

**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**M & L TRANSIT SYSTEMS, INC.
USDOT# 569035
Petitioner**

**Docket No. FMCSA-2013-0512
(Eastern Service Center)**

**FINAL ORDER ON REQUEST FOR REVIEW
OF UNSATISFACTORY SAFETY RATING**

I. Procedural History

On December 6, 2013, M & L Transit Systems, Inc. (Petitioner) served a document that requests administrative review of a safety rating and also responds to violations alleged in a civil penalty proceeding (Petition).¹ Petitioner did not provide a copy of the compliance review that resulted in the safety rating. According to the Federal Motor Carrier Safety Administration's Safety and Fitness Electronic Records (SAFER) System, Petitioner's current safety rating is Conditional based on a September 13, 2013 compliance review (CR).²

Petitioner alleges that the compliance review erroneously cited it with a violation of 49 CFR 383.37(a) – knowingly allowing, requiring, permitting, or authorizing an

¹ The civil penalty proceeding is identified as Case No. MA-2013-0145-US1421. The civil penalty proceeding is not before the Assistant Administrator in these proceedings, which are only related to Petitioner's request for administrative review of its safety rating under 49 CFR 385.15.

² <http://safer.fmcsa.dot.gov>

employee to operate a CMV during any period in which the driver does not have a current commercial learner's permit (CLP) or commercial driver's license (CDL) or does not have a CLP or CDL with the proper class or endorsements. Although Petitioner outlined its argument as to why the violation should not have been cited on the compliance review report, Petitioner did not indicate how this alleged error resulted in its Conditional safety rating. Because I could not determine whether removal of the challenged violation from the compliance review would result in an improved safety rating, on December 30, 2013 I ordered the Regional Field Administrator for FMCSA's Eastern Service Center (Field Administrator) to respond to Petitioner's request and provide a copy of the CR report.

On January 13, 2014, the Field Administrator responded to the Interim Order. The Field Administrator averred that Petitioner committed violations of acute and patterns of violations of critical Federal Motor Carrier Safety Regulations (FMCSRs).³ These violations generated in deficient Factor ratings.⁴ Petitioner's Unsatisfactory safety rating resulted from two unsatisfactory Factor ratings and one conditional Factor rating

³ Regional Field Administrator's Response to the Assistant Administrator's Interim Decision (FA's Response), Exhibit 1.

⁴ 49 CFR Part 385, App. B.II.(g)(h); C. For each instance of noncompliance with an acute regulation or each pattern of noncompliance with a critical regulation, one point is assessed. A pattern is more than one violation. When a number of documents are reviewed, the number of violations required to meet a pattern is equal to at least 10 percent of those examined. However, each pattern of noncompliance with a critical regulation relative to Part 395, Hours of Service of Drivers, is assessed two points. A satisfactory Factor rating is assigned if the acute and/or critical equals 0 points. A conditional Factor rating is assigned if the acute and/or critical equals one point. An unsatisfactory Factor rating is assigned if the acute and/or critical equals two or more points.

under FMCSA's Safety Fitness Rating Methodology (SFRM).⁵ The CR report identified the following violations of acute and patterns of violations of critical regulations:

FACTOR 1 – General: Parts 387 and 390			
Violation	Acute/ Critical	Discovered/ checked	Points
49 CFR 390.35 – making or causing to make a fraudulent or intentionally false entry on a record in a driver qualification file on driver(s).	Acute	1/6	1
Factor 1 Rating = conditional			
FACTOR 2 – Driver: Parts 382, 383 and 391			
Violation	Acute/ Critical	Discovered/ Checked	Points
49 CFR 382.215 – using a driver known to have tested positive for a controlled substance	Acute	1/1	1
49 CFR 387.37(a) – knowingly allowing, requiring, permitting, or authorizing an employee to operate a CMV during any period in which the driver does not have a current CLP or CDL or does not have a CLP or CDL with the proper class or endorsements.	Acute	3/20	1
Factor 2 Rating = unsatisfactory			
FACTOR 3 – Operational: Parts 392, 395			
Violation	Acute/ Critical	Discovered/ Checked	Points
49 CFR 395.5(b)(2) – requiring or permitting a passenger-carrying commercial motor vehicle driver to drive after having been on duty 70 hours in 8 consecutive days.	Critical	16/140	2 ⁶
Factor 3 Rating =unsatisfactory			

According to the Field Administrator, Petitioner submitted a request to change to its proposed Unsatisfactory safety rating based on corrective action under 49 CFR

⁵ 49 CFR Part 385, App. B., III.

⁶ 49 CFR Part 385, App. B. II. Each instance of noncompliance with a critical regulation relative to Part 395, Hours of Service of Drivers, is assessed two points.

385.17. On November 4, 2013, FMCSA notified Petitioner that its safety rating had been upgraded to Conditional.⁷

The Field Administrator argues that because it upgraded Petitioner's safety rating to Conditional and because Petitioner has not challenged its Conditional safety rating, Petitioner's Petition is moot. Moreover, the Field Administrator argues that even if Petitioner's Petition is not moot, Petitioner fails to allege material error in the CR.

II. Decision

Because it is Petitioner's burden to demonstrate error, a petition for administrative review must explain the error and include a list of all factual and procedural issues in dispute and any information or documents that support its argument.⁸ Only those issues that caused the less than Satisfactory safety rating will be reviewed.⁹

Upgrade of a safety rating from Unsatisfactory to Conditional under 49 CFR 385.17, renders a request for review under 49 CFR 385.15 moot if the petitioner requested that its safety rating be upgraded to Conditional or the allegations of error could not improve petitioner's safety rating to Satisfactory. In this case, Petitioner alleged errors in the calculation of its safety rating and asked to upgrade its safety rating to Satisfactory.¹⁰ Therefore, the Field Administrator's upgrade of Petitioner's safety

⁷ FA's Submission, Exhibit 4.

⁸ 49 CFR 385.15(b). A petitioner requesting review of its safety rating, should provide a copy of its copy of the compliance review report that resulted in the rating.

⁹ *A & B Marine Trucking, Inc.*, FMCSA-2002-13104 (Final Order Under 385.15, Sept. 7, 1999). *Multistar Indus., Inc. DBA Mutlifrost, Inc. v. U.S. Dep't of Transp.*, No.12-73485 (9th Cir. Feb. 7, 2013).

¹⁰ Petition, Page 3.

rating to Conditional does not automatically render Petitioner's request moot. I must therefore evaluate the merits of Petitioner's request for review.

Petitioner challenged one of the three violations of 49 CFR 383.37(a) -- knowingly allowing, requiring, permitting, or authorizing an employee to operate a CMV during any period in which the driver does not have a current CLP or CDL or does not have a CLP or CDL with the proper class or endorsements.¹¹ Petitioner asserted that on the date of the alleged violation involving Michael Sheehan, Mr. Sheehan did not operate a CDL passenger endorsed vehicle on a public road.¹²

The Field Administrator averred that the CR report was "amended to record that the investigator discovered two, rather than three, instances of noncompliance with 49 CFR 383.37(a)."¹³ The Field Administrator did not concede that the investigator incorrectly cited the violation challenged by Petitioner on the CR report.¹⁴ The Field Administrator contended, however, that even if I were to remove the violation attributed to Michael Sheehan, Petitioner's rating would be unaffected because of the remaining two unchallenged violations of 49 CFR 383.37(a).¹⁵

¹¹ FA's Submission, Exhibit 1.

¹² Petition, Page 2.

¹³ FA's Submission, Page 4. The Field Administrator did not present a copy of the amended CR report for the record.

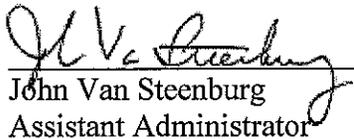
¹⁴ It appears that the Field Administrator dismissed the charge related to Emmanuel Lamarre. FA's Submission, Exhibit 1, Exhibit 2.

¹⁵ FA's Submission, Page 4.

The Field Administrator is correct. 49 CFR 383.37(a) is classified as an acute regulation.¹⁶ Therefore, even if the violation attributed to Michael Sheehan were removed, one other violation of 49 CFR 383.37(a) remained on the CR. The remaining violation of this acute regulation would be assessed one point under the SFRM.¹⁷ Petitioner did not challenge the violation of 49 CFR 382.215, which was assessed one point and also included in Petitioner's Factor 2 rating. The violations of 49 CFR 383.37(a) and 49 CFR 382.215 totaled two points and resulted in an unsatisfactory Factor 2 rating. As no other challenges were presented to the remaining violations used to calculate Petitioner's safety rating, the rating would remain Unsatisfactory unless upgraded through corrective action under 49 CFR 385.17.

The Field Administrator upgraded Petitioner's safety rating to Conditional under 49 CFR 385.17. Petitioner failed to demonstrate that the error alleged, if proven, would improve its safety rating to Satisfactory.

It is therefore ORDERED that Petitioner's request for review is denied.


John Van Steenburg
Assistant Administrator

Federal Motor Carrier Safety Administration

1/27/14
Date

¹⁶ 49 CFR Part 385, App. B.VII.

¹⁷ No points are assessed for violations of critical regulations unless a pattern of violations is established. In contrast, one point is assessed for each violation of an acute regulation regardless of whether a pattern has occurred. 49 CFR Part 385, App. B.

CERTIFICATE OF SERVICE

This is to certify that on this 21 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.

Michael F. D' Ampolo President M & L Transit Systems, Inc. 60 Olympia Ave. Woburn, MA 01801 <i>Petitioner</i>	One Copy U.S. First Class Mail
John C. Bell Trial Attorney FMCSA Office of Chief Counsel Eastern Service Center 802 Cromwell Park Drive, Suite N Glen Burnie, MD 21061 <i>Field Administrator's Attorneys</i>	One Copy U.S. First Class Mail
U.S. Department of Transportation Docket Operations, M-30 West Building Ground Floor Room W12-140 1200 New Jersey Avenue, S.E. Washington, D.C. 20590	Original Personal Delivery