

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**S & S MOVING, INC.,
(U.S. DOT No. 2037814)**

Petitioner.

**Docket No. FMCSA-2012-0462¹
(Southern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On October 3, 2012, S & S Moving, 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) (Claimant) on September 24, 2012.² The NDFAO was issued after Petitioner failed to timely reply to a Notice of Claim (NOC), served June 4, 2012, proposing a civil penalty of \$52,200 based on: (1) one violation of 49 U.S.C. § 13702(a)(2), failing to provide a published tariff, with a proposed penalty of \$1,100; (2) one violation of 49 CFR 375.403(a)(7), collecting more than the original amount of a binding estimate, with a proposed penalty of \$1,100; and (3) two violations of 49 CFR 392.9a(a)(1), operating without the required operating authority (household goods), with a proposed penalty of \$50,000 (\$25,000 per count).³ The NDFAO advised Petitioner that the NOC would become the Final Agency Order in this proceeding effective October 1, 2012, with the civil penalty immediately due and payable on that date.

¹ The prior case number was LA-2012-0060-GA0653.

² See Exhibit FA-4 to Field Administrator's Response and Opposition to Petition for Reconsideration of Notice of Default and Final Agency Order (Response to Petition).

³ See Exhibit FA-2 to Response to Petition.

Petitioner claimed that two NOCs were issued on June 4, 2012—one seeking penalties of \$1,990 and the other seeking penalties of \$52,200.⁴ Petitioner stated that it settled the \$1,990 claim and requested arbitration for the \$52,200 claim. Petitioner alleged that it was told by an FMCSA representative that the matter would be headed to arbitration and that notice of the arbitration action would be sent to Petitioner. Petitioner contended that it did not default because it intended to have the matter arbitrated and did not respond to the NOC because it was awaiting notice of an arbitration proceeding to resolve this claim. No such notice was sent. On December 7, 2012, Claimant served his response to the petition.⁵

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.⁶ 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

⁴ The Settlement Agreement attached to the Petition, however, indicates that the NOC seeking penalties of \$1,990 was actually issued on May 31, 2012.

⁵ Under 49 CFR 386.64(c), either party may serve an answer to a petition for reconsideration within 30 days of the service date of the petition. Claimant's answer was untimely because it was served 65 days after the petition for reconsideration was served. Claimant did not explain why he failed to serve a timely response; nor did he seek leave to serve an untimely response. However, Claimant's response to the petition is the only document in the docket and, insofar as it includes documents necessary to resolve this proceeding, it will be accepted for the limited purpose of receiving such documents. Any arguments made by Claimant will not be considered.

⁶ The NOC reply deadline was July 9, 2012. This date was calculated by adding 30 days to the June 4, 2012 service date of the NOC and an additional five days because the NOC was served by mail. See 49 CFR 386.8(c)(3).

be vacated. The NOC issued on June 4, 2012 included the following language:

“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.”⁷

Petitioner, therefore, was advised of the requirements for replying to the NOC and the consequences for failing to comply with these requirements.⁸ The failure to timely reply to the NOC was clearly within Petitioner’s control and, consequently, not due to excusable neglect.⁹ Petitioner’s claim that it did not reply to the NOC based on an undocumented oral conversation with an FMCSA representative directly contradicting the language quoted above is simply not credible.

Petitioner’s statement that it sought arbitration of the penalty proposed in the June 4, 2012 NOC amounts to an admission to all four violations alleged in that document. Under 49 CFR 386.14(b)(3), referral to binding arbitration is contingent upon an admission that the violations occurred. Consequently, Petitioner did not present a meritorious defense to the violations.

⁷ See NOC, page 5.

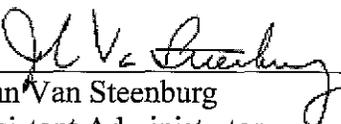
⁸ It should be noted that Petitioner also failed to timely reply to the May 31, 2012 NOC, resulting in the issuance of an NDFAO in that case on July 17, 2012. See Exhibit FA-4 to Response to Petition.

⁹ 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.

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.¹⁰

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding. The civil penalty of \$52,200 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.

It Is So Ordered.



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/23/14
Date

¹⁰ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, Oct. 8, 2008, at 5.

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.

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