

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**MILLIE'S TRANSPORTATION
SPECIALIST, LLC,
(U.S. DOT No. 2122760)**

Petitioner.

**Docket No. FMCSA-2014-0026¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On October 7, 2013, the Virginia Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on Millie's Transportation Specialist, LLC (Petitioner), proposing a civil penalty of \$10,000.² The NOC, which was based on a September 10, 2013 compliance review, charged Petitioner with one violation of 49 CFR 392.9a(a)(1), operating without the required operating authority (property, non-HHG).

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 November 13, 2013.³ The NDFAO advised Petitioner that the NOC would become the Final Agency Order in this proceeding effective November 18, 2013, with the civil penalty immediately due and payable on that date.

¹ The prior case number was VA-2013-0182-US1274.

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

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

On or about November 14, 2013, Petitioner served a reply to the NOC.⁴ The reply was submitted by Franklin Jenkins, one of Petitioner's two partners. Mr. Jenkins admitted that the company operated after its operating authority was revoked, but claimed he was unaware of the revocation because his partner, Paul Layne, received revocation-related documents and either did not open them or opened them and failed to handle the matter.⁵ Mr. Jenkins stated that Petitioner has ceased operations and is on the verge of bankruptcy. According to Mr. Jenkins, Mr. Layne has abandoned the partnership and refuses to take any responsibility for its business affairs.

By letter dated December 9, 2013, Petitioner submitted its Petition for Reconsideration of the NDFAO.⁶ Mr. Jenkins attached a copy of his reply to the NOC and reiterated that the violation was his partner's fault, that the company ceased operations in May 2013, and that he was consulting with a lawyer regarding filing for bankruptcy.

In his Answer to the Petition served January 9, 2014, Claimant requested that the petition be denied because it was not timely served and, in any event, did not set forth any basis for reconsideration of the Final Agency Order.

2. Decision

Under 49 CFR 386.64(a), any party may petition the Assistant Administrator for reconsideration of a Final Agency Order within 20 days following service of that Order. In this case, the Final Agency Order was served on November 13, 2013. The Petition for

⁴ See Exhibit B to Claimant's Answer to Petition.

⁵ Mr. Jenkins stated that Mr. Payne was responsible for handling such matters because Mr. Jenkins was otherwise occupied as a driver for another motor carrier.

⁶ See Exhibit D to Claimant's Answer to Petition.

Reconsideration, therefore, was required to be served by no later than December 9, 2013.⁷ By arguing that the due date was December 8, 2013, Claimant failed to take into account that the 8th was a Sunday and that the due date was, therefore, Monday, December 9. Although there was no certificate of service or postmark indicating when Petitioner's letter was mailed, Claimant stated, in his Answer to the Petition, that the petition was served on or about December 9, 2013. I find, therefore, that the petition was timely served.

Although it submitted a timely petition for reconsideration, Petitioner failed to meet its burden of demonstrating that the Final Agency Order should be vacated. 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.⁸ 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 did not deny that it failed to timely reply to the NOC and provided no explanation for its noncompliance, there are no grounds for finding excusable neglect. Moreover, Petitioner admitted the violation, but claimed that the company had ceased operating and was contemplating filing bankruptcy. The term "meritorious defense" in § 386.64, however, does not apply to requests to reduce a civil penalty where the Petitioner does not contest the

⁷ Five days are added to the 20-day period because the NDFAO was served by mail. *See* 49 CFR 386.8(c)(3). Because December 8, 2013, the 25th day, fell on a Sunday, the deadline is extended to Monday, December 9, 2013. *See* 49 CFR 386.8(a).

⁸ The NOC reply deadline was November 11, 2013. This date was calculated by adding 30 days to the October 7, 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).

substantive violations set forth in the NOC.⁹ Moreover, Petitioner's prospective bankruptcy filing would not prevent imposition of a civil penalty in this proceeding. Under 11 U.S.C. § 362(b)(4), the filing of a bankruptcy petition does not automatically stay the commencement or continuation of an action or proceeding by a governmental unit to enforce that governmental unit's police or regulatory power. Such actions or proceedings include civil penalty proceedings.¹⁰ Although 11 U.S.C. § 362(b)(5) stays the enforcement of a money judgment obtained in a governmental proceeding subject to the § 362(b)(4) exemption, it does not prevent FMCSA from determining whether a bankrupt carrier violated the Federal Motor Carrier Safety Regulations and assessing an appropriate civil penalty.

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 belatedly filing a response to the NOC or 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.¹¹

The Petition for Reconsideration, therefore, is denied. The Notice of Claim is the Final Agency Order in this proceeding and the civil penalty of \$10,000 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.

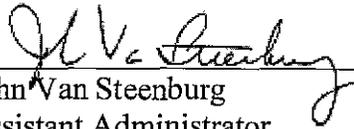
⁹ See *In the Matter of Curtis R. Lunnery, dba L & F Transport*, Docket No. FMCSA-2007-28487, Order Denying Petition for Reconsideration, May 5, 2009, at 3.

¹⁰ See *In the Matter of Globus Moving LLC, dba Globus Moving*, Docket No. FMCSA-2006-26592, Final Order, Nov. 25, 2008, at 10.

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

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.

It Is So Ordered.



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/23/14

Date

CERTIFICATE OF SERVICE

This is to certify that on this 24 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.

Franklin Jennings, Partner Millie's Transportation Specialist, LLC 105 Canyon Road Winchester, VA 22602	One Copy U.S. Mail
Cynthia Campise, Esq. Trial Attorney Office of Chief Counsel (MC-CCE) Federal Motor Carrier Safety Administration 802 Cromwell Park Drive, Suite N Glen Burnie, MD 21061	One Copy U.S. Mail
Curtis I. Thomas, Regional Field Administrator Eastern Service Center Federal Motor Carrier Safety Administration 802 Cromwell Park Drive, Suite N Glen Burnie, MD 21061	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