BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of: **GERALD MCAVOY,** **Respondent.**	**Docket No. FMCSA-2008-0097**[1] **(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. *Background*

On January 16, 2008, the Field Administrator for the Eastern Service Center, Federal Motor Carrier Safety Administration (Claimant) served a Notice of Claim (NOC) on Gerald McAvoy (Respondent).[2] The NOC, based on a December 17, 2007 compliance review, charged Respondent with: (1) one violation of 49 CFR 382.301(a), using a driver before the motor carrier has received a negative pre-employment controlled substance test result, with a proposed civil penalty of $2,400; (2) four violations of 49 CFR 395.8(e), false reports of records of duty status, with a proposed civil penalty of $11,000 per count; (3) six violations of 49 CFR 395.8(i), failing to require a driver to forward the original record of duty status within 13 days of completion, with a proposed civil penalty of $11,000 per count; and (4) one violation of 49 CFR 396.11(a), failing to

[1] The prior case number was ME-2008-0019-US1192.

[2] Exhibit A to Field Administrator's Response and Opposition to Petition for Reconsideration (hereafter Claimant's Response).

require a driver to prepare a driver vehicle inspection report, with a proposed civil penalty of $810. Claimant proposed a total civil penalty of $113,220.[3]

After Respondent failed to respond to the NOC, Claimant served a Notice of Default and Final Agency Order (NDFAO) on February 25, 2008.[4] The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective March 3, 2008, with the civil penalty immediately due and payable on that date.

On March 11, 2008, Respondent served a Petition for Reconsideration.[5] Respondent attributed his failure to reply to the NOC to "a misunderstanding" on his part. Sometime in January 2008, Respondent sent a letter to Claimant requesting that his safety rating be upgraded based on corrective actions taken in response to the December 17, 2007 compliance review.[6] Respondent stated that he did not realize he was required to send another letter to respond to the NOC. Respondent did not deny committing any of the violations alleged in the NOC, but contended he could not afford to pay the proposed penalty because he only has one truck operating in interstate commerce and is already deeply in debt to numerous creditors.

In his Response to the Petition served April 7, 2008, Claimant contended that the Petition should be denied because Respondent failed to timely respond to the NOC and did not present sufficient grounds for vacating the Final Agency Order.

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[3] Respondent was assessed the maximum civil penalty of $110,000 for the part 395 violations pursuant to section 222 of the Motor Carrier Safety Improvement Act of 1999, codified at 49 U.S.C. § 521 note.

[4] Exhibit B to Claimant's Response.

[5] Exhibit C to Claimant's Response.

[6] Because the letter is not dated, it is not clear whether it was sent before Respondent received the NOC. The letter did not mention the NOC.

2. *Decision*

It is undisputed that Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a).[7] Therefore, he defaulted. 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 Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has not met his burden of demonstrating that the Final Agency Order should be vacated. Respondent's explanation for failing to respond to the NOC does not establish excusable neglect. His undated safety rating upgrade request was designed solely to obtain an improvement in Respondent's safety rating and made no reference to the NOC. Respondent's claim of "a misunderstanding" indicates that he did not carefully read the NOC. Page 7 of that document clearly states, in upper case letters, that Respondent must serve a written response to the NOC within 30 days and that failure to serve a timely reply may result in the issuance of a notice of default and final agency order declaring the NOC, including the civil penalty proposed therein, to be the final agency order in the proceeding. Respondent's failure to heed this unambiguous warning, regardless of whether he took appropriate corrective action, was not excusable neglect. Moreover, post-violation corrective action in response to an NOC is an admission that the violations occurred, not a defense to the violations. Consequently, Respondent did not present any meritorious defenses.

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[7] The NOC reply deadline was February 20, 2008. This date was calculated by adding 30 days to the January 16, 2008 service date of the NOC and an additional five days because the NOC was served by mail. *See* 49 CFR 386.8(c)(3).

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Although Respondent arguably acted with due diligence by filing his Petition for Reconsideration within two weeks after receiving the NDFAO, it would be an empty exercise or futile gesture to vacate the Final Agency Order if Respondent is unable to demonstrate a meritorious defense.[8]

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor carrier or driver to participate in the proceedings when required to do so.[9] Having failed to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.[10]

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.[11]

It Is So Ordered.

Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

6-29-10
Date

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

[9] *See In the Matter of Parcel Shipper's Express, Inc.,* Docket No. FMCSA-2000-9523, Order, May 25, 2001, at 3.

[10] *In the Matter of Kent Ness dba Ness Harvesting,* Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions for Reconsideration, March 15, 2002.

[11] Respondent should consult the NDFAO for payment instructions.

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CERTIFICATE OF SERVICE

This is to certify that on this 1 day of July, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Gerald McAvoy P.O. Box 24 Benedicta, ME 04733-0024	One Copy U.S. Mail
John C. Bell, 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
Loretta Bitner Acting Field Administrator Federal Motor Carrier Safety Administration 802 Cromwell Park Drive, Suite N Glen Burnie, MD 21061	One Copy U.S. Mail
Steven M. Piwowarski Maine Division Administrator Federal Motor Carrier Safety Administration Edmund S. Muskie Federal Building 40 Western Avenue, Room 411 Augusta, ME 04330	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

Annie Miller