

**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)**

FINAL DECISION 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 issued December 10, 2012, I denied Petitioner's request for stay.

In an Interim Order issued December 13, 2012, I found that the Field Administrator did not err in finding a violation of 49 CFR 390.35 – fraudulently or intentionally making false entries on inspection and vehicle maintenance records. As to

the remaining violations, however, I directed the Field Administrator to explain further how Federal and State violations were attributed in Factors 3 and 4 of Petitioner's safety rating.

The Field Administrator submitted his response to the Interim Order on December 17, 2012. He explains that the passage of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA-LU)¹ on August 10, 2005 amended the Agency's statutory authority,² requiring it to consider operations that affect interstate commerce within the United States. To implement this authority, FMCSA issued a policy memorandum on August 21, 2006 explaining that interstate and intrastate violations will contribute to a motor carrier's safety fitness determination.³ On June 6, 2007, FMCSA explained further in another policy memorandum that compliance reviews should include all State violations that have an equivalent Federal regulation.⁴

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. Petitioner has the burden of proof to demonstrate that FMCSA erred in assigning its safety rating.

¹ 119 Stat. 1725.

² 49 U.S.C § 31144(a).

³ Exhibit A-1 to Field Administrator's Response to Third Interim Order.

⁴ Exhibit A-2 to Field Administrator's Response to Third Interim Order.

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,⁵ 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 ⁶
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.⁷ Two points are assessed, however, for a pattern of noncompliance with a critical regulation relative to part 395 – hours of service or drivers.⁸ A factor rating of satisfactory, conditional, or unsatisfactory is assigned based on the number of points assessed in each factor.⁹ If the acute and/or critical = 0 points, the factor is satisfactory; if the acute and/or critical = 1

⁵ 49 CFR Part 385, App. B. II.

⁶ 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.

⁷ 49 CFR Part 385, App. B., II. (g).

⁸ 49 CFR Part 385, App. B., II. (h).

⁹ 49 CFR Part 385, App. B., II. C.

point, the factor is conditional; and if the acute and/or critical = 2 or more points, the factor is unsatisfactory.¹⁰ The individual factor ratings are then converted into an overall safety rating according to the motor carrier safety rating table.¹¹ If a motor carrier receives 2 or more unsatisfactory factor ratings, the compliance review will result in a proposed unsatisfactory safety fitness rating.¹² 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:

Factor	Critical/Acute Violation	Number of Violations
Factor 1 (General) ¹³	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
Factor 4 ¹⁴ (Vehicle)	49 CFR 396.17(a) – using a commercial motor vehicle not periodically inspected	1

¹⁰ *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.

¹¹ 49 CFR Part 385, App. B., III. A.

¹² *Id.*

¹³ Petitioner received a conditional rating for Factor 1.

¹⁴ Petitioner's 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 or critical violation is also discovered. Petitioner had five OOS vehicles out of 14 vehicles inspected, thus resulting in a vehicle OOS rate of 35.7%. Appendix B to 49 CFR Part 385, section II. A. (a)(1).

IV. Decision

Violation 7: 49 CFR 395.8(e) – false reports of records of duty status (RODS).

Petitioner asserts that FMCSA erred because the RODS were measured against the Illinois I-Pass on-site records. Petitioner contends that I-Pass has no means for tracking each vehicle in use. Petitioner also claims that when the safety investigator checked the RODS against the I-Pass modules for reported locations, the modules could have been in any vehicle in the fleet because the modules were not assigned to particular vehicles.

In response to Petitioner's allegation, the Field Administrator argues that when SI McConnell asked for a list of transponder assignments, Petitioner gave it to him.¹⁵ The Field Administrator states that Petitioner is only arguing after the fact that it did not assign I-Pass modules to specific vehicles. Moreover, the Field Administrator avers that the other two violations were based on fuel records and even if I disregard the challenged violations, Petitioner would still have a critical false log rate of 100% (two false logs out of two records checked).

The Field Administrator states in his Response to the December 13, 2012 Interim Order that Violations 7 and 8, State and Federal violations of 49 CFR 395.8(e) – false records of duty status, were combined for the safety rating, as directed by FMCSA's June 6, 2007 policy memorandum.¹⁶ He further explains that the SI added the total number of records checked and total number discovered for each violation. Thus, the number discovered is 18 (3 found in Violation 7 + 15 found in Violation 8), with 124 records

¹⁵ Exhibit A-27 to Field Administrator's Response to Interim Order.

¹⁶ Exhibit A-2 to Field Administrator's Response to Third Interim Order.

checked (3 checked in Violation 7 + 121 checked in Violation 8). The number of records discovered is divided by the number of records checked ($18 \div 124$) to determine the violation rate, which totals to 14.5%, a critical rate of at or above 10%. The Field Administrator concludes that with a combined critical rate of 14.5%, Petitioner had 2 points¹⁷ for Factor 3.

Assuming for the sake of argument that Petitioner prevails on its claim¹⁸ regarding Violation 7, its Factor 3 rating would remain unchanged. The number discovered would be 17 (2 found in Violation 7 + 15 found in Violation 8), with 124 records checked (3 checked in Violation 7 + 121 checked in Violation 8); $17 \div 124$ totals to 13.8%, still a critical rate at or above 10%. Therefore, I find that the Field Administrator did not err in calculating Petitioner's Factor 3 rating.

Violation 15: 49 CFR 396.17(a) -- using a commercial motor vehicle not periodically inspected.

Petitioner argues that based on previous compliance reviews, it had offered Level V roadside inspections as periodic inspections under the regulation, which FMCSA accepted in the past. The Field Administrator states he is unaware of such a practice, and avers that Petitioner has not demonstrated that FMCSA has permitted this in the past. 49 CFR 396.17(f), in relevant part, provides that vehicles passing roadside or periodic inspections performed by a State government meeting the minimum standards of the

¹⁷ A pattern of noncompliance with a critical regulation relative to Part 395 is assessed two points. Appendix B, II. (h).

¹⁸ Although Petitioner alleges error with two of the three instances in this violation, the Field Administrator provided evidence that only one log was checked against I-Pass records.

FMCSRs will be considered to have met the requirements of an annual inspection.

Petitioner claims that because it took corrective actions and certified such within 15 days of a roadside inspection,¹⁹ its vehicle was in fact periodically inspected. Petitioner's argument is unpersuasive. I do not interpret the regulation to mean that a certification of corrective actions conducted after a roadside inspection noting defects in a vehicle equates to a passing roadside inspection.

Petitioner also argues that the motor coach identified as Lex 32 should not have been included in the violation because it is used only in intrastate commerce. As the Field Administrator explained in his response, intrastate violations are considered in the safety rating calculation. More importantly, the Field Administrator stated that Lex 32 was not among the motor coaches included in the violation. Rather, SI McConnell stated that the four motor coaches in violation while traveling in intrastate commerce were Lex 1, 12, 20 and 27.

In the December 13th Interim Order, I directed the Field Administrator to explain how the State and Federal Violations of 49 CFR 396.17(a) contributed to Petitioner's Factor 4 rating. The Field Administrator states that, as provided in the June 6, 2007 policy memorandum noted previously, the violations were combined. Thus, the number discovered is 8 (4 found in Violation 15 + 4 found in Violation 16), with 26 records checked (13 checked in Violation 15 + 13 checked in Violation 16). The number of records discovered is divided by the number of records checked ($8 \div 26$) to determine the violation rate, which totals to 30.7%, a critical rate at or above 10%. A pattern of noncompliance with a critical regulation therefore added one point to Petitioner's Factor

¹⁹ Petitioner refers to 49 CFR 396.9(d)(2)-(3).

4 rating. In combination with Petitioner's 35.7% vehicle OOS rate, Petitioner's Factor 4 rating became unsatisfactory. Therefore, I find that the Field Administrator did not err in calculating Petitioner's Factor 4 rating.

Vehicle OOS Rate

Petitioner's vehicle OOS rate was calculated by dividing the number of OOS vehicles found (5) by the number of vehicles inspected (14). Its vehicle OOS rate, at 35.7%, combined with a critical violation caused Petitioner to receive an unsatisfactory rating for Factor 4. Petitioner challenges the OOS finding for the motor coach identified as Lex 32, contending that the OOS conditions were found in error. Petitioner claims that it should not have been cited with 49 CFR 393.83(c) – improper exhaust from a generator because the exhaust pipe had been removed for repairs during the Level V inspection. If Petitioner had re-installed the pipe for the inspection, Petitioner avers that it would not have counted as a violation. The Field Administrator submitted the Declaration of Rick D. McFarland, Illinois State Police Officer,²⁰ who inspected Lex 32. Officer McFarland stated that the pipe at issue would not have solved the exhaust problem, as the leak was located before the section where the pipe would have been placed. Furthermore, Officer McFarland stated that the Lex employee did not inform him that the pipe was being repaired at the time of the inspection.²¹ The Field Administrator's evidence demonstrates that the officer did not err in his determination of Lex 32 as out-of-service. Therefore, Petitioner's vehicle OOS rate remains unchanged.

For the foregoing reasons, I find that the Illinois Division did not err in

²⁰ Exhibit B to FA's Response to Interim Order.

²¹ *Id.*

calculating Petitioner's overall Unsatisfactory safety rating.

Procedural Due Process

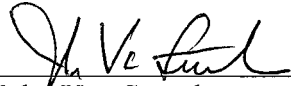
Under 49 CFR 385.15(e)(1), the Agency will issue a written decision on a petition for review from a passenger motor carrier that has received a proposed Unsatisfactory safety rating within 30 days after receiving the request. As noted in my December 5, 2012 Order, although Petitioner submitted proof that its Petition was received on November 1, 2012, it was not docketed by U.S. DOT Dockets until on or about December 5, 2012. Had Petitioner's submission been docketed when received November 1, 2012, a final decision on the matter would have been issued by December 1, 2012. In its December 7, 2012 Request for Immediate Stay, Petitioner argued that it did not receive due process because its Petitioner was not timely reviewed. While there was a delay in reviewing Petitioner's Petition caused by the administrative delay in docketing the petition, the outcome of these proceedings would not have changed. The petition for review would have been denied, its Unsatisfactory rating would have become final, and Petitioner would still have been ordered to cease its operations. Therefore, the delay in docketing Petitioner's petition was harmless error²² as Petitioner was not prejudiced by the delay in review.

²² See *PDK Laboratories Inc. v. U.S. Drug Enforcement Administration*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.").

Accordingly, it is hereby

ORDERED that the petition for administrative review is denied and Petitioner's safety rating remains Unsatisfactory.

It Is So Ordered.



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

12/21/12
Date

CERTIFICATE OF SERVICE

This is to certify that on this 21 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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