Your Safety Rating Rights

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In my former job as an enforcement program specialist with the Federal Motor Carrier Safety Administration, I frequently observed that although the trucking industry is well aware of the Federal Motor Carrier Safety Regulations, not all carriers fully understand the underlying elements of FMCSA's enforcement policies, including the role of the safety investigator and enforcement team.

Take the dreaded FMCSA safety compliance review conducted by that agency or its state partners. Noncompliance can mean civil penalties and increased operating costs, either direct and indirect.

A compliance review that produces either a positive or negative safety fitness rating can result in an enforcement action called a Notice of Claim, which is essentially a list of alleged violations with associated penalties and fines. And yes, an enforcement action can occur even if a carrier's safety rating is "satisfactory."

The indirect costs of a low safety rating come in the form of higher insurance rates and the loss of customer base or contracts for hire. The review that generates a carrier's safety rating is, after all, a public record available to a carrier's insurance company, customers and competitors. Safety performance ratings also are tools FMCSA uses to determine which carriers the agency needs to visit or revisit.

The direct costs of noncompliance are those associated with the Notice of Claim and its fines.

Because my job with FMCSA included negotiating enforcement-case settlements, it was clear to me that many motor carriers don't know their rights regarding a Notice of Claim. That's unfortunate, because by acting immediately after receiving a compliance review and/or Notice of Claim, a carrier, its agent or its attorney can review details of the alleged violation(s) and file Part 385.15 and/or Part 386.14 petitions under Title 49 of the Code of Federal Regulations. To protect themselves, carriers must become thoroughly knowledgeable about these petitions and understand their options.

For example, should a motor carrier use the Part 385 petition process to challenge a less-than-stellar safety performance rating? In simple terms, a carrier can file a 385.15 petition if it believes the investigation was done incorrectly or that evidence used by FMCSA was incorrect.

While few motor carriers know, or even understand, the advantages to filing a Part 385.15 petition challenging a proposed safety rating, doing so forces FMCSA to produce the evidence it used to determine the rating — and the government often fails to meet that burden of proof.

Critical or acute violations that affect the safety rating, but do not result in an enforcement case, are most often not documented by the safety investigator, at least partly because of time restraints: The investigator only collects evidence FMCSA plans to use in the enforcement action. This lack of documentation provides a solid foundation for a Part 385.15 petition because the government must be able to support the proposed rating.

In 2004, several separate — but well-known — decisions involving Part 386.14 petitions were referred to collectively as the "Starving Students decision," after the moving company involved. These decisions changed evidence-collection procedures for safety investigators by requiring documentation for all counts on which FMCSA plans to take enforcement action *before* the carrier signs fir the compliance review. Many safety investigators don't document critical violations unless they plan enforcement actions. That is to the advantage of the carrier, because it means FMCSA lacks documentation or evidence to support the violations that generated the safety rating. As a result, critical or acute violations affecting the compliance review's rating factors maybe removed, improving an overall safety performance rating.

Unsupportable violations also could result if the investigator operates outside the Electronic Field Operation Training Manual, or fails to document critical violations for which no enforcement action was taken.

Part 386.14 challenges provide a choice of administrative adjudication or binding arbitration. Both choices, more often than not, provide the carrier with a reduced or suspended penalty amount accessed in the Notice of Claim. The carrier just needs to know what to say and what to produce as corrective action. For that, carriers should consult the "How to Reply" section of the Notice of Claim and the Part 386 section of the regulations.

Carriers that don't want to struggle with filing a petition, instead preferring to pay the violation amount in full, should be sure to write on the cashier's check or money order some version of "no admission," for example: *I deny all the charges* or *I'll pay the fine, but I didn't do anything wrong* or even a simple *I didn't do it.*

"No admission" means FMCSA can't count the case as part of the cancers history and must have its legal staff write a motion, with the associate administrator having to decide if the agency can consider full payment an admission of guilt.

Clearly, the key to a profitable business operation is knowing not only what you must do to comply with safety regulations, but also with what the regulatory agencies must themselves comply.

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