

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**LEX EXPRESS, INC. dba  
LEX EXPRESS,  
U.S. DOT # 824116**

**Petitioner.**

**Docket No. FMCSA-2012-0459  
(Midwestern Service Center)**

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FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION  
DECEMBER 13 P 1:45

**INTERIM ORDER ON PETITION FOR REVIEW OF SAFETY RATING**

**I. Procedural History**

On October 31, 2012, Lex Express, Inc. dba Lex Express (Petitioner) filed a Petition for Administrative Review of a proposed Unsatisfactory safety rating. Petitioner's Unsatisfactory safety rating arose from an October 16, 2012 compliance review (CR) conducted by the Illinois Division of the Federal Motor Carrier Safety Administration (FMCSA). On November 19, 2012, the Field Administrator for the Midwestern Service Center issued an Order to Cease All Transportation in Interstate and Intrastate Commerce and Revocation of Registration (Order to Cease), effective December 7, 2012 at 12:01 am. Petitioner filed a Request for Immediate Stay of the Order to Cease on December 7, 2012, seeking a stay of the Order until the Agency reached a determination on its petitions under 49 CFR 385.15 and 385.17. By Order dated December 10, 2012, I denied Petitioner's request for stay.

**II. Standard of Review**

The purpose of a request for administrative review under 49 CFR 385.15 is to determine whether FMCSA committed error in assigning a safety rating. Under Section

385.15(b), the motor carrier's request must explain the error it believes FMCSA committed in assigning the rating and provide information or documents in support of its argument.<sup>1</sup> Petitioner has the burden of proof to demonstrate that FMCSA erred in assigning its safety rating.<sup>2</sup>

### III. Safety Fitness Rating Methodology

FMCSA's safety fitness rating methodology (SFRM) assigns a safety rating based on the evaluation of the motor carrier's non-compliance with regulations identified as either "acute" or "critical" under 49 CFR Part 385, Appendix B; its recordable accident rate; and its vehicle out-of-service rates,<sup>3</sup> which are grouped into six factors under the SFRM:

Factor 1	General = Parts 387 and 390
Factor 2	Driver = Parts 382, 383, and 391
Factor 3	Operational = Parts 392 and 395
Factor 4	Vehicle = Parts 393 and 396 <sup>4</sup>
Factor 5	Hazardous Materials = Parts 397, 171, 177, and 180
Factor 6	Accident Factor = Recordable Accident Rate

A motor carrier is assigned one point for each instance of non-compliance with an acute regulation or each pattern of noncompliance with a critical regulation.<sup>5</sup> Two points

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<sup>1</sup> 49 CFR 385.15(b).

<sup>2</sup> *In the Matter of AA Logistics, Inc.*, FMCSA-2012-0206, Final Decision on Petition for Review of Safety Rating (August 13, 2012).

<sup>3</sup> 49 CFR Part 385, App. B.II.

<sup>4</sup> When a total of three or more inspections are recorded in the Motor Carrier Management Information System (MCMIS) during the twelve months prior to the compliance review or performed at the time of the review, the Vehicle Factor will be evaluated on the basis of the out-of-service rates and noncompliance with critical regulations. 49 CFR Part 385, App. B.II.A.

<sup>5</sup> 49 CFR Part 385, App. B., II.(g).

are assessed, however, for a pattern of noncompliance with a critical regulation relative to part 395 – hours of service or drivers.<sup>6</sup> A factor rating of satisfactory, conditional, or unsatisfactory is assigned based on the number of points assessed in each factor.<sup>7</sup> If the acute and/or critical = 0 points, the factor is satisfactory; if the acute and/or critical = 1 point, the factor is conditional; and if the acute and/or critical = 2 or more points, the factor is unsatisfactory.<sup>8</sup> The individual factor ratings are then converted into an overall safety rating according to the motor carrier safety rating table.<sup>9</sup> If a motor carrier receives 2 or more unsatisfactory factor ratings, the compliance review will result in a proposed unsatisfactory safety fitness rating.<sup>10</sup> Under 49 CFR 385.11, the proposed safety fitness rating becomes final after 45 or 60 days (depending on the classification of carrier's operations, e.g. passenger, hazardous materials, cargo). The compliance review report provided by the Field Administrator indicates that Petitioner's Unsatisfactory safety rating resulted from unsatisfactory ratings in the following factors:

<b>Factor</b>	<b>Critical/Acute Violation</b>	<b>Number of Violations</b>
Factor 1 (General)	49 CFR 390.35 – fraudulently or intentionally making false entries on inspection and vehicle maintenance records.	1
Factor 3 (Operational)	49 CFR 395.8(e) – false reports of records of duty status	2

<sup>6</sup> 49 CFR Part 385, App. B., II. (h).

<sup>7</sup> 49 CFR Part 385, App. B., II.C.

<sup>8</sup> *Id.* A motor carrier's factor 6 rating is determined according to its recordable accident rate rather than referenced to critical or acute regulations. 49 CFR Part 385, App. B.II.B.

<sup>9</sup> 49 CFR Part 385, App. B., III.A.

<sup>10</sup> *Id.*

Factor	Critical/Acute Violation	Number of Violations
Factor 4 <sup>11</sup> (Vehicle)	49 CFR 396.17(a) – using a commercial motor vehicle not periodically inspected	1

#### IV. Decision

*Violation 5: 49 CFR 390.35 - fraudulently or intentionally making false entries on inspection and vehicle maintenance records (acute)*

Petitioner contends that although its employee noted that brakes were in need of service soon, this safety investigator misunderstood these statements and do not rise to the level of a fraudulent or intentionally false entry on an inspection or vehicle maintenance record. Petitioner avers that it maintains an internal policy of changing brakes above the manufacturer's wear-line and that the brakes were not out of compliance. As part of his evidence, the Field Administrator provided copies of the vehicle inspection records indicating that no repairs were needed on the front of the form, while the back of the same form contains notations of necessary repairs. The Field Administrator also provided the Declaration of FMCSA Safety Investigator David McConnell,<sup>12</sup> who conducted the CR and interviewed various employees. SI McConnell's declaration includes an account of his conversation with Eric Manson, the mechanic who made the notation. In that conversation, Manson admitted that Lex's

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<sup>11</sup> Its Factor 4 rating was based on one critical violation and a vehicle out-of-service rate greater than 34 percent. If a motor carrier has three vehicles inspected at the time of review and the vehicle out-of-service (OOS) rate is 34 percent or greater, the initial factor rating will be conditional. The factor rating may be lowered to unsatisfactory if an acute regulation or critical violation is also discovered. Petitioner had five OOS vehicles out of 14 vehicles inspected, thus resulting in a vehicle OOS rate of 36%. Appendix B to 49 CFR Part 385, section II. A. (a)(1).

<sup>12</sup> Exhibit A-1, Declaration of David McConnell, ¶ 5, FA's Response.

shop manager directed him “to not put out-of-service defects on the front of the form because they needed to stay operating and [Lex] didn’t have the means to repair the buses because of a limited budget.”<sup>13</sup> Petitioner also claims that it needed to use the back of the report because it was not using repair order forms at the time. Although Petitioner provided evidence of its brake measurement policy training requirements, the document is dated after the date of the CR. While the policy may qualify as corrective action, it does not support Petitioner’s claim that the brake notations on the inspection records should be interpreted in any other way. Thus, Petitioner’s explanation of the entries on the vehicle inspection records does not constitute a defense to the violation noted on the CR and therefore Petitioner failed to demonstrate error in the citation of that violation on the CR.

Regarding another instance of the same violation, Petitioner contends that faulty brakes on its bus did not cause an April 11, 2012 accident. Rather, Petitioner provides yet another alternative explanation that the safety investigator did not consider the total stopping distance required. The Field Administrator states that the accident was not the basis of the violation. Rather, the Field Administrator presented evidence documenting inconsistencies in the inspection and vehicle maintenance records. In a driver vehicle inspection report (DVIR) dated 9:15 a.m. on April 8, 2012,<sup>14</sup> the driver noted the brakes on bus number 23 needed adjusting, and took another bus instead. In that same DVIR, a mechanic stated that he corrected the defects and dated it April 10, 2012. An April 10<sup>th</sup> repair order for the bus, however, stated that no brake adjustment was needed. Another

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<sup>13</sup> *Id.*

<sup>14</sup> Exhibit A-21.

April 8, 2012 DVIR for bus 23, filled out at 1:00 p.m., noted no defects with the vehicle.<sup>15</sup> Petitioner did not explain the conflicts among the DVIRs and the repair order. I can only conclude that a false entry was made in the records as it makes no chronological sense if all the reports are true. Therefore, I find that the Field Administrator did not err in finding a violation of 49 CFR 390.35.

#### *The Remaining Violations*

The compliance review presented both Federal and State violations for Petitioner. Under Factor 3, for violations of 49 CFR 395.8(e), Violation 7 is cited as a critical State violation;<sup>16</sup> and Violation 8 is cited as a critical Federal violation.<sup>17</sup> The CR assessed 2 points for Factor 3, resulting in an unsatisfactory rating for that factor. Therefore, it appears that the State violation contributed toward the factor rating.<sup>18</sup>

Under Factor 4, for violations of 49 CFR 396.17(a), Violation 15 is cited as a critical State violation;<sup>19</sup> and Violation 16 is cited as a critical Federal violation.<sup>20</sup> The CR assessed only one point for Factor 4. This one point, along with a vehicle OOS rate of 36% rendered Petitioner unsatisfactory for Factor 4. Therefore, it appears that the State violation was counted toward Petitioner's Factor 3 rating, but may not have counted

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<sup>15</sup> This report is not in the FA's evidence, but was included in the Petition.

<sup>16</sup> 3 instances discovered out of 3 records checked.

<sup>17</sup> 15 instances discovered out of 121 records checked.

<sup>18</sup> The third citation of 49 CFR 395.8(e), Violation 9 (Federal), was not designated as a critical violation and thus did not contribute toward the assignment of a safety rating.

<sup>19</sup> 4 instances were discovered out of 13 records checked.

<sup>20</sup> 4 instances were discovered out of 13 records checked.

toward its Factor 4 rating. The Field Administrator did not specify which violations were included in the calculation of the safety rating in his response to the Petition.

Past decisions issued under 49 CFR 385.15 have stated that a State violation cannot have any effect on the safety rating.<sup>21</sup> If the enforcement policy has since changed to include State violations in the determination of a safety rating, I request the Field Administrator to submit that evidence for the record. Although Petitioner challenges Violation 15, a State violation, it is not clear from the CR which violation contributed to the unsatisfactory Factor 4 rating. Therefore, I direct the Field Administrator to explain which critical violation of 49 CFR 396.17(a) was counted toward Petitioner's Factor 4 rating. He must also explain why a State violation contributes to one factor rating, while it does not in another factor.

Lastly, the Field Administrator states that the motor coaches considered for the 396.17(a) violations were Lex motor coach numbers 1, 12, 20, and 27.<sup>22</sup> Violation 15 cites Lex 27 as one of the vehicles in violation, but Violation 16 cites Lex 9, which is not among the four vehicles SI McConnell identified as subject to the violation. I direct the Field Administrator to clarify this point.

I cannot make a determination on whether the Illinois Division erred in issuing Petitioner's overall safety rating until these remaining issues are resolved.

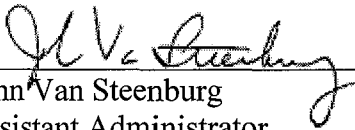
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<sup>21</sup> See *In the Matter of Alliance Transp., Inc.*, FMCSA-2002-13113 (Aug. 4, 2000); *In the Matter of Alger Transport Co.*, FMCSA-2002-13128 (Sept. 13, 2000).

<sup>22</sup> Exhibit A-1, Declaration of Safety Investigator McConnell at ¶ 12.

Accordingly, it is hereby ORDERED that the Field Administrator for the  
Midwestern Service Center submit further evidence and argument in accordance with this  
Interim Order no later than Monday, December 17, 2012.

*It Is So Ordered.*

  
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John Van Steenburg  
Assistant Administrator  
Federal Motor Carrier Safety Administration

12/13/12  
Date



**CERTIFICATE OF SERVICE**

This is to certify that on this 17 day of December, 2012, 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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