

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**ACROSSTOWN CHARTER, INC.
USDOT No. 1462555**

Petitioner.

**Docket No. FMCSA-2013-0487
(Midwestern Service Center)**

**ORDER DENYING PETITIONER'S MOTION TO VACATE FINAL
ORDER**

A December 30, 2013 Final Order found the Petition for Review of a proposed Unsatisfactory safety rating submitted by Petitioner, Acrosstown Charter, Inc., to have been untimely. On December 31, 2013, Petitioner moved to vacate the Final Order. For the reasons set forth below, Petitioner's motion is denied.

1. The Pertinent Regulatory Provisions

(a) 49 CFR 385.11(b): If a safety rating is Satisfactory or improves a previous Unsatisfactory safety rating, it is final and becomes effective on the date of the notice.

(b) 49 CFR 385.11(c): In all other cases, a notice of a proposed safety rating will be issued.

(c) 49 CFR 385.15(a): A motor carrier may request administrative review if it believes the Federal Motor Carrier Safety Administration (FMCSA) committed an error in assigning its proposed safety rating in accordance with § 385.11(c) or its final safety rating in accordance with § 385.11(b).¹

¹ Part 385 and Appendix B to Part 385 do not contemplate an appeal of a Satisfactory safety rating or of the individual components of the underlying compliance review. *See In the Matter of United Propane, Inc.*, Docket No. FMCSA-2001-9343, Dismissal of

(d) 49 CFR 385.15(b): The motor carrier must explain the error it believes FMCSA committed in issuing the safety rating.

(e) 49 CFR 385.15(c)(2): A motor carrier must make a request for administrative review within 90 days of the date of the proposed safety rating issued under § 385.11(c) or a final safety rating issued under § 385.11(b), or within 90 days after denial of a request for a change in rating under § 385.17(i).

(f) 49 CFR 385.17(a): A motor carrier that has taken action to correct the deficiencies that resulted in a proposed or final rating of Conditional or Unsatisfactory may request a rating change at any time.

(g) 49 CFR 385.17(i): If FMCSA determines that the motor carrier has not taken all the corrective actions required, it will notify the carrier in writing.

(h) 49 CFR 385.17(j): Any motor carrier whose request for a safety rating change is denied in accordance with paragraph (i) may request administrative review under the procedures of § 385.15. The motor carrier must make the request within 90 days of the denial of the request for a rating change.

(i) 49 CFR 385.15(f): The decision on a request for administrative review under § 385.15 constitutes final agency action.

2. Background

On August 2, 2013, the Field Administrator for FMCSA's Midwestern Service

Petition for Safety Rating Review, August 29, 2001. Accordingly, the only permitted request for administrative review of a final safety rating issued under § 385.11(b) would be an Unsatisfactory safety rating that improved to Conditional, with the motor carrier alleging that the safety rating should have been improved to Satisfactory.

Center issued to Petitioner a proposed Unsatisfactory safety rating,² which was based upon a July 30, 2013 compliance review (CR).³ The CR cited Petitioner, in part, for a pattern of violating 49 CFR 395.8(k)(1), failing to preserve driver's record of duty status (RODS). On August 21, 2013, Petitioner requested an upgrade in its safety rating based upon corrective action⁴ in accordance with 49 CFR 385.17. On September 3, 2013, the Field Administrator denied Petitioner's request.⁵ The proposed Unsatisfactory safety rating became final on September 17, 2013.⁶ Petitioner submitted a second request for an upgrade based upon corrective action on September 11, 2013,⁷ which was denied by the Field Administrator on October 15, 2013.⁸ On November 22, 2013, Petitioner requested review of the proposed Unsatisfactory safety rating pursuant to 49 CFR 385.15, contending that FMCSA's "Safety Investigators erred by under-reporting the number of records of duty status they 'checked,' and therefore erroneously concluded that [Petitioner]'s violation rate for violations of 49 C.F.R. 395.8(k)(1) was 10 percent or higher."⁹ Petitioner did not allege any other errors in the assignment of its safety rating or in either denial of its requests for an upgrade based upon corrective action.

On December 3, 2013, an Interim Order found that

[a]lthough Petitioner asserts that its petition for review is

² See Exhibit C to "Petition for Administrative Review of 'Unsatisfactory' Safety Rating Pursuant to 49 C.F.R. § 385.15," November 22, 2013 (Petition for Review).

³ See Exhibit B to Petition for Review, Part B, page 5.

⁴ See Exhibit F to Petition for Review.

⁵ See Exhibit G to Petition for Review.

⁶ See Petition for Review, at 4, paragraph 15; Exhibit C to Petition for Review.

⁷ See Exhibit H to Petition for Review.

⁸ See Exhibit I to Petition for Review. Petitioner submitted a third request on December 12, 2013. See Petitioner's Reply Brief in Support of [its] Petition for Administrative Review, December 31, 2013 (Petitioner's Reply Brief), at 2; Exhibit 1 to Petitioner's Reply Brief.

⁹ See Petition for Review, at 5.

timely based on the fact that it was filed within 90 days after the denial of its request for upgrade under 49 CFR 385.17, Petitioner fails to allege any error regarding the Field Administrator's denial. Instead, Petitioner challenges the findings in the underlying CR. Under 49 CFR 385.15(c)(2), a request for review from a proposed safety rating must be made within 90 days of the date of the proposed safety rating issued under 385.11(c) or a final safety rating under 49 CFR 385.11(b). Petitioner was served with the proposed Unsatisfactory safety rating on August 2, 2013, more than 90 days before it filed its request for administrative review under 49 CFR 385.15. Therefore, it appears that its petition for review may be untimely under 49 CFR 385.15(c)(2).

The Field Administrator was directed to serve a response within 10 days of the service date of the Interim Order addressing the issues raised by Petitioner as well as the timeliness of the Petition for Review. The Interim Order stated that "Petitioner may serve any additional argument and evidence regarding the timeliness of its Petition within 10 days of the service date of the Interim Order." Because the Interim Order was served on December 3, 2013, both parties had until December 13, 2013 in which to respond.

On December 11, 2013, the Field Administrator moved for additional time, until December 20, 2013, to respond. Petitioner was silent as to the request. On December 20, 2013, the Field Administrator agreed with the Interim Order, stating: "The Assistant Administrator's suspicions are valid. The Petition ... must be denied as untimely." He also submitted argument as to why there was no error made in issuing the proposed Unsatisfactory safety rating. Petitioner did not submit additional argument or evidence.

On December 30, 2013, a Final Order issued, granting the Field Administrator's request for an extension and finding the Petition for Review to have been untimely. The Final Order reasoned that a request for administrative review under 49 CFR 385.15(c)(2) must be submitted within 90 days of the date of the proposed safety rating issued under

49 CFR 385.11(c). Since notice of the proposed Unsatisfactory safety rating was issued on August 2, 2013, Petitioner had until October 31, 2013 in which to petition for review. Petitioner did not do so until November 22, 2013, making the request untimely.

While the Final Order found that Petitioner's request for review of the Field Administrator's denial of its first and second requests for upgrade to have been timely, it pointed out that Petitioner failed to assert that the Field Administrator erred or abused his discretion in denying the upgrades. Petitioner's sole contention that the safety investigators under-reported the number of RODS checked pertained to the Agency's assignment of the proposed Unsatisfactory safety rating under §385.15, and not to the Field Administrator's denial under § 385.17. Accordingly, the Petition for Review was denied.

On December 31, 2013, Petitioner moved to vacate the Final Order and requested leave to reply to the Interim Order in support of its petition for administrative review. With regard to its request for leave to reply, Petitioner averred that the Field Administrator submitted his response to the Interim Order on December 20, 2013, before having received any ruling on his request for an extension. Petitioner stated that the Field Administrator's response contained documents previously unavailable to Petitioner. Without explaining why, Petitioner contended that it had "reasonably believed" that I would either deny the Field Administrator's request for an extension or grant the extension of time and provide Petitioner with a like opportunity to submit additional argument and evidence. Petitioner asserted that by granting the Field Administrator's request for extension in the Final Order, after the Field Administrator had submitted his response, I had denied Petitioner the opportunity to be heard both on the timeliness issue

and the other issues raised by its Petition for Review. Petitioner, therefore, replied to the Interim Order on December 31, 2013, “[a]ssuming” that it had 10 days from the filing of the Field Administrator’s response to do so.

On the issue of the timeliness of the Petition for Review, Petitioner argued that there is nothing in the language of § 385.15 or § 385.17¹⁰ supporting the conclusion that a petition filed pursuant to § 385.15 after 90 days of a safety rating being issued but within 90 days of a denial under § 385.17 may attack only the denial. Petitioner focused on the language of § 385.15(b): “The motor carrier’s request [for administrative review of a final safety rating in accordance with § 385.11(b)] must explain the error it believes the FMCSA committed in issuing the safety rating.” According to Petitioner, “[a] petition for administrative review arguing only that the motor carrier’s corrective action was sufficient, and that the Field Administrator was wrong to conclude otherwise, fails to meet 49 C.F.R. § 385.15(b)’s mandate that the petition must raise error in the issuance of the safety rating.” Petitioner then addressed the issue that it had raised in its Petition for Review that the RODS were under-counted.

On January 23, 2014, the Field Administrator responded to the Motion to Vacate the Final Order. He contended that the Motion to Vacate amounts to a petition for reconsideration, which is not permitted under part 385. He also argued that I had permitted Petitioner to submit additional argument and evidence regarding the timeliness of its Petition within 10 days of the service date of the Interim Order. “Petitioner was given leave to submit within the same 10 day period [as the Field Administrator] additional argument regarding the timeliness issue – and nothing more.” The Field

¹⁰ Petitioner inadvertently referred to §§ 395.15 and 395.17.

Administrator pointed out that: (a) he had served his response within the time that he had requested; (b) Petitioner did not respond to the Field Administrator's request for additional time; and (c) Petitioner did not request additional time. He concluded that Petitioner had no cause to complain.

3. Decision

The Field Administrator is correct that Petitioner had the same amount of time to submit additional argument and evidence as the Field Administrator. Petitioner knew that the Field Administrator had requested until December 20th by which to respond. Petitioner should have submitted its argument and evidence by that date or requested an extension. The Field Administrator is also correct that Petitioner's Motion to Vacate the Final Order is not permitted under 49 CFR part 385 since it is essentially a Petition for Reconsideration.¹¹ Pursuant to 49 CFR 385.15(f), the Final Order constituted final agency action.

Even if the Motion to Vacate were allowed, Petitioner's arguments are unavailing. Petitioner argued as follows:

(A) In accordance with § 385.15, a motor carrier may request administrative review of either a proposed safety rating issued under § 385.11(c) or a final safety rating issued under § 385.11(b);

(B) Under either scenario, the motor carrier must explain the error that FMCSA committed in issuing the safety rating;

(C) In accordance with § 385.15(c)(2), a motor carrier must request review of the safety

¹¹ See *In the Matter of Stricklin Trucking Co., Inc.*, Docket No. FMCSA-2011-0127, Order on Reconsideration, March 20, 2012, at 6-7; *Stricklin*, Order on Request for Clarification, October 4, 2012, at 7.

rating within 90 days of the proposed rating under issued under § 385.11(c) or a final safety rating issued under § 385.11(b) **or** within 90 days after denial of a request for a change in rating under § 385.17(i);

(D) A denial under § 385.17(i) is based only on corrective action, not error in the issuance in the safety rating;

(E) Because a motor carrier is required to explain the error in the issuance of the safety rating in its petition, the petition may not be limited to arguing that its corrective action was sufficient; and

(F) A motor carrier therefore has 90 days from the denial of an upgrade based upon corrective action in which to explain the error in the proposed safety rating.

This argument is somewhat different from the one that Petitioner made in its November 22, 2013 Petition for Review. There it argued the Petition was timely because it was filed within 90 days of the date that the safety rating became final, September 17, 2013, and within 90 days of the denial of its request for an upgrade based on corrective action, September 3, 2013. The Final Order informed Petitioner that its argument failed because the time periods for requesting review under § 385.15(c)(2) are distinct.

Because Petitioner received a proposed safety rating under 49 CFR 385.11(c), the time for requesting review began on the date of the notice of its proposed rating, August 2, 2013. Petitioner did not acquire a second opportunity to request administrative review when its rating became final on September 17, 2013 because the final rating did not arise under the provisions of 49 CFR 385.11(b) but rather occurred as a result of the notice of proposed rating under 49 CFR 385.11(c).

The Final Order must have convinced Petitioner as to its error in arguing that it may petition for review within 90 days of the date that its safety rating became final,

because that argument is not set forth in its Motion to Vacate. But its new reasoning is similarly flawed. If Petitioner were permitted (or required, as it contended) to challenge the assignment of the proposed Unsatisfactory safety rating within 90 days after denial of its request for upgrade based upon corrective action, then it could continually challenge that assignment by submitting additional requests for upgrades. In accordance with § 385.17(a), Petitioner may request a safety rating upgrade based upon corrective action **at any time**. Thus far, Petitioner has submitted three requests for upgrades and has received two denials. The Field Administrator denied Petitioner's first upgrade request on September 3, 2013 and Petitioner's second upgrade request on October 15, 2013.

By Petitioner's reasoning, it would have had until January 13, 2013 in which to petition for review.¹² It would be of no import that its original Petition for Review was untimely since, under Petitioner's new theory, it would have been given a fresh 90 days by the September 3rd and October 15th denials. "Permitting a carrier to challenge the findings of a CR in connection with a § 385.17(i) appeal^[13] filed more than 90 days after issuance of a proposed rating would make the 90-day deadline for challenging an allegedly erroneous rating essentially meaningless. The regulations do not contemplate such an illogical result."¹⁴

Petitioner is not permitted to argue error of a proposed safety rating by using the 90-day deadline for challenging a denial of a request for upgrade based upon corrective

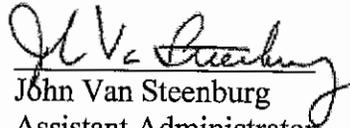
¹² Ninety days from the second denial on October 15, 2013 was January 13, 2014.

¹³ The appeal is made under § 385.17(j); the denial is issued under § 385.17(i).

¹⁴ See *In the Matter of Christenson Transportation, Inc.*, Docket No. FMCSA-2008-0064, Decision on Petition for Review of Safety Rating, April 25, 2008, at 5-6; see *In the Matter of Jerry J. Kobs, Inc.*, Docket No. FHWA-97-2869, Order of Administrative Law Judge Ronnie A. Yoder, September 26, 1997, at 6 ("the law is not presumed to be nonsensical....").

action. Petitioner had 90 days from the notice of the proposed rating in which to challenge it. The Petition to Review was late. Accordingly, the Motion to Vacate is denied, and this matter is closed.

It Is So Ordered.


John Van Steenburg

Assistant Administrator

Federal Motor Carrier Safety Administration

2/18/14
Date

CERTIFICATE OF SERVICE

This is to certify that on this 19 day of February, 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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