BIBB DBA CRB
EXPRESS,
(U.S. DOT No. 854719)**

Petitioner.

**Docket No. FMCSA-2013-0440¹
(Southern Service Center)**

ORDER GRANTING PETITION FOR RECONSIDERATION

1. Background

On October 16, 2013, Chris Roshard Bibb, dba CRB Express (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 October 9, 2013.² The NDFAO was issued after Petitioner failed to timely reply to a Notice of Claim (NOC) served August 30, 2013, proposing a civil penalty of \$2,750 based on one alleged violation of 49 CFR 385.308(d), operating a commercial motor vehicle in interstate commerce after the effective date of an Out-of- Service Order for failing to respond to a demand for a written response demonstrating corrective action.³ The NDFAO advised Petitioner that the NOC would become the Final Agency Order in this proceeding effective October 13, 2013, with the civil penalty immediately due and payable on that date.

¹ The prior case number was AL-2013-0076-US0519.

² See Exhibit K to Field Administrator's Response and Opposition to Petition for Reconsideration (Response to Petition).

³ See Exhibit J to Response to Petition.

Petitioner claimed he was not aware that he had been placed out of service at the time of the alleged violation on August 7, 2013 and did not receive the letter placing him out of service until after that date. He also asserted that he had submitted a written response to FMCSA demonstrating corrective action in response to the Agency's demand.

On November 20, 2013, the Field Administrator for FMCSA's Southern Service Center (Claimant) served his Response to the Petition. 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), he defaulted.⁴ 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.

Because Petitioner provided no explanation for failing to timely reply to the NOC, there is no basis for finding that his failure to reply was due to excusable neglect. I conclude, however, that Petitioner presented a potentially meritorious defense. Respondent's burden in demonstrating a meritorious defense "is not to satisfy the trial court that [it] would necessarily prevail at a trial on the merits, only that [it] is prepared to present a plausible defense." (Hannah

⁴ The NOC reply deadline was October 4, 2013. This date was calculated by adding 30 days to the August 30, 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).

v. Blackwell, 567 So.2d 1276, 1278 (Ala.1990).⁵

Claimant submitted the Declaration of Safety Investigator (SI) Alan Brooks as part of his evidence. SI Brooks conducted a compliance review of Petitioner on August 13, 2013, because Petitioner had been involved in a significant crash on August 7, 2013.⁶ According to SI Brooks' Declaration, on July 1, 2013, Joseph P. DeLorenzo, the Director of FMCSA's Office of Enforcement and Compliance, sent a letter to Petitioner advising him that his high vehicle out-of-service rate required a written response demonstrating immediate corrective action acceptable to FMCSA, in accordance with the Agency's New Entrant Safety Assurance Program.⁷ The letter advised Petitioner that failure to submit an acceptable response within 30 days of the letter would result in the revocation of his new entrant registration. It also noted that the mere submission of a corrective action plan (CAP) would not necessarily prevent his registration from being revoked.⁸

⁵ See *In the Matter of Ray the Mover of Manchester, Inc.*, Docket No. FMCSA-2008-0032, Order Denying Motion for Default and Requiring Claimant to Submit Evidence, June 9, 2008, note 8, at 6.

⁶ According to the Georgia Police Report prepared in connection with this crash, the trailer of one of Petitioner's vehicles was struck by a train after it stalled while crossing the railroad tracks. The driver's wife, a passenger in the vehicle, told Police that the vehicle stalled because its brake lines malfunctioned due to insufficient air pressure. See Exhibit G to Response to the Petition. The compliance review resulted in assignment of a proposed "unsatisfactory" safety rating, which became effective on October 15, 2013.

⁷ See 49 CFR 385.308(a)(7). Mr. De Lorenzo's letter is Exhibit A to the Response to the Petition.

⁸ Although not expressly stated in the letter, this language suggests that a timely-submitted CAP would have to be acceptable to FMCSA in order to prevent registration revocation.

Respondent responded to the July 1, 2013 letter by submitting a one-paragraph CAP that was received by FMCSA's Southern Service Center on July 24, 2013.⁹ On August 1, 2013, Joel Hiatt, the Southern Service Center Director, sent Petitioner a letter notifying him that his CAP was not acceptable and detailed the plan's deficiencies.¹⁰ The August 1 letter stated that Petitioner's new entrant revocation was scheduled to be revoked (emphasis added), and he would be forbidden to operate in interstate commerce, on or after August 2, 2013, unless he submitted the requested documentation demonstrating compliance before that date.

The NOC cited Petitioner for operating in interstate commerce in violation of the Out-of-Service Order on August 7, 2013, the date of Petitioner's accident. Petitioner's defense is that he was unaware that his CAP had been rejected and that he had been placed out of service on the date of the accident. Although 49 CFR 385.308(d), the violation charged in the NOC, states that failure to demonstrate corrective action within 30 days will result in the revocation of the new entrant's revocation,¹¹ Claimant did not present any evidence that an Out-of-Service or Revocation Order was actually served on Petitioner. The closest document in the record to such an Order is the August 1, 2013 letter, which is essentially a warning that Petitioner's new entrant registration would be revoked if he did not immediately provide additional documentation. That document is captioned "Carrier's Expedited Action Response of Corrective Action under 49 CFR 385.308" and does not advise Petitioner that his registration is "scheduled to be revoked"

⁹ See Exhibit E to the Response to the Petition.

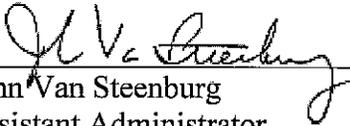
¹⁰ See Exhibit F to the Response to the Petition.

¹¹ Although not specifically stated in the regulation, "corrective action" presumably means corrective action acceptable to FMCSA.

until the second page.¹² Without evidence of an actual Out-of-Service or Registration Revocation Order, Petitioner's claim that he was unaware of such an Order on August 7, 2013 is potentially meritorious. In addition to having a potentially meritorious defense, Protestant acted with due diligence in submitting his Petition for Reconsideration one week after issuance of the NDFAO.

The Petition for Reconsideration, therefore, is granted and the Final Agency Order dated October 9, 2013 is vacated.

It Is So Ordered.



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/7/14

Date

¹² In contrast, Agency Out-of-Service Orders, Orders to Cease Transportation, or Registration Revocation decisions expressly prohibit interstate transportation in the caption and/or the opening paragraph.

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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